MANAGING CONSTRUCTION LAW DISPUTES IN THE SUPREME COURT OF NEW SOUTH WALES—ISSUES AND INNOVATIONS

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INTRODUCTION

An observation made in 1986 by the former Justice Smart of the New South Wales Supreme Court, in Abignano Ltd v Electricity Commission of New South Wales,[1] to the effect that construction contracts in that state have long been 'notorious' for their extremely tight profit margins remains decidedly the case today. Indeed this remains true notwithstanding the fact that the industry generally continues to enjoy what can only be described as boom conditions, with the value of construction work performed in New South Wales in 2003–04 estimated to be in the order of $26.1 billion.[2] Shortly stated, cash flow remains the life blood of many subcontractors, contractors and principals alike.

It is only when this general context is taken into consideration that the imperative of the quick, just and cheap disposal of construction disputes—to borrow from the expressed 'overriding purpose' of the New South Wales Supreme Court Rules, to which I will turn later—is thrown into its proper relief. To this end the court has at its disposal a number of procedural mechanisms designed to focus parties' time and expenditure on the real issues in dispute between them, being mechanisms which, although applicable to all proceedings, are of especial relevance to construction disputes. Those which I intend to deal with today include the 'fast–track' management of disputes via the use of specialist lists, the availability of court–annexed alternative dispute resolution in the form of arbitration or mediation and the power of the court to reference proceedings out (or discrete issues therein) for inquiry and report by a referee. Additionally I propose to examine the utility of proportional costs awards as a means of maximising the efficiency of litigation, a concept derived from the 1996 Woolf Reforms in the United Kingdom and, to some degree, proposed to be implemented in New South Wales as one aspect of that jurisdiction's forthcoming Uniform Civil Procedure Rules.

Of course those present will already be familiar with the concept, if not the specific New South Wales form, of such procedures, demonstrating that any move towards national uniformity in this area may not be as daunting a task as it might first appear. As the attendees of the Australian Institute of Judicial Administration on cost–effective justice last month were reminded, 'modern case management ideas cut across traditional jurisdictional boundaries'.[3]

Before turning to the substance of my address, however, it would be remiss of me in dealing with the management of construction disputes in New South Wales not to briefly mention a relatively recent, albeit non–procedural, reform in this area, the Building and Construction Industry Security of Payment Act 1999.[4] This Act provides parties to construction contracts in New South Wales with a statutory right to progress or milestone payments and access to an expedited adjudication procedure for the determination of disputes concerning such payments.[5] Critically, however, the Act sets up what has been deemed a 'dual railroad track system'[6] in which statutory provisions concerning the quantum of progress payments, the value of the work to which they relate and the date upon which they become due and owing are applicable only insofar as the contract under consideration does not otherwise provide.[7]

A second important feature of the Act is that adjudication determinations, while representing an amount due and payable immediately upon the claimant filing an 'adjudication certificate' in the court for enforcement as a judgment,[8] are both without prejudice to the final rights of the parties and delivered within extremely tight time frames.[9]

Finally, it should be noted that the Act has abrogated the effect of 'pay when paid' and 'pay if paid' clauses in construction contracts to which it applies,[10] whose operation in instances of disputation between head contractors and principals were considered to be unduly harsh on third party subcontractors.

The particular relevance of the Act to the present discussion is that it represents one means by which parties to a construction dispute may readily access early and relatively inexpensive dispute resolution processes, albeit restricted in scope to progress payment disputes specifically. In my experience, the availability of such processes is fundamental in view of the fact that large, strategic litigations, whose expense often escalates out of all proportion to the real issues in dispute, remain an unfortunate feature of construction disputes in New South Wales. Be they party or court–instigated, there is therefore a manifest need for a range of different procedural devices facilitative of the early resolution or settlement of such matters, or the availability of sanctions when case management or other obligations are not met by the parties or their representatives. The security of payment legislative scheme is one such device. Others are mediation, arbitration, references out, and the like, to which I now intend to turn. But there is always the capacity for further innovation in the quest to make the management of construction disputes more efficient, more proportional to the questions really in issue; and it is this area which, in my submission, any discussion as to national uniformity ought to focus.

TECHNOLOGY AND CONSTRUCTION LIST PROCEDURE

Construction proceedings commenced in the Supreme Court of New South Wales, whose jurisdiction is ordinarily restricted to matters involving claims in excess of $750,000,[11] are placed in the Technology and Construction List of the court's Equity Division. This List, which is administered concurrently with the Commercial List of the Equity Division, is intended to facilitate the expedited disposition of proceedings commenced in or transferred to it, with matters subject to continual case management from the return date of the summons onwards.

