442

BUILDING DISPUTE PRACTITIONERS' SOCIETY

ANNUAL DINNER, MELBOURNE

WEDNESDAY 20 JULY 1983

BUILDING, DISPUTES AND THE LAW

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The Hon Mr Justice M D Kirby CMG
Chairman of the Australian Law Reform Commission

THE PERILS OF BUILDING DISPUTES

In my relatively short but exciting career at the Bar, and in the five years previously when I was a busy solicitor, I had precious little involvement in building disputes. The practice seems to attract a very special breed of particularly valiant lawyers. Doubtless this is because of the features of building disputes recounted by the Governor-General, Sir Ninian Stephen, when addressing the dinner of the International Construction Law Conference in October 1982. His Excellency, who seemed to speak from bitter personal experience, described the special features of building litigation. It is worth reminding you of these Vice-Regal remarks.

The first related to the formal visits to the building sites, called a 'view':

> It invariably seems to take place in pouring rain or a blinding dust storm and the critical explanations of where and when are, whenever possible, given standing as close as may be to an operating rock crusher or to a batching plant working at full throttle. There is a delightful legal fiction which governs the use to which views may be put, at least when conducted by judges and in Australia. According to it, the judge must shut his eyes to almost everything he sees on site and, to be sure that he derives as little possible benefit as he can from the view, he must, like some Hare Krishna devotee, continuously and inwardly intone the incantation, 'I will use what I see only to better understand what I hear and for no other purpose, Amen'.

The battle of wits between the expert arbitrator, an engineer or an architect, on the one hand, and lawyers on the other, was described by the Governor-General as an effort to establish 'moral superiority':

> The game of upmanship begins by the arbitrator saying to counsel as they arrive on site that now that they are at the site the critical path analyses that have been discussed during the evidence will of course become clear to all. They however know full well that nothing on God's earth will make those analyses clear to them and are thus stricken speechless, a terrible state in which for counsel to find themselves. The arbitrator should swiftly make good this temporary advantage by picking up any piece of steel he may see lying on the site, making sure of course that it is totally irrelevant to the dispute in issue, and after looking enquiringly at its fractured end, ask counsel for their opinion about the extent of its martensitic quality. This ploy is most effective when the relevant dispute is about the quality of the concrete mix or the applicability of a rise and fall clause or indeed anything about which steel quality has nothing to do, because it sets counsel worrying and worried counsel are docile counsel. And views have other uses; there is no more satisfying sensation for a harassed witness who has endured long cross-examination by opposing counsel, than to get that counsel out on a view, equipped with a helmet three sizes too big and work boots one size too small and insist on walking him through as yet uncompacted aggregate the whole of the length of an airport runway. In this I speak from bitter experience.

Having read, ashen faced, these baleful reminiscences, I must confess to you that I was pleased, in retrospect, that my practice took me so rarely into the field of building disputes. How much safer, at this distance, seemed the great battles of industrial relations. After all, the worst thing that can happen to you in a practice in the industrial courts is that a chance utterance or two may cause a national strike; an angry word from counsel may merely ruin an industry, throw thousands into unemployment and cost the economy a million dollars or so!

You will forgive me, then, if I cannot address your dinner from the point of view of one of the cognoscenti. My observations must be those offered from Olympus. Perhaps you will think I have got my Greek mountains confused and that they show Delphic qualities. Certainly, I promise you, they will not take on a Marathon length.

THE BUILDING INDUSTRY

A healthy Building Dispute Practitioners' Society requires lots of building disputes. The proliferation of such disputes tends to require a healthy building industry, though I appreciate that hard times can occasionally themselves promote litigation.

Today, the Australian Bureau of Statistics released figures showing that investment in home loans in Australia have risen to the highest figure since the collection was started by the Bureau in October 1975. However, other recently published figures tend to show that the long-awaited rise in building levels in Australia is not yet apparent. In fact, recent statistics suggest that the corner has not yet been turned. Building is an industry that feeds on growth. Stimulated by growth in the economy, it makes, in turn, its own contribution to employment and investment levels. The building industry can be divided into five basic groups:

* housing with an annual turnover of about $6 billion dollars a year;
* general construction, $3.5 billion;
* civil engineering, $2.5 billion;
* suppliers and consultants, $6 billion;
* overseas building, particularly in South East Asia, a further $1 billion.

