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The New Supreme Court Building Cases Practice Rules – How Can Counsel Assist?

John Digby QC
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CONTINUING PROFESSIONAL DEVELOPMENT

TOPIC: **"THE NEW SUPREME COURT BUILDING CASES PRACTICE RULES – HOW CAN COUNSEL ASSIST?"**
(Professional Skills)

SPEAKER: **G. JOHN DIGBY QC**

A. Background

- Since about the late 1970s size and complexity of construction litigation seems to have increased exponentially;
- There has been an increasing concern on the part of courts and practitioners, and litigants, that major building and engineering disputes are often excessively time-consuming to address and prohibitively expensive to litigate;
- Many courts including the Victorian Supreme Court have devoted considerable specific thought and energy towards efficiently and economically managing large building and engineering cases;
- There has been a growing realisation that the application of conventional litigation processes and techniques often does not result in the efficient and economic disposal of substantial building litigation;
- There are indications that the entities which have in the past participated in large scale building and engineering litigation are becoming increasingly reluctant to become involved in that form of dispute resolution because of the inherent time and cost involved.

B. The usual features of a substantial building and engineering dispute

The problems referred to above are primarily caused by the usual features of substantial building and engineering cases.

- Complex factual matrix, often involving facts arising over the many years during which the relevant project was negotiated and then delivered;
- Complex legal issues, usually of a contractual nature, but also often including Trade Practices Act 1974 and apportionment questions;
- Very large documentation relevant or potentially relevant to the issues;
- A large number of significant and/or potentially relevant witnesses;

- A likelihood that a number of parties, subcontractors, suppliers and consultants for example, may be potential parties.
- A significant body of expert evidence.

C. In the past the traditional method of approach to building cases has not changed significantly

Since the establishment of the Supreme Court Building Cases List in about late 1992, construction and engineering cases, although well managed by the successive Judges in charge of Supreme Court Building Cases List, have been dealt with, and conducted by practitioners, largely in the way in which litigation has been traditionally undertaken, save perhaps for the absence of interrogation, the introduction of witness statements, and recent attempts to conduct an effective electronic Trial.

Ultimately, most experienced practitioners would agree that notwithstanding the volumes of discovered materials, the existence of weighty Court Books and a flood of witness statements, after separating the chaff grain there is usually relatively little statement evidence and documentation which is crucial and probative.

Initiatives such as dealing with preliminary issues and the utilisation of referees have in the past been sparingly utilised, mainly it is suggested, because experience has shown that the parties' propensity to move to marginalise or negate the outcome of a preliminary issue or enquiry by a Special Referee, renders these initiatives expensive and less effective than they might have otherwise been.

D. New mindset required to facilitate the potential effectiveness of the recently introduced Building Cases List Practice Note No. 1 of 2008

Counsel and other practitioners prosecuting substantial building and engineering cases in Court can contribute substantially to the effectiveness of the Practice Note, by way of an approach which is constructive and facilitative, while ensuring that their client's rights and interests are appropriately protected and pursued. Conversely, the adoption of an inflexible and/or tactical approach by Counsel, and other practitioners, will

probably render ineffective the court's efforts to improve the procedural framework within which construction and engineering cases are conducted.

E. Practice Note No. 1 of 2008 – in a nutshell

The new Practice Note it should be observed, does not change or alter the Building Cases Rules (Chapter II Order 3).

(i) Administration

- Master Daly will be closely associated with the management of the Building Cases List, assisting the Judge in charge of the List and for example, presiding over the Resources Conference (PN paras. 3 and 6).
- The Resources Conference is a new feature of the procedural framework introduced by the new Practice Note and involves an early meeting of both lawyers and persons responsible for the litigation presided over by the Master. This process is directed to a number of ends including ascertaining the resources required to be applied to the litigation, the framework for the conduct of the interlocutory and also the trial process. The Resources Conference may be conducted in part on a "without prejudice" basis.

(ii) Procedure

- The Practice Note does not alter the application of the Rules of Court.
- The Judge in charge of the Building Cases List will appoint a Trial Judge to a matter within 14 days of the last appearance being filed. This introduces a docket system in respect of each subject case. The appointed Trial Judge will thereafter manage the interlocutory aspects of the matter and the trial.
  The parties are required to provide an Information Sheet to the Master by email within 30 days after the last appearance is filed.