At present there is in excess of 100 matters pending in the List, covering a broad range of subject–matter from general construction projects disputes, contractual disputes relating to the supply of construction materials or related services and infrastructure matters, to claims for administrative law relief in respect of adjudication determinations under the Security of Payments Act to which reference was made earlier.

Case management of the List takes place each Friday morning before the List Judge, where directions are given as to hearing preparations, ADR or reference proceedings, and Notices of Motion are listed for hearing.

For more detail on the specific managerial role of the List Judge, see the paper delivered by Justice Bergin to the Law Council of Australia's Construction and Infrastructure Seminar in Melbourne in May this year, available on the Supreme Court website.[12] (See also in this Issue.)

In view of the List's emphasis on efficiency and speed, proceedings are commenced in it by way of the special form of summons annexed to Practice Note 100 of the Supreme Court. The summons is required to be divided into four parts, with each part respectively containing the following information:

(a) In Part A, the plaintiff provides a broad outline of the nature of the dispute and a brief précis of the circumstances from which the claim is said to arise;

(b) In Part B, point form specifics of the issues of fact and/or law likely to arise must be set out;

(c) In Part C, the plaintiff must set out a summary of his, her or its contentions which, while there is an obligation to avoid formality, constitutes the primary pleading in the matter; and

(d) In Part D, any questions thought appropriate for reference are listed.

Additionally, Practice Note 100 dictates that:

(a) The proceedings are to be brought before the court for an initial directions hearing on the return date for the summons.

(b) At the first and subsequent directions hearings, orders will be made as to matters including the preparation of statements of agreed issues, the making of admissions, the delivery or exchange or experts reports, the compilation of Scott Schedules, and so forth. Critically, orders relating to the provision of particulars, discovery or the administration of interrogatories 'will be made only upon demonstrated need being established in respect of particular matters'.[13]

(c) When matters are listed for hearing, the usual order for hearing contained in Annexure 3 of the Practice Note will ordinarily be made, providing for (amongst other things) the filing and service of experts reports not less than 28 days prior to the hearing, the exchange of objections to affidavits not less than 14 days prior to the hearing and notice as to what documents are to be tendered at the hearing within that latter timeframe.

(d) An ongoing obligation is imposed upon the parties to give consideration as to whether the proceedings are suitable for alternative dispute resolution or reference out to a referee.

Parties are expected to prepare a timetable for the bringing of a matter to hearing, and are at liberty to apply to have the matter placed in the Friday list prior to the time set down for its next directions hearing. Should some timetable slippage occur and consensus as to the way to proceed can be reached, however, parties may approach the List Judge in chambers for Consent Orders adjusting the timetable.

One final issue relating to the management of the Technology and Construction List I would like to address is the expansion in the use of information technology in both the management of documents and the taking of evidence. In my opinion, the submission of softcopy documents, the taking of evidence by video link, the provision of 'virtual data rooms' and the like should be encouraged as a potential means to significantly increase the efficiency of litigation. Indeed paragraph 27 of Practice Note 100 specifically reminds practitioners of the benefits of such techniques and advises that the court will, where appropriate, make orders requiring their use, potentially even in the absence of mutual party consent.

Additionally, Chief Justice Spigelman in March of this year issued Practice Note 127 dealing precisely with the 'Use of Technology in Civil Litigation'. Amongst other things, the Practice Note dictates that the 'court will expect the parties to consider preferring the use of technology to exchange information when they believe more than 500 documents between them will be discoverable',[14] and sets out the recommended electronic formats in which such documents should be placed before exchange or submission to the court. It is critical that the court be involved early in the process so that the full benefits of the use of technology can be realised.

COURT–ANNEXED MEDIATION

Part 72C, r2 of the Supreme Court Rules provides as a general obligation applicable to all proceedings that, on the first occasion when proceedings are before the court for directions, each party must be prepared to address as to whether consent is given for the referral of the matter to mediation. In the event that such consent is present, parties are also expected to have conferred on the identity of the mediator and the manner in which his/her remuneration is to be borne.

In the event that parties are unable to agree as to the desirability of mediation, the court nevertheless has power to compulsorily refer the proceedings to mediation pursuant to s110K(1) of the Supreme Court Act 1970 (NSW). That subsection provides:

If it considers the circumstances appropriate, the court may, by order, refer any proceedings, or part of any proceedings, before it (other than any or part of any criminal proceedings) for mediation, and may do so either with or without the consent of the parties to the proceedings concerned.