Relatively few builders possess skills to participate in the total industry. Accordingly, most only see the concerns of their own area of operations — including the legal concerns. Jennings is one of the exceptions, although even this company has only about 4% of the national market shared of home building, home extension and general construction work.

The result of this fractured and disparate industry, and of our Federal legal system, is a multitude of regulations governing builders. Regulations are imposed by Federal, State and local government authorities, as well as various other land use authorities established by law. They are a builder's minefield; but often a lawyer's delight.

During the past few months, in hard times, there has been an increasing realisation of the national expense that is involved in the diversity and proliferation of laws governing the building industry. One of the most important speeches concerning the building industry offered during the last few months was made by Mr J G J Wood, Managing Director of Jennings Industries Limited. Speaking to the National Construction Industry Conference in October 1982, he made an important appeal for efforts to secure uniformity of laws and a reduction of disparate laws. He also appealed for a solution to the need for a 'fast track' to cut through multiple legal regulations and to

thereby facilitate the growth of building. Ruefully, Mr Wood commented that sometimes it took longer to complete the paper work to obtain the necessary approvals and permits for building than actually to build the project. Time, he reminded his audience, is money to an invester:

> One important area that needs urgent attention is the planning process. The deficiencies here are all too apparent, and are contributing to an increasingly unacceptable wastage of money, time and effort ... The industry can ill afford the extra and unnecessary cost burden incurred through time wastage on this scale. It is widely acknowledged that our existing systems of land use control and, in particular, zoning, are less than perfect and needlessly costly. Nevertheless, the system not only thrives but escalates and multiplies. Radical alternatives or remedies are rarely adopted and then only by a minister willing to 'fast track' a project. The construction industry recognises the need for and supports controls on planning and measures to protect the environment. But there is an urgent need to proceed to the stage where the number of bodies involved is reduced to the minimum and, more importantly, the division between their responsibilities is clearly visible and understood. Another area in which the industry would greatly welcome some rationality is regulation. The enormous scope of activities subject to regulation, the massive amounts of legislation and overlapping codes, the multiplicity of bodies who administer them and above all the fact that it is too often left to individuals to interpret them, have turned such things as the Uniform Building Regulations into time-consuming monsters. Standardisation of the many regulations, specifications and conditions of contract in force throughout Australia would save the country hundreds of millions of dollars ... The savings in costs to home buyers alone have been estimated at more than half a billion dollars a year.

I imagine that most people here would say Amen to that. But how is uniformity and standardisation to be secured? The current effort to get a Uniform Defamation Act shows the difficulty in Australia. Perhaps computerisation will come to the aid of simplification of building laws and practices. I have already had discussions in Melbourne with the Federal Minister, Mr Barry Jones about a Commonwealth initiative in relation to land use data bases in Australia. Happily, the Minister is interested and supportive and I am hopeful that progress will be made.

THE BUILDING DISPUTES TRIBUNAL

Assuming we can reach the stage most attractive to your Society, namely a healthy level of building disputes, who is to decide them?

I am aware of initiatitives that are being taken by Mr Justice Beach in the Supreme Court concerning new Rules for Building Cases. I am also aware of proposals for the appointment of a mediator in the County Court of Victoria and the Inquiry into court delays in Victoria by Professor Ian Scott. If we turn to arbitration, it must be acknowledged that somehow we have never quite achieved achieved the success in Austalia with arbitration that is undoubtedly the gift of English and North American procedures. The need for simplification and modernisation of arbitration procedures has been recognised by work in many law reorm bodies, other than my own. Indeed, almost every one of Australia's law reform bodies has tackled arbitration law and I know of the efforts in Victoria to reform the Arbitration Act.

Perhaps the most important Victorian development in recent months has been the proposal to establish a Residential Buildings Disputes Tribunal. The idea has grown out of the moves to provide better protection for consumers. These moves have led to the erosion of the unity of the court system in the creation of special courts such as the Market Court, the Small Claims Tribunal and the Residential Tenancies Tribunal in Victoria. In the Commonwealth sphere, there are many such tribunals as well. However, Federal tribunals are often created for constitutional reasons because of the rigid separation of powers under the Australian Constitution and the constitutional limitations upon what Federal Courts and judges can do. No such constitutional reason exists for creating tribunals in Victoria. Reasons, if any, must be found in the superior or different job which tribunals can do when compared to the courts.