  The Information Sheet (PN paragraph 6, and the Annexure) requires such information as:
  - Previous attempts to resolve the matter
  - Extent to which the parties are already aware of claims and defences.

- Absent information which either party may desire to evaluate their claim or defence.
- Summary of claims and counterclaims.
- Indication as to whether or not additional parties are likely to be added to the proceeding.
- Number and identification of witnesses.
- Identification of likely expert evidence.
  Whether the case is suitable for a joint expert report.
  The identification of experts proposed to be called and their area of expertise.
- A description of any special considerations concerning discovery.
  Whether it is appropriate to limit or stage discovery.
  Whether any preliminary questions appear to be appropriate to be determined pursuant to Order 47.04, if so what such question or questions might be.
- Whether any questions are suitable for reference out to a Special Referee pursuant to Order 50.01 and if so, what question or questions would be suitable.

(iii) Other Procedural Initiatives foreshadowed

- The number of directions hearings will be curtailed if possible (PI paragraph 2(h)).
- Interlocutory Orders will be made on the papers if possible (PI paragraph 2(i)).
- The cost orders are made, the court will strive to fix those costs if possible (PI paragraph 2(k)).
- Opposed interlocutory application will where appropriate, be referred to Master Daly (PI paragraph 2(j)).
- With consent, the case or questions in the case may be referred for “non-binding evaluation” (PI paragraph 12(i)).
- Some time, more than a month before the fixed trial date, the Trial Judge shall convene the final directions hearing (PI paragraph 13) and ascertain the matters, including any special trial procedures, whether a further mediation should occur and the like (PI paragraph 14).

- The Trial Judge may consider making special orders for the efficient conduct of the trial (PI paragraph 15) including:
    - ❖ the order of evidence;
    - ❖ a preliminary determination on a particular question;
    - ❖ impose time limits including in relation to examination and cross-examination either by reference to a topic or time (PI paragraph 15(d));
    - ❖ direct expert witnesses or other witnesses to meet in a conclave and report on points of agreement and disagreement (PI paragraph 15(f));
    - ❖ direct an expert or other witness to give concurrent evidence (PI paragraph 15(g)).

F. Conclusion

There are many areas in which Counsel can assist in encouraging and implementing a facilitative approach to litigation and in relation to the initiatives identified in the Practice Note No. 1 of 2008, including:

(a) encouraging Instructors and litigants to adopt the new approach and initiatives referred to in the Practice Note, for example constructive identification of limits which could be placed on discovery, preliminary questions and/or questions suitable to be referred out to a Special Referee (PN 6 and Annexure; PN 11);

(b) attempting to be a positive influence against any unnecessary step or action in the litigation which will delay the litigation or generate effort and cost disproportionate to the likely benefit of such a step or action (for example discouraging marginal disputes about particularisation and possible inadequacies in discovery, and the like, and discouraging overly tactical steps or action);

(c) do what can be done to make witness statements and Court Books as focused and concise as possible;

(d) endeavour to narrow the breadth of pleading, if possible;

(e) endeavour to conduct the trial with particular focus on efficiency and brevity in relation to addresses and cross-examination, and the like;

(f) be constructive in making an effort to formulate helpful suggestions to the court to assist it in framing the best interlocutory orders, and if possible, minimising argument about management issues;

(g) bringing a constructive, co-operative and flexible mind to the consideration of trial initiatives such as concurrent evidence, and permitting for example, experts to cross-question other experts in sessions of concurrent evidence (if permitted by the Court);
(h) encouraging instructions to agree to, or co-operate with, the imposition of limits at trial for submissions, cross-examination and the like;
(i) if appropriate encouraging pre-trial processes like the engagement of a single joint expert;
(j) bring a constructive, co-operative and flexible mind to the orders being made for a conclave of experts and the production of joint reports in relation to issues which are agreed and issues which are in dispute;
(k) question whether interlocutory and preparation and presentation steps are necessary and/or proportionate given the time and cost involved.

When initiatives and options are being addressed within the context of the Practice Note, Counsel should, (bearing in mind their obligation to their client and the limits of his or her instructions) endeavour to work co-operatively or collaboratively with the Judge, and hopefully the other parties to agree and detail the best possible procedure for advancing the litigation and completing the Trial.