The benefits to be obtained from an early mediation of the dispute—be they settlement proper or, failing such outcome, the narrowing of the issues in dispute—are the subject of particular emphasis in the Technology and Construction List by virtue of Practice Note 100. Emphasising, as noted above, that consideration of the use of ADR procedures should be given throughout the interlocutory stages rather than merely at commencement, paragraph 24 of the Practice Note informs practitioners that:

Consideration of the use of alternative dispute resolution 'ADR' procedures is encouraged. Apart from the requirement under the Rules that parties inform the court when proceedings are first listed whether they consent to referral for mediation or neutral evaluation, the lawyers for the parties and the parties should have in mind the use of ADR procedures and the Judges will in appropriate cases draw attention to their possible use and require that failure to engage in ADR be explained.

Undoubtedly the availability of court–annexed mediation, when combined with the always–available capacity of the parties to undertake a purely consensual mediation, represents one of the critical procedural devices to which reference was earlier made by which the management and disposition of construction disputes may be made more efficient. The s110K power to compulsorily refer proceedings to mediation, however, must be exercised sagely and with full consideration of the fact that the

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raison d'etre of mediation, the key to its effectiveness, is the concept of 'party ownership' of the process. Unless the protagonists are prepared to sit down and genuinely attempt to reach compromise, then a compulsory reference may be conducive of little more than further time and costs thrown away. The epitome, that is to say, of a counter–productive exercise.

While understandable in view of the danger of such an outcome, the view that proceedings in which at least one party objects to a reference to mediation are never suitable for such a procedure itself has a number of shortcomings. In Remuneration Planning Corp Pty Ltd v Fitton,[15] Hamilton J said:

Of course, there may be situations where the court will, in the exercise of its discretion, take the view that mediation is pointless in a particular case because of the attitudes of the parties or other circumstances and decline to order a mediation. However, since the power was conferred upon the court, there have been a number of instances in which mediations have succeeded, which have been ordered over opposition, or consented to by the parties only where it is plain that the court will order the mediation in the absence of consent. It has become plain that there are circumstances in which parties insist on taking the stance that they will not go to mediation, perhaps from a fear that to show willingness to do so may appear a sign of weakness, yet engage in successful mediation when mediation is ordered.

Alternatively expressed, while the genuinely expressed and reasoned wishes of the parties will always be a persuasive consideration,[16] the demonstrable benefits of providing parties with the opportunity to confront issues directly in an intimate and confidential environment—rather than via the technical and bellicose media of pleadings and submissions—should never be excessively discounted.

In addition to cases in which the benefits of mediation may be lost sight of due to concerns regarding bargaining position, there are matters driven by concerns other than a desire to have the real issues in dispute determined. As stated by Austin J in Higgins v Higgins,[17] regardless of the parties preferences in such cases:

... referral may be appropriate where the court is satisfied that the parties' approach to the resolution of the proceedings is being unduly influenced by emotional or irrational considerations, the effect of which might be minimised by a skilled mediator.

While his Honour was there speaking in the context of a family property dispute, the same might be said in the context of a long running, acrimonious and seemingly intractable construction dispute in which the parties have, either intentionally for strategic purposes or subconsciously due to the coming roar of battle, lost sight of the true origins and function of the litigation.

With a view to involving parties in the court's power to refer proceedings to mediation, Practice Note 118 allows the parties to be referred to a registrar for an information session on the benefits of mediation before the court reaches a conclusion on whether a reference to mediation proper is appropriate. It is also worth recording that experience dictates that mediation during the course of proceedings is often successful. This often occurs because issues have been partly ventilated and parties can

see how much is still left in the proceedings.

CONSENSUAL ARBITRATION

Little, of course, needs to be said for the purposes of today's discussion concerning the benefits of a consensual submission to arbitration pursuant to the Commercial Arbitration Act 1984 (NSW). The (relatively) uniform national scheme of which that Act forms one component has, after all, been with us for two decades now, and its provisions comprehensively discussed elsewhere.

Thus it suffices to note that Part 72A, r1A of the Supreme Court Rules provides as a general rule that appeals to the court against a decision of an arbitrator, or proceedings for a declaration of right that an award is not binding on a party, should be listed in either the Commercial List or the Technology and Construction list (whichever is applicable) so as to bring the matter to as rapid a conclusion as possible.

What I would like to address, however, is the reform options to the common s38 of the uniform scheme recently proposed by the Standing Committee of Attorneys General. Presently, of course, that provision allows for the applicable Supreme Court to grant leave to appeal against a question of law 'arising out of' an award, provided that the determination of that question could 'substantially affect the rights of one or more parties to the arbitration agreement' and there is either:

(a) a 'manifest error of law on the face of the award'; or

(b) 'strong evidence that the arbitrator ... made an error of law and the determination of that question may add, or may be likely to add, substantially to the certainty of commercial law.'

