NEW APPROACH TO ENGINEERING AND CONSTRUCTION PROBLEMS

TREND TOWARD ALTERNATIVE DISPUTE RESOLUTION

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Trend to alternative dispute resolution

The guest speaker at the dinner of the 1989 Country Convention of the Institution of Engineers, Australia was Justice Michael Kirby. Justice Kirby is the President of the Court of Appeal of New South Wales. He told the dinner, held at Morwell on 17 November 1989 that important new steps were being taken by courts in Australia to improve the efficient and just disposal of disputed claims of relevance to the engineering profession.

Justice Kirby said that in the construction industry it was not unusual for disputes to arise. The obscure and sometimes unsatisfactory nature of standard forms of contract used; the multitude of activities in which room for dispute emerged; financial difficulties of proprietors and builders and even changes of the law by the courts all conspired to increase the number of disputes. He said that whilst courts, presided over by judges, generally gave a high level of satisfaction in determining such disputes, there were a number of well known disadvantages:

* The cost and delay of litigation;
* The uncertainty of accurate understanding of expert engineering and other evidence; and

* The disinclination of some lawyers to become involved in the mass of detail, abundant documents and copious facts typically inherent in construction disputes.

Justice Kirby reviewed the moves towards alternative dispute resolution which were now well advanced in courts throughout Australia. He listed the alternatives as including:

* Reference to arbitration;
* Reference of particular issues to referees or court appointed experts;
* The use of conciliators to attempt to bring the parties together;
* The use of mediators;
* Reference of issues or disputes to expert appraisal; and
* Short hearings before a body constituted by a retired judge and a skilled engineer.

Justice Kirby said that these innovations represented, in part, variations on the theme of arbitration which had long existed as an alternative to litigation for the resolution of construction and other engineering disputes. However, he said the growing number of such disputes, enhanced during periods of economic downturn; the growing technical complexity of evidence of an expert character and the burgeoning costs and delays of litigation in the courts were adding to the pressure for the adoption of alternative dispute resolution. This could either be as an alternative

to courtroom litigation or as a complement to such litigation - supplementing it in effective ways and in particular areas where appropriate.

Taking early account of settlement

Justice Kirby said that the choice of litigation against other forms of dispute resolution depended very much on initial agreement between contracting parties. If there was no reference to an alternative mechanism of dispute resolution, an issue was posed for the parties as to how they would bring their dispute to conclusion. He pointed out that most disputes of this character (and indeed of all characters) are settled. This is so whether they are brought in courts of law or before arbitrators, mediators etc. The difficulty was that, at the outset of the dispute, tempers are high, self-rightousness of the entrenched positions is often an obstacle to sensible and business-like conclusions about the interests of the parties. Hard as it may be to do so, it was essential for skilled managers to realise the very great costs that can be run up by construction disputes. This was particularly so because of the great detail of such disputes and the technical and other evidence which lends itself to high lawyer, witness and other costs. Given that most disputes are ultimately settled, it was essential to avoid the predicament, so frequently seen in the court, that the outcome of the litigation would effectively determine the economic viability of one or other (or sometimes both) parties to the dispute. It was therefore essential to

endeavour to foresee the possibility of disputes and provide for them. If that had not occurred, it was equally essential at the outset of a dispute for the parties to calculate without emotion the potential of costs of resolving the dispute, the amount and issues at stake, the likelihood of success and then act accordingly in their own best interests.

The advantages and disadvantages of ADR

Justice Kirby said that he agreed with the comment of the judge formerly in charge of the building list in the Supreme Court of New South Wales (Smart J) that in a number of cases litigation could still be the most suitable way to resolve the essential issues at stake. This was generally so where there were substantial legal questions in dispute; a multitude of parties involved in the proceedings; issues raised such as might render the proceedings difficult to control or substantial allegations of dishonesty. See R Smart, "Aspects of Construction Industry to Contracts and Disputes" (1989) 5 Building & Const L 7, 14.

However, even in such cases it was essential to weigh up the considerations previously stated. A Pyrrhic victory, particularly against another party rendered bankrupt or insolvent by the litigation, would be cold comfort years later. Apart from anything else, litigation of this kind could involve the absorption of a great deal of time of the parties, thereby incurring opportunity costs of considerable size for each of them.

The various advantages and disadvantages of

arbitration, mediation, conciliation and expert reference were discussed. As to the right choice of the appropriate dispute resolution procedure if this were available to the parties, Justice Kirby mentioned the competing considerations reviewed by Justice Smart in another article in (1989) 5 Building & Const L, 169, 170. He also referred to the note by de Jersey J (1989) 63 ALR 70.

Innovations in NSW Construction List

In concluding his remarks, Justice Kirby drew attention to recent developments in what is now called the Construction List of the Supreme Court of New South Wales. He said that the endeavour of the New South Wales Court was now to get "the best of both worlds" of litigation and alternative dispute resolution. In the past, in engineering contracts, broad arbitration clauses had typically been inserted. This had the advantage of swift and generally accurate resolution of complex technical questions, typically decided by engineers. But it had the disadvantage that often complex questions of law were resolved by engineers who were not lawyers. Objections were then taken on appeal where the contention was also made that technical rules relating to natural justice had not been observed. On the other hand, pure litigation had the clear disadvantages of expense and delay. Furthermore, complex engineering issues were then resolved by lawyers who were judges. They might or might not fully understand and appreciate the technical issue in contest.