Now, I have seen the comments of the Minister, Mr Spyker, at your discussion night in November 1982. I have also seen the submission of your Society concerning the proposed special Buildings Dispute Tribunal. I am familiar with and sympathetic to some of the difficulties identified by the Society. In the Federal sphere, we are learning to live with the border disputes that can arise between Federal and State courts. So serious are the problems, according to some commentators, that constitutional amendments are even being proposed to cure them.

Reflecting on the Society's submission about the proposed Tribunal, and the proliferation of consumer, environmental, industrial and administrative tribunals, I was forced to ask myself <u>why</u> it is that courts seem to be losing their business in Australia to special tribunals? Is it because of:

* exaggerated notions of the dignity of courts and judges;
* inconvenient rules of evidence which lawyers understand but which laymen sitting in the back of courts or called as witnesses find puzzling;
* costly delays in court hearings;
* lethargic traditional and languid court procedures;
* the expense of courts and of the legal practitioners who are usually needed in them.

Public debate about these matters in Australia concentrates on externals such as wigs and gowns. But the economics of court operations are much more important to the debate. Of course, there are inconveniences in setting up separate tribunals. They include:

* the possible reflection which the proliferation of tribunals provides on the relevance of the court system and its central importance in our society;
* the spectre of forum shopping ie litigants choosing the place in which they will bring their case — to their own perceived best advantage;
* the 'border disputes' as to whether the special tribunal has or has not jurisdiction in the particular case;
* the inequality of some litigants before special tribunals;
* expensive mistakes that can arise in choosing the wrong forum which remind us of the terrible inefficiencies painted in Dickens' prose before the unification of the courts in England.

What should be the proper response of law reformers and of the community to the creation of suggested separate and specialised tribunals?

* there are many who will say that we should fight them. But to do this with any hope of success, practitioners must somehow devise courts hearings or arbitration procedures that address the inefficiencies and perceived injustices, delays and expense of the court procedures currently on offer, particularly in small claims;
* there are others who say we must accept the inevitable, that specialist tribunals will proliferate because specialisation means greater cost effectiveness and efficiency. But if this is the conclusion we reach (and in the Federal sphere it may also be reached for constitutional reasons) urgent thought must surely be given to ancillary reforms. These might include:

** first, improving the procedures for judicial review of subordinate bodies. Important reforms have been achieved in this connection in the Federal sphere in the Administrative Decisions (Judicial Review) Act 1977. So far there is no parallel legislation in any of the State jurisdictions, though Victoria comes closest in the Administrative Law Act 1978. In the building dispute field, the limitations of that Act were recently demonstrated by Mr Justice O'Bryan in the case of Monash University and Prentice Builders (22 February 1983).

** secondly, we should seek to bring the new tribunals together under an umbrella organisation. A hundred years after Dicey we should try to develop a coherent administrative law. Again, this has been ventured in the Federal sphere by the creation of the Administrative Appeals Tribunal : a general tribunal, with separate divisions, aimed at ultimately bringing the whole field of administrative law into the one national administrative tribunal. Its President is a distinguished Victorian lawyer, Mr Justice Daryl Davies. Such a uniform approach does not prevent experimentation and variety of hearing techniques. However, it could help to prevent forum shopping, the mistaken choice of the wrong tribunal and the other dangers of an interjurisdictional kind mentioned in your Society's submission on the proposed Building Tribunal.

** thirdly, attention should be given to enhancing the quality of the performance of specialist tribunals. This does not necessarily mean making them all lawyers or replicating all of the expensive procedures of the courts. But it does mean that tribunals should be so created, manned and run that the ideal of impartial justice and adherence to the Rule of Law is not lost in the quest for fairness to the consumer.

These few comments are all that I can offer for your consideration. They are ventured on the basis of a background in industrial and administrative law rather than building disputes. One of the great values of the English legal system lies in the way in which we ultimately bring specialist problems back to the generalist appellate review. I entered your specialist field tonight in fear and trepidation : a veritable Daniel in the Lion's Den. But I am glad to join you. And in concluding I can do no better than to quote Vice-Regal authority again:

> There is also no better way to end an after dinner speech than by sitting down punctually, seeking no extension of time.