The two key reform models, based upon the concern that the operation and wording of the existing appeal provisions has the potential to undermine the principle of finality in arbitration, are to either adopt the approach of Chapter VII of the UNCITRAL Model Law[18] (replicated almost verbatim in the New Zealand Arbitration Act 1996) or that of s69 of the United Kingdom Arbitration Act 1996. Respectively, these options would involve dispensing holus bolus with a right of appeal against substantive errors of law, or retaining such a right but discarding the expression 'manifest error of law on the face of the award'.

As to the first option, Art 34 of the Model Law dictates that recourse to a court against an arbitral award may only be made when certain, largely procedural, irregularities have arisen during the course of the arbitration, including the invalidity of the submission, failure to give proper notice, the determination of matters not submitted for adjudication or the repugnance of the award to the public policy of the forum. Conspicuously, there is no capacity for a party to appeal against (or have 'recourse against', to adopt the Continental expression) what it considers to be substantive errors of law.

It is submitted that such a radical prioritising of arbitral finality over the principle of access to justice encapsulated by Lord Justice Scrutton's famous dicta that 'there must be no Alsatia in England where the King's writ does not run'[19] is not suitable to the context of domestic Australian arbitrations. The Model Law was intended to apply, as dictated by Art 1, exclusively to 'international commercial arbitration' (as defined), with the lack of any substantive right of appeal being justified on the basis that many such proceedings are conducted between large, sophisticated legal actors sufficiently well–resourced to protect their own interests and unwilling to submit to the jurisdiction of potentially unfamiliar national courts. Indeed the uniform scheme already recognises that parties to international arbitrations must have more latitude to control the proceedings themselves, witnessed by the greater scope to oust appellate rights and the continued applicability of Scott v Avery clauses by and to such parties.[20]

But the domestic context is very different, particularly in the building and construction industry with its reputation for tight profit margins and overwhelming dependency on cash flow. For such parties, while the additional expense of pursuing an appeal to the Supreme Court is certainly undesirable, the inability to have recourse against a plainly or manifestly erroneous decision of law could be potentially disastrous. As stated by Justice Smart in Abignano Ltd v Electricity Commission of New South Wales, supra, in the following lengthy but highly pertinent passage:

In contrast to the London situation, there are relatively few international arbitrations in either New South Wales or Australia. The great majority of arbitrations here concern local building and engineering disputes. To date may of the matters relating to these which have come before the courts involve the construction of local contracts. Arbitrations of such local disputes are designed to achieve a private, prompt and speedy hearing and to lead to an earlier finality with restricted rights of appeal. This enables both parties to know where they stand and to carry on with their business. While a contractor often needs to have any money to which

it is entitled without delay so as to carry on with its business and other projects, it does not wish to be precluded from obtaining such moneys by arbitral error which is not corrected ... Principals are wary about unexpected windfalls to a contractor as a result of an erroneous but arguable interpretation of a contract.[21]

Additionally, and finally in respect of the proposal to adopt the Model Law approach, the availability of a right of substantive appeal is of importance in ensuring consistency in the interpretation of boilerplate commercial clauses. In Pioneer Shipping Ltd v BTP Tioxide ('The Nema'),[22] Lord Diplock emphasised that 'it is in the interests alike of justice and the conduct of commercial transactions that those standard terms should be construed and treated by arbitrators as giving rise to similar legal rights and obligations in all arbitrations in which the events have given rise to the dispute do not differ from one another in some respect.' This policy is presently reflected in s38(5)(b)(ii) of the uniform scheme with its reference to the determination of questions of law likely to add substantially to the certainty of commercial law.

Of course, none of this is to say that the right of appeal against a substantive error of law should not be tightly circumscribed in view of the fact that the parties have voluntarily consented to submit to binding arbitral proceedings. Rather it is to submit that, especially in the construction industry for the reasons set out by Justice Smart in Abignano, it is appropriate in the domestic context to retain at least a bare right to such appellate review.

As to the second reform option, s69 of the United Kingdom Arbitration Act provides that a party may appeal against an error of law 'arising out of' an award if the determination of that question will 'substantially affect the rights of one or more of the parties' and (inter alia):

(a) the decision of the arbitral tribunal on the question was 'obviously wrong'; or

(b) the question is one of 'general public importance and the decision of the tribunal is at least open to serious doubt'; and

(c) 'that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.'