At this Bar, there has always been a very healthy and respectful inter-relationship between Counsel and the Court which should make this approach readily achievable.

4 June 2008

PRACTICE NOTE NO. 1 OF 2008

Building Cases – A New Approach

1. The Judges and Masters of the Commercial and Equity Division have, with the approval of the Chief Justice, decided to implement, on a pilot basis in 2008, a new approach to litigation in the Building Cases List. The pilot is intended to explore the possibility that the time presently consumed and expense presently incurred by the parties in conducting building cases might be moderated by a more intense involvement by the Court in these matters and in the expectation that this might be achieved with the co-operation of the lawyers for the contending parties. It is also intended to inculcate, and to the extent necessary to enforce, a professional culture in which attention is focussed, not on overwhelming an adversary, but rather upon achieving a just and cost-effective outcome for the litigants.

2. The features of the new approach are the following:
   a. A building case should be approached like any building project, with time and cost budgeting.
   b. Parties will be expected to have engaged in serious settlement discussions before the commencement of the proceeding.
   c. At an early stage a Judge will be assigned to assume responsibility for the management and trial of the case.
   d. Judges will be more active and pro-active in exercising their powers in order to seek to achieve a just resolution of building disputes in a speedy and efficient manner.
   e. Judges will be mindful of the need not to apply the resources of the parties and of the Court needlessly or in a manner which is out of proportion to the matters in issue.
   f. Lawyers will be expected to approach their cases co-operatively and with the objective of not using the resources of the Court and of the parties needlessly or in a manner which is out of proportion to the matters in issue.

g. Lawyers will be encouraged to focus on the central issues in the case.

h. Judges will keep the number of directions hearings to a minimum.

i. Where possible, interlocutory applications should be determined on the papers.

j. Opposed interlocutory applications will, where appropriate, be referred to a Master; and

k. Where costs of a directions hearing are ordered to be paid, they will, if possible, be fixed.

3. Master Daly and the other Masters of the Division will assist the Judge in charge of the List and the Trial Judges in the management of building cases in the List.

4. Fourteen days after the last appearance a Judge will be appointed to be the trial Judge for the proceeding and will, pursuant to Ch II R.3.02(3), be requested to exercise the powers of the Judge in charge of the List in relation to the proceeding, and the parties will be so advised.

5. A feature of the new approach will be the early convening of a resources conference after the pleadings are closed. This is a conference which will be convened by the Court as soon as possible after the appointment of the Trial Judge and chaired by a Master at which the resources budget for the proceeding will be established. The conference will be relatively informal and the Master may, in the appropriate case, conduct part of the conference on a without prejudice basis and may speak separately with the parties.

6. Thirty days after the last appearance the solicitor for each party or group of parties will be required to complete an information sheet in the form annexed and exchange a copy with each other party and to file by email with the associate to the Master convening the resources conference. It will be the responsibility of the solicitor to ensure that the information is accurate and promptly to bring to the attention of the Court and the other parties any respect in which the information contained in the sheet is no longer accurate. **[Note: Counsel should have input into the Information Sheet. Constructive and co-operative input required.]**

7. At the resources conference the parties should be represented by a lawyer who is sufficiently instructed to deal with the matters to be considered at the conference. The person responsible for the litigation within the organisation of each of the parties will be required to attend the resources conference. **[Note: Counsel should appear at the Resources Conference. Constructive and co-operative and flexible input required.]**

8. Matters for consideration at the resources conference will include the following:
   a. The resources which each of the parties might apply to the litigation;
   b. The resources in terms of trial time which the Court is expected to apply to the litigation;
   c. Whether any limit should be placed upon these resources or costs or upon discovery or other interlocutory step;
   d. The number of directions hearings which should be required;
   e. The range of possible outcomes of the proceeding for each party including for each, the best result including costs recovered and its own costs incurred and the worst result including costs which it might be ordered to pay and its own costs incurred;
   f. Whether there should be an order for the electronic trial of the proceeding and the likely costs of this; and
   g. Whether any other procedures might be adopted in order to use these resources or costs to greatest effect.

9. At the conclusion of the conference the Master will prepare a report of matters agreed and those discussed at the conference, other than those matters discussed during any without prejudice part of the conference and those discussed with a party separately from other parties. The report will be placed on the Court file and a copy will be sent to the lawyers for each of the parties with a request that it be forwarded to the person responsible for the litigation within the organisation of each of the parties. The copy on the Court file will not be available for inspection by any person other than the parties without an order of the Court.