It was against this background that the Supreme Court of New South Wales had introduced a new method for the resolution of disputes which has the advantage of providing input on engineering matters from engineers but reserving the resolution of legal matters to a lawyer, namely the judge. He said that under part 72 of the Supreme Court Rules (NSW) where the court receives a matter into its construction list, within three weeks of the issue of the writ, the court requires the parties to clarify the issues, file statements of evidence within a short time and agree upon a referee to hear the technical engineering matters involved. These are then referred for report to the court pursuant to part 72. The procedure is outlined in the judgment of Cole J in the Supreme Court of New South Wales in Astor Properties Pty Limited v L'union des Assurance de Paris, SC, (NSW) 28 April 1989, unreported. In that case the history of arbitration and other forms of dispute resolution are traced and the differing functions of an arbitrator, a referee and a court appointed expert made plain.

Achieving finality but with justice

By the same token, Justice Kirby pointed out that the appointment of an appropriately qualified expert to report to the court on technical questions could only be useful if the court, upon receipt of the expert's report, respected his or her conclusion on the technical questions. That conclusion would not foreclose argument. The decision would remain that for the judge. If it was contended that the expert had

missed a point, misunderstood evidence or wrongly adopted one viewpoint on a technical question, the judge might refer the matter back to the expert for reconsideration and further report. But the litigation of technical issues cannot be endless. This was stated most clearly in another unreported judgment of Cole J in Chloride Batteries Australia Limited v Glendale Chemical Products Pty Limited, SC (NSW) 16 December 1988. unreported. In that case a dispute arose concerning whether acid supplied by the plaintiff for use in power stations in New South Wales had excess chloride levels. The question was whether it was this that had resulted in damage to electrical accumulators and caused considerable losses to the plaintiff and substantial liabilities by it to the Electricity Commission and others. The question involved was referred to an appropriately qualified expert as referee for inquiry and report. The consent of the parties was not required for this order of reference. Upon receipt of the expert's report, it was made available to the parties. The plaintiff, about whose claim the expert was unpersuaded, sought to persuade Cole J that the expert had misunderstood or misinterpreted evidence and certain technical reports to which he referred.

In the result, Cole J referred the matter back to the expert for further consideration and report. When this report came back, the expert adhered to his earlier opinion. The plaintiff failed both in an application to cross-examine the expert and in an application to call to Australia the two authors of the technical paper which it was said he had

misunderstood. Cole J, upon the bias of his assessment of the expert's report, followed earlier decisions in Victoria in Nichols v Stamer [1980] VR 479 (Brooking J) and Interger Computing Pty Limited v Facom Australia Limited & Ors, unreported, Marks J, 10 April 1987 in laying down the proper relationship between the expert and the judge.

The judge must continue to apply his own mind to the report. He does not surrender the decision to the expert. But by the same token the reports of experts appointed as referees in this way are designed to save the judge time and to help avert mistakes on technical evidence. The consequence of this is that normally the court will accept the opinion of the appointed referee on the technical questions referred.

Advantages of the NSW system

It is in the interaction between technical experts and the court that the new construction list of the Supreme Court of New South Wales offers fresh hope to the efficient but just resolution of disputes involving engineers. Under the practice of the construction list the referee is required to report within three months of the issue of the proceedings. That report comes back to the court. It is considered by the court the week after it is received. In this way the ultimate decision is that of the court not of the referee. But great weight is given to the report for the reasons previously stated. This is a "felicitous arrangement" and it is referred to in further the judgment of Cole J in Hooper

Bailee Association v Natcon Group Pty Limited. This is an unreported decision delivered on the very day of Justice Kirby's address in Morwell.

In his paper "Construction Industry Disputes: How Did we Get Where We Are", the Assistant Crown Solicitor of South Australia, Mr Robert Martin has examined the serious predicament that had been reached in Australia in the resolution of disputes in the construction industry, including those involving engineers. See (1989) 5 Building & Const L 89. At 93 he concluded:

> "The marriage of arbitration methods and the court system, such as is being developed in the Supreme Court of New South Wales, seems to have a lot going for it."

Justice Kirby said that this was also his opinion. He considered that the innovations being introduced in court techniques by the Construction List in New South Wales would demonstrate their utility and would eventually be adopted throughout the country. It was not only engineers and scientists who had to move with the times. Lawyers and courts must also adapt to new circumstances and new problems. Unless they did, serious injustice would be done by those who could simply not afford to have their disputes brought to lawful resolution. As another alternative, lawyers and courts would be painted entirely out of the picture, depriving engineers and the construction industry of the useful contribution of lawyers to assure the resolute and lawful determination of matters genuinely in contest.

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