Thus it is evident that the UK appeal procedure remains very similar to that of the uniform scheme, with the exception (principally) that the concept of an error of law 'on the face of the award' has been jettisoned. It appears that the presence of this expression in s38 is the source of the Attorneys' concern, given that:

(a) s38(1) abolishes the court's jurisdiction, save as provided by s38(2), to review an award for an error of fact or law 'on the face of the award'; but

(b) s38(2) then provides a right of appeal against a question of law 'arising out of' an award; and then

(c) s38(5)(b)(i), read cumulatively with s38(2), provides that the error of law 'arising out of' the award must be 'manifest on the face of' that award.

The potential for confusion is then, to pardon the expression, manifest. Does the abolition of appeals against errors of fact or law 'on the face of the award' mean that the right of appeal against errors 'arising out of' the award is broader than the former concept? This was the view propounded by President Kirby (as his Honour then was) in the 1988 case of Wardley Pty Ltd v Adco Constructions Pty Ltd.[23]

In the United Kingdom, however, it is settled that the expression 'arising out of' should be given a restrictive formulation such that the court cannot intervene unless it is apparent 'from a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the [contract] clause by the arbitrator is obviously wrong'. This was the view of Lord Diplock in The Nema, supra, and has clearly formed the basis for the use of the expression 'obviously wrong' in the present s69 of the United Kingdom Act. Given this reading, does the expression 'manifest error on the face of the award' in s38(5) expand the scope of review beyond errors 'arising out of' the award? This was the view of Commercial Division Chief Judge Rogers in the 1991 case of Promenade Investments Pty Ltd v State of New South Wales.[24] Or are the two expressions merely synonymous? This, in turn, was the view of Sheller JA on appeal in Promenade Investments.[25]

It is of course recognised that such difficulties of nomenclature are not common in practice; rare it is to find a party who, after having incurred the expense of both arbitral and first–instance appeal proceedings, is willing to take the matter further to the Court of Appeal. Nonetheless, the clumsy wording of ss38(1), (2) and (5) is a latent defect in one of the most critical aspects of the uniform scheme that could potentially be overcome by an adoption of the more straightforward, less contradictory approach of the United Kingdom Act.

COURT–ANNEXED ARBITRATION

The Supreme Court's power to compulsorily refer proceedings to arbitration under the Arbitration (Civil Actions) Act 1983 (NSW), which power is derived from

s76B of the Supreme Court Act, is for present purposes worthy of only cursory examination. This is because, while constituting another device available to the court in order to potentially increase the efficiency of litigation, court–annexed arbitration is rarely used in the construction context.

Pursuant to Pt 72B, r1 of the Supreme Court Rules, proceedings in the Equity Division in which the court considers that the total value of all relief sought is likely to exceed $750,000 are not susceptible to a compulsory reference to arbitration. As noted above, $750,000 is the effective lower limit of the Supreme Court's jurisdiction, and thus few cases are in the List which would not be caught by Pt 72B, r1. Presumably, this restriction is founded upon the perceived injustice of the court having the power to compulsorily divert parties to such high–stakes proceedings to a binding, adjudicative ADR process from which limited appeal rights exist.

REFERENCES TO REFEREES

The power of the court to reference either the whole or part of proceedings out to a referee for determination is the most important and frequently used ADR mechanism in construction disputes in the Supreme Court of New South Wales. Indeed as discussed above, it is a requirement of Practice Note 100 that parties specifically identify on the List's special form of summons (and statement of defence) whether they consider any questions arising in the proceedings as being appropriate for reference. Indeed since 1990 a pro forma 'usual order for reference' has been annexed to Practice Note 100, indicating the commonality of that procedure in both commercial and construction disputes in the Supreme Court.

While the existing power of the court to make orders for reference, contained in Pt 72 of the Rules, was introduced in 1986, the concept itself is by no means novel.[26] Indeed the first statutory provision dealing with references was found in s3 of the United Kingdom Common Law Procedure Act 1854, which allowed for the reference of either the whole or part of proceedings when the dispute consisted 'wholly or in part of matters of mere account which ... [could not] conveniently be tried in the ordinary way'.[27] This power was re–enacted and enlarged by the Judicature Acts some two decades later, and substantially replicated by many of the Australian colonial legislatures. In New South Wales, for instance, the Supreme Court has been seized of a statutory reference power since the coming into force of the Arbitration Act 1892.