10. The trial Judge may have regard to the content of the report of the resources conference in managing the proceeding, in conducting the trial and in

determining costs issues.

11. In the case of a proceeding which is conducted in accordance with this Practice Note from its commencement, the trial Judge will, within one month after the resources conference, convene an initial directions hearing at which the lawyers for the parties will explain to the Court what the proceeding is about and what interlocutory steps are to be taken including –

    a. whether each of the parties has given to each other party sufficient information regarding its position to enable the other to understand what are the principal questions in issue between them;
    b. whether the parties have attempted to resolve the dispute by mediation or otherwise and whether an immediate mediation is appropriate;
    c. what are the substantial questions in issue;
    d. whether any other parties are expected to be joined;
    e. whether apportionment is sought against any party or other person;
    f. whether there are any questions which might be appropriately determined pursuant to R47.04;
    g. whether there are any questions which might be referred to a special referee or to arbitration pursuant to O 50;
    h. whether there should be an electronic trial of the proceeding; and
    i. whether any and if so what experts have been or are expected to be retained for the purposes of the proceeding and whether a common expert might be jointly retained.

    [Note: Counsel should appear. A constructive and co-operative and flexible approach required.]

12. The managing Judge will from time to time address the future progress of the proceeding with the co-operation of the lawyers for the parties and may give directions including:

    a. fixing milestones dates for the preparation of the case for trial, including the issue and return of subpoenas;
    b. directions for the preparation of the proceeding for trial;
    c. fixing a time after which no further party may be joined;
    d. that the parties provide an estimate of the likely duration of the trial and a timetable for the conduct of the trial;

e. after consultation with the Listing Master, fixing the date for the commencement of the trial of some or all of the questions in issue;

f. directions for the conduct of the trial;

g. that certain questions be determined in a preliminary way by trial in the Court or by reference to a special referee or otherwise;

h. that the trial be conducted in stages;

i. with the consent of the parties, that the case or any questions in issue be referred for non-binding evaluation;

j. that there an electronic trial of the proceeding;

k. that there be time limits for the trial or part of the trial; and

l. that a question be referred to a Master.

[Note: Counsel should appear. A constructive and co-operative and flexible approach required.]

13. Not less than one month before the date fixed for the commencement of the trial the trial Judge shall convene a final directions hearing.

14. At the final directions hearing the parties must attend by a lawyer who is able to deal with the following matters:

a. whether the case is ready for trial;

b. whether the timetable is still considered appropriate;

c. whether a mediation or a further mediation would be likely to achieve a settlement of some or all of the questions in issue; and

d. whether the trial might be conducted using any of the special trial procedures mentioned in the following paragraph.

[Note: Counsel should appear. A constructive and co-operative and flexible approach required.]

15. The trial Judge may, with the co-operation of the lawyers for the parties, give consideration to the making of special orders for the efficient conduct of the trial and may give directions to that end, including the following:

a. direct that the evidence of all parties upon a particular question be given before the evidence upon other questions;

b. hear the evidence and submissions of the parties upon a particular question in a preliminary way;

c. hear and determine a particular question in a preliminary way;

d. impose time limits for the trial or part of the trial including the examination or cross-examination of witnesses by reference to topic or time;

e. direct the order in which witnesses shall be called;

f. direct that expert or other witnesses meet in conclave and report on the points of agreement and disagreement; and

g. direct that expert or other witnesses give concurrent evidence.

[Note: Counsel should appear. A constructive and co-operative and flexible approach required.]

16. The trial judge may, if the occasion warrants, make orders that costs be awarded on an issues basis, or that the costs of an unsuccessful issue, of unnecessary discovery, of the unnecessary inclusion of documents in the court book or the unnecessary use of resources may not be allowed to the successful party or that these costs be awarded against a successful party.

17. This Practice Note will commence and apply to all cases entered in the List after 1 March 2008. Cases which are in the List on the commencement date may, if the Judge in charge of the List so orders, be conducted in accordance with the provisions of this Practice Note, or such of them as are appropriate.

18. This Practice Note is supplemental to Practice Note No 2 of 2001 which remains in force.