REFLECTIONS AND REMINISCENCES OF A BUILDING JUDGE

The Honourable Professor Robert Brooking QC

This is the first time I've been the guest of the Law Council. The Society has a dinner every year —that's the main reason for its existence, I suspect—and somehow or other I got onto the free list at the start, in 1979, and I've managed to stay there ever since. The last time I spoke at the Society's annual dinner I said that I resembled Halley's comet by appearing as a speaker regularly but infrequently—not every 77 years but every 7—and that in view of my age it was probably the last time I'd have the pleasure of speaking at one of those dinners. Little did I know that the Law Council would join forces with the Society and get me up onto the podium once more, for what is positively my last appearance.

Speaking of age, Brian Gallagher obviously had that in mind when he very kindly offered to pick me up tonight, drive me here and drive me home. Everyone knows that elderly drivers have no business to be on the roads; they get in the way of young men. Why, a few weeks ago it was reported that an 80 year old man who had been driving slowly along the road up in Queensland wearing a hat had his jaw broken by a young fellow who had been driving behind him. In a decision that got a lot of publicity the Queensland judge said he really had to mark the community's disapproval of breaking the jaws of octogenarians, but went on to point out that elderly men driving Volvos and wearing hats at the same time could be a source of provocation to law-abiding citizens. So I left both my car and my hat at home tonight and came in with Brian.

Sometimes when I talk to a group of building and building law experts I manage to conceal my own ignorance by talking instead about some ancient building I inspected recently in the course of my travels abroad. Originally I thought I might get away with that tonight by telling you about my visit to Egypt and recent discoveries by Egyptologists in the Valley of the Kings—how they found in one very ancient tomb a jar of wheat labelled in hieroglyphs 'Use before 1800 BC' and a jar of wine labelled 'Best before the Middle Kingdom'.

But George Golvan was adamant. He said 'None of your phoney travelogues this time. Stick to your subject—Reflections and Recollections of a Building Judge.'

Originally he told me he wanted a substantial speech. But I asked him to take pity on me—and you. The fact of the matter is that people have been so generous in arranging farewell functions for me that I am speeched-out. So George agreed to let me off with an insubstantial speech.

Reflections and recollections... I have been a building barrister rather than a building judge. How did it all begin? When I went to the bar as a very young man I had no intention of doing building cases. Really I was very ill-equipped to do anything much as an advocate, as regards both training and logistics. As to logistics, I had no library—just my old university textbooks. Some of you will remember Mr Venn Brown of Butterworths. I went into debt as a result of the blandishments of Venn Brown and took on hire purchase—the only form of chattel security in those far off days—an incomplete set of the VLR from 1929 to 1952.

I couldn't get a room in chambers. It took me two years to get half a room and seven years to get a room of my own. I was one of the large collection of homeless vagrants who held conferences on the bridge running across Selborne Chambers near the notice boards. We vagrants—les

miserables—huddled together on that bridge, holding our conferences. The first two or three of us to arrive were lucky—we could sit down with our client on one of the two benches each side of the bridge. Of course we had no telephones, but then neither did many of the people who had rooms. For them there was a sort of forerunner of the mobile phone in the form of the mobile clerk —Nicholls or Dever or Foley —who emerged from his room and bellowed out a message that could be heard throughout the building.

I was very lucky when after a while Ted Woodward and Ray Northrop, who shared a little room in Saxon House, let me use their desk for a conference if they were out of the room. And of course I had no car: I went all over Melbourne by train or tram to all the suburban courts we had in those decentralised days.

So much for logistics. As for training, back in those days neither the university (there was only one university, not half a dozen) nor the Bar provided any formal training. Not even moots. All you could do was join the debating society. We really did let new born barristers loose to learn their trade at their clients' expense. Although I'd studied evidence and procedure as a university subject, it was not until one of my earliest cases—a claim for work and labour done at Brighton petty sessions—that I learned one important truth. In the running—if I can call it that —of that case it suddenly dawned on me—no one had taught me this—that cases were decided, not on the facts, but on the evidence —that hermetically sealed box labelled 'the evidence'. It was the first thing, and certainly the most important, I ever learned about the law in practice. Even if you had the road traffic regulations, or the health regulations, lying in front of you on the bar table, if you hadn't deposited them in that box labelled 'the evidence', you were in trouble.