Notwithstanding this pedigree, the unique feature of the New South Wales Pt 72 reference procedure is that it provides for the reference out of the whole of proceedings, regardless of whether those proceedings involve matters of an especially technical or scientific nature. The breadth of this power is matched only by equivalent provisions in Victoria and the Australian Capital Territory, with the other Australian jurisdictions retaining more circumscribed reference mechanisms.[28] Part 72, r1(1) reads:

The court may, in any proceedings in the court, subject to this rule, at any stage of the proceedings, on application by a party or of its own motion, make orders for reference to a referee appointed by the court for inquiry and report by the referee on the whole of the proceedings or any question

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or questions arising in the proceedings.[29]

Certainly it cannot be doubted that the availability of such a broad reference power is a procedural device of great utility in the construction context, allowing for the determination of highly technical issues in a manner that does not require the time and expense of presenting relevant material in a manner comprehensible to a lay judicial officer. As stated by the former Justice Campbell of the Queensland Supreme Court in the 1982 case of Honeywell Pty Ltd v Austral Motors Holdings Ltd:[30]

[t]here are often advantages in having the facts of building and engineering disputes and of some relating to trade and commerce decided by arbitration, for such a procedure may well be quicker and cheaper than submitting the issues to the ordinary processes of the law. Moreover, building disputes frequently involve the tribunal in a detailed examination of a large number of separate or unrelated items analogous to the taking of accounts. The arbitrator selected by the parties is generally a person well acquainted with the particular area of trade or commerce; he is chosen because of his knowledge and experience and the calling of numerous expert witnesses therefore becomes unnecessary.

Similarly in the 1991 case of Beveridge & Anor v Dontan Pty Ltd,[31] Commercial Division Chief Judge Rogers expressed the opinion that:

[o]ne of the difficulties afflicting litigants today is the high cost of dispute resolution. One of the reasons for this is the requirement, in cases involving technical expertise, to educate the non–expert tribunal in the manifold matters of expertise brought before a court. Obviously that is unnecessary where the trier of facts is an expert. Thereby proceedings will be shortened and costs will be saved.

Moreover the potential time and cost savings flowing from the appointment of an expert referee are complemented by the sheer flexibility of reference proceedings. Pursuant to Pt 72, r8, subject to any directions of the court to the contrary, a referee may 'conduct the proceedings under the reference in such manner as the referee thinks fit' and, not being bound by the rules of evidence, may inform him or herself 'in relation to any matter in such manner' as he or she sees fit.

The obverse view of such a broad, compulsory reference power rests upon the right of parties to have their dispute adjudicated upon by courts rather than private umpires. Such concerns are by no means new; in the 1877 case of Longman v East,[32] for instance, Lord Justice Cotton said that:

I have no hesitation in saying that in my opinion it seems to me that, except under very special circumstances, the parties should not be deprived of their right of having their cases, if they desire it, adjudicated upon before the ordinary tribunals and in the ordinary way.

Some one hundred years later upon the promulgation of Pt 72, this concern regarding the potential for compulsory references—over and above the objection of the parties—to undermine the right of access to the courts was echoed by the New South Wales Bar Association. In the Association's Bar Notes, it concluded that:

[t]he fundamental point of the Bar's opposition to this rule lies in the principle that, absent any binding contractual constraints, a citizen is entitled to have his disputes determined in and by the courts of the land in accordance with law.[33]

In the event, however, subsequent interpretations of Pt 72 have overwhelmingly favoured the former, efficiency based view of references over the latter, principled approach. Thus, contrary to the position in other Australian jurisdictions,[34] it is established in New South Wales that the court has no predisposition to making or refusing an order for reference depending on the wishes of the parties. For Justice Smart in Park Rail Developments Pty Ltd v RJ Pearce Associates Pty Ltd & Ors,[35] the rationale for this position is that

[t]here has been a change in the attitude of the courts as to the value of arbitrations and references and the desirability of people of suitable standing, experience and qualifications dealing with, inter alia, technical matters and contract administration.

Again particularly in the construction context, the potential time and cost advantages of reference proceedings are critical as:

Many contractors, subcontractors and small consultants have limited financial resources and need the money claimed to survive financially or to carry on and develop their business in the normal way. As arbitrations and references usually take place promptly the parties are not encumbered with the costs of proceedings extending over several years awaiting a hearing. Because of the technical knowledge of the arbitrators or referees, the hearing may be quicker.

Indeed to defer to the views of the parties as to the suitability of the proceedings (or a question therein) to reference would

emasculate the ability of the court to use Pt 72 as a means of circumventing the strategic prolonging of litigation as a means of running down the resources of the other side.

Similarly in Super Pty Ltd (formerly known as Leda Constructions Pty Ltd) v SJP Formwork (Aust) Pty Ltd,[36] Chief Justice Gleeson held that a party dissatisfied with a referee's report is not entitled to a de novo hearing of issues of fact or law on an application to the court for it to exercise its discretion to vary, adopt of set aside the report.[37]

It is submitted that, while the perspective of those concerned with the ex facie potential for Pt 72 to derogate from the fundamental right of access to the courts is understandable, the existence of a broad reference power and the approaches to consent and adoption propounded in New South Wales are entirely correct. Certainly the power is broad, but it is tempered by the fact that the court at all times retains a supervisory power to control the conduct of the reference. As per Pt 72, r5, the court may 'at any time and from time to time ... give such instructions as the court thinks fit relating to the inquiry or report'. But more fundamentally, the breadth of Pt 72 permits the court to adapt the terms of the reference—if indeed one is required—to fit the particular circumstances of the dispute; a consideration which, certainly in the construction context, is all–important.

Before moving on, however, I would like to note from my experience that such benefits of reference proceedings are almost entirely contingent on a prudent choice of referee. Too often in the List one sees applications to set aside a referee's determination upheld due to the fact that a proceeding involving a substantial question of law, as well as significant technical issues, was referred to an umpire skilled only in the latter aspect of the dispute. Invariably errors of law are made, and the parties must then endure the expense of a further reference or, alternatively, the matter proceeding to a curial hearing. Of course, the obverse is true in instances where a purely legal expert is appointed.

Accordingly it is my opinion that the decision to refer the whole of the proceedings out to reference must be carefully considered; in many circumstances, it may well be preferable to formulate certain discrete technical issues to be subject to report, leaving residual questions of law for adjudication in the ordinary course. Alternatively, the power of the court contained in Pt 72, r4 to appoint two or more referees might be considered, allowing for a mixed panel of technical and legal specialists. Whatever course is chosen, it must be continually kept in mind that to incur the cost of an abortive reference due to carelessness at the formative stages of the process is to undermine the whole purpose of the mechanism.

THE 'OVERRIDING PURPOSE' OF THE SUPREME COURT RULES

Finally in respect of existing case management procedures I would like to draw your attention to the 'overriding purpose' of the New South Wales Supreme Court Rules in their application to civil proceedings, expressed in r3 to be the facilitation of the 'just, quick and cheap resolution of the real issues in the proceedings'. That rule further provides that the court must 'seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule', that parties are under a duty to assist the court in furthering the overriding objective and that any failure to do so may be taken into account when the court is exercising its discretion as to costs.

The particular importance of the overriding objective in the fast–track environment of the Commercial and Technology and Construction Lists is further reinforced by paragraph 13 of Practice Note 100, which dictates that at the first directions hearing the nature of the orders the court will make are dependent on what will best further the just, quick and cheap disposal of the proceedings.

Introduced in 2000, the provenance of the overriding purpose rule is the finding of the 1996 Woolf Report that '[c]ivil procedure involves more judgment and knowledge than the rules can directly express';[38] the notion that rules of court are by no means a procedural code, but rather a means of guiding the court in the exercise of its inherent and statutory power to control its own processes (and, obversely, indicating to parties how that discretion is likely to be exercised). Accordingly, the existence of an overriding purpose is by no means a mere aspirational statement. Rather, expressed as it is in obligatory terms ('the court must seek to give effect'), it has the potential to effect substantially the manner in which the Rules are interpreted, administered and applied.

Thus in Idoport Pty Ltd & Anor v National Australia Bank & Ors,[39] a massive commercial litigation in which the defendant bank was sued for an amount in excess of $50 billion in respect of its purchase and implementation of an electronic share trading system, it was proposed by the plaintiffs, but resisted by the defendants, to hear the

matter in a 'Technology Court.' In general terms, the use of that facility would entail the provision of evidence via video link, an electronic document management network and internet access to documents from the Bench and Bar table.

Relying on the overriding purpose rule, Justice Einstein ordered that the proceedings were to be conducted via the Technology Court notwithstanding the opposition of the defendant. The headnote to his Honour's reasons illustrates both the logic of that decision and its relevance to the present discussion, being that:

The inherent jurisdiction of the court to regulate its own proceedings so as to promote matters relating to convenience, expedition and efficiency in the administration of justice, includes directing or ordering the parties to use certain procedures, if the benefits derived from the use of such procedures justify the costs and will ensure that the trial proceeds quickly and efficiently.

That is to say, the utility of the array of procedural devices which I have discussed today in securing the more efficient management of construction disputes is virtually set at naught unless the court has both the power and the obligation to apply its own view as to the most appropriate course of action in any given matter. As I noted at the outset, protracted and strategic litigation remains an unfortunate feature of construction disputes in New South Wales such that the power of the court to urge—or if necessary compel—the parties to adopt a particular procedure is crucial.