Well, there I was, a young man at the bar, with my set of the VLR from 1929 to 1952, hoping that no one would come up with a case decided before 1929. Earning as little as four guineas a day —gross—by doing motor accident cases, and often earning nothing by waiting all day to get on at Footscray Court without success. (In those days Joan kept house on five pounds a week.) And then one day a door opened and I entered the wonderful world of the building case. A builder who was being sued and had a case coming up the following Monday went to see a solicitor on the Friday afternoon. The solicitor could do no more than put the proverbial backsheet round the client, and I got the brief. All it consisted of was a bundle of grubby invoices. Being a barrister without a room, I said I'd see the client at 9 o'clock on the Saturday morning, at my home. I remember it was winter and I had an open fire going in the little room that was both living room and study. Nine o'clock, 10 o'clock, came and went—still no client. He arrived about eleven. A rather unprepossessing man, armed with nothing except a brown paper bag. At first I thought he'd brought his lunch, but on examination (as the doctors say) the bag was found to contain more grubby invoices, all out of order and most of them relating to a different job.

I think I described the client as rather unprepossessing. That is an understatement. He was wearing a striped flannel pyjama jacket under his pullover. He hadn't shaved for about three days, and this was long before it became fashionable, as it is now, to have a three-day stubble. His eyes were

bloodshot and his breath smelt strongly of intoxicating liquor, as the police used to say in petty sessions. I was afraid that if I sat him too close to the fire his breath would ignite and he would erupt like Mount Vesuvius. I began to think that if this builder's houses were as unprepossessing as his appearance and his work was as reliable as his keeping of appointments we were going to lose this case.

It was with a heavy heart that I went to court on the Monday morning. Surprisingly, the client turned up on time, and, equally surprisingly, he brought with him several witnesses—a motley crew of subcontractors. I have since wondered whether they too, like the invoices, related to a different job. But I didn't have time to find out before my opponent, who was just as inexperienced as I was, seeing the large number of subcontractors' trucks and vans parked outside the court, and the large number of horny-handed subcontractors, took fright and made me an offer of settlement we couldn't refuse. It was from this experience that I formulated the first of what I like to think of as Brooking's Laws. You're all familiar with Sir Isaac Newton's three laws of motion. Well, over the years and on the basis of empirical experience I've formulated Brooking's five laws of building cases. These aren't laws in the lawyer's sense, but scientific laws. Brooking's first law of building cases, discovered by me on that Monday morning, is: That in building cases there is no correlation between the number of witnesses a party has and the merits of that party.

Perhaps this would be a convenient time, as I see some of you are taking notes, to give you Brooking's second law of building cases, since it relates to a correlation which has been empirically proved to exist. Brooking's second law is: That the total number of witnesses to be called in a building case is directly proportional to the reluctance of the judge to hear it.

You may now, if you wish, take down Brooking's third law, perhaps the most important of all my discoveries, since it's valid not only for building cases but for all litigation. This is the law of implied terms, and it is: That the probability of the existence of a implied term is inversely proportional to the number of paragraphs taken to plead it.

Now I must get back to the course of my career. Very early on I was lucky enough to be taken under the wing of Mr J P Adam of Weigall and Crowther. He became my mentor, while ostensibly seeking my advice. And so, in the days when the Grollos were barrowing concrete for domestic drives, and borrowing while they were barrowing, I became a doer of building cases. Small domestic ones at first. I soon found out that, if you put to one side children and spouses—those were the days when the only partners were business partners—the thing people got most worked up about was their house. Understandably, since it was by far their biggest investment. They couldn't wait to get you, the barrister, out to their house to show you how a marble would roll quickly from one corner to the other of a supposedly level floor or how the roof leaked. In order to preserve what they called 'the evidence', they would live with that leaking roof, put up with the draughts, year after year rather than fix them. And when I say years I mean years. For when I was at the bar no self-respecting building case would mature in less than 5 or 10 years. In the Supreme Court building cases, like the best wine, were still maturing after 14 years.

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Brooking's fourth law is the law of case management: a building case that is at rest will remain at rest unless it is acted upon by a force. Forced on, in other words.

Plaintiff's lawyers would get very upset if you tried to get the case dismissed for want of prosecution. Delays which were commonplace then would never be tolerated today.

Newton's first law of motion tells us that a body at rest will remain at rest unless it is acted upon by a force. Brooking's fourth law is the law of case management: a building case that is at rest will remain at rest unless it is acted upon by a force. Forced on, in other words.

When I started out in building cases I enlarged my library by picking up for five shillings in a secondhand bookshop the 4th edition, 1944, of James Nangle's *Australian Building Practice*. I still have it. It taught me the difference between purlins and rafters and studs and noggins. Before the critical path was invented, although it was only just around the corner, I bought myself one of those little yellow EUP (English University Press) books: *Teach Yourself Quantity Surveying*.

It was J P Adam who introduced me to the architects' and master builders' standard form lump sum contract. I spent hours in the Practice Court trying to persuade judges on a summons for final judgment that a progress certificate meant what it said—pay now and argue the point later. It was perhaps an anticipation of the much more recent phenomenon of trying to persuade judges that a performance bond or similar security means payment now.

Gradually I got into what I suppose you could call the big time work—the multi-storey buildings, the highway construction, the pipelines, the plants and so on. The long arbitration and the heavy litigation. At times it was a career literally of ups and downs. I feel uncomfortable even on a stepladder. I've had to conceal my fear of heights and go on views and clamber all over plants, trying not to look down. As well as those ups I've had my downs. Once I was offered a mixture of ups and downs, but I said no. There was a dispute over the lining of some very tall chimneys at a power plant. The proprietor wanted me to see for myself by going up to the top of the chimney and then being lowered inside it in a bosun's chair to get a good look at the cracking of the refractory lining. I'm afraid I was just as refractory as the lining. I said I could see all I needed to from the photographs and expert reports.

Speaking of going down, I've had quite a bit to do with piling in my time, mainly as a result of water problems. We owe those problems to the fact that we built our city by a river and to the fact that, as many have found to their cost, putting down a test bore only tells you what's down that particular hole: it doesn't tell you whether there's an underground river a short distance away. In the particular case of Melbourne, we have our very own Coode Island silt to thank for some of our problems. I had two or three cases at the bar about cast in situ piles. You had a metal casing or sleeve and the idea was to achieve a seal at the bottom of this before you cast your pile. I always resisted the temptation to go down and see how this was done. Many of the workers were miners and I remember how a Cornish miner nicknamed Bushy was down about 80 feet—it was feet in those days—having a look at the seal one day when it blew and he was brought up to the surface on a rising tide of quicksand. He was rescued, losing only his boots. But this kind of incident led me to believe that having a view down below was not for me. Another time one of our engineers went down 130 feet inside a 30 inch diameter sleeve

to have a look at a troublesome seal. He put his right hand and forearm under the bottom edge of the sleeve and it moved, trapping him 130 feet below the surface. Then it moved again and he freed himself.

The biggest rush I remember having in a building case was when Sir Ninian Stephen was appointed to the Supreme Court in the middle of a long pipeline arbitration in which he'd been appearing as senior counsel. I replaced him, having had nothing to do with the case before. As I recall, we were given a three week adjournment and had to get the case up—it had been going for quite some weeks—and be ready to go on.

My most enjoyable building case was one of my last. I was acting for the contractor which had built a woodchip mill in Tasmania and hadn't been paid. It was the first long case tried by Sir Guy Green, then the newly appointed chief justice. The defendant said our work was defective in many different ways, but the main allegation was that we had failed to install metal packers under numerous heavy items of plant, with the result that they weren't held down properly. Luckily our engineer running the job was a great believer in keeping albums of photos showing the job from whoa to go. So we got out all those albums and also all the odd snapshots the workers had taken. I remember there was one of a possum taken at lunchtime one day. And we went through all these photos with a magnifying glass looking for packers—it was rather like one of those puzzles in a child's picture book: 'How many fish can you see in this picture?' —and you find fish in the trees and all sorts of other odd places. We found packers in dozens of photographs although they'd never been consciously photographed. After a six week hearing, when we were still cross-examining the plaintiff's first witness, we settled. For the full amount claimed, plus interest, plus costs, plus a public apology in the Mercury for criticising our workmanship, plus the dismissal of the counterclaim.

Speaking of counterclaims, you may remember that Newton's third law of motion is that every action is opposed by an equal and opposite reaction. My fifth law of building cases is that every action brought is opposed by an at least equal and opposite counterclaim.

It remains only for me to say thank you. To the Law Council and the Society for honouring me with this dinner. To George Golvan for so carefully arranging and stage managing it and for his remarks tonight. To Justice David Byrne for his speech. If ever I had a mantle as some kind of expert in construction law, it has certainly long since slipped from my shoulders and settled very comfortably onto his as the acknowledged authority in this field in which we have all reaped a harvest at some time or another. And finally I thank each and every one of you for finding the time in your busy lives to come here tonight. Thank you all very much for coming. Many of you have already been to a farewell function for me—and here you are again, putting to flight my morbid fears that you would understandably think I had been farewelled enough already. It's good to see so many old friends here tonight.

This speech was given by The Honourable Professor Robert Brooking QC on the 5th of June 2002. The event was organised jointly by the Building Dispute Practitioners' Society and the Construction and Infrastructure Law Committee.

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