From this perspective it can then be submitted that the logical first step in any move towards national unification in this area involves the instigation of attitudinal change in parties, practitioners and the judiciary alike. It requires to move away from assumptions that parties will be able to delay, obfuscate or engage in excessive strategic manoeuvring without incurring the court's opprobrium; equally, it is necessary for practitioners and judicial officers to overcome deeply entrenched suspicions concerning the value of court–annexed ADR mechanisms such as mediation or references out. As I mentioned above, we already have the many of the necessary procedural devices available to more effectively manage construction disputes. What is required is specific direction as to how such devices will be utilised, and it is submitted that a statement in the nature of an overriding purpose, obliging all concerned to further the goal of efficiency, is capable of going at least some of the way to achieving that goal.

PROPORTIONALITY OF COSTS AND THE PROPOSED UNIFORM CIVIL PROCEDURE RULES

The proposed New South Wales Uniform Civil Procedure Rules are to be included in a Schedule to a Bill, presently styled the Civil Procedure Bill 2004. It is the intention of the drafters to amalgamate common procedural features of the Local, District and Supreme Courts for the sake of clarity and consistency, while resisting any dramatic changes in substance.[40]

Nonetheless one of the few substantive reforms to be effected by the new procedural framework is found in proposed s61 of the Bill—headed 'Proportionality of Costs'—and is to the following effect:

In any proceedings, the practices and procedures of the court should be administered in accordance with the principle that the issues between the parties should be resolved in such a way that the costs to the parties are proportionate to the importance and complexity of the subject–matter in dispute.

Given the breadth of this provision, it appears likely that, if enacted, it will have a definite impact on both the manner in which the court manages proceedings generally and that in which it exercises its general discretion as to costs. Such an analysis is consistent with the twin concepts of 'proportionate procedures' and 'proportionate costs',[41] introduced into the United Kingdom Civil Procedure Rules following the Woolf Report and upon which the proposed s61 of the New South Wales uniform rules is based.

A useful starting point in an examination of this concept of proportionality is the overriding purpose of the United Kingdom Civil Procedure Rules, which sets out the principle of 'proportionate procedures' in obliging the court to deal with matters before it 'in ways which are proportionate:

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party.[42]

In turn the substance of the principle of proportionate procedures is found in, amongst other things, the various case management paths introduced by the Civil Procedure Rules and the procedural sanctions which may accompany their breach. Essentially, therefore, the concept of proportionate procedures (whether pursuant to the proposed New South Wales s61 or the United Kingdom Rules) is concerned with designing and applying court structures capable of dealing with cases such that

their disposal is commensurate with the issues in dispute.[43]

This is all very familiar. For instance, a procedurally proportionate resolution to a building dispute concerning very specific technical issues as to the structural soundness of, say, a supporting wall might be to refer the question to a referee rather than have the parties incur the expense of litigating the matter before a lay judge. Rather, it is the concept of 'proportionate costs' which is truly novel to existing New South Wales and Australian procedural law, introducing as it does considerations of efficiency into an area traditionally concerned only with questions of reasonableness. Properly implemented, it is submitted that proportionality of costs potentially represents another (albeit ex post facto) device the court's utilisation of which could provide an incentive to parties, of their own motion, to adopt the most cost and time effective means of isolating and resolving the real issues in dispute between them.

In his final Access to Justice report, Lord Woolf explained the rationale of introducing an element of proportionality to the area of costs as follows:

The function of taxation is not to undertake an independent assessment of the charges claimed as a whole but to resolve disputes over items between the paying and receiving party. The process therefore depends on the paying party identifying those items on the bill which are capable of being challenged effectively. The taxing officer or Master does not give his opinion of the reasonableness of the bill as a whole. Thus there is no objective assessment of what would have been a reasonable sum for conducting a particular case; instead, it is a retrospective check on the reasonableness of the costs in fact incurred by a party over the course of the litigation. As long as a party, judged by the conventions of current practice, was acting reasonably in the way in which he conducted the case and charges for the actual work done were reasonable in the circumstances, the taxing process does not intervene. The taxing system is therefore not a method of controlling costs absolutely but a safeguard against claims for costs which can be shown to be out of line with the norm. Taxation provides no encouragement to litigants to conduct litigation in the most economical manner.[44]

Alternatively expressed, so long as reasonableness remains the sole criterion upon which cost awards are assessed then the area will continue to remain an anachronism in a vastly changed procedural environment. The common thread of all the various dispute resolution mechanisms at the disposal of the court which I have discussed today—mediation, arbitration, references and the like—is that the court now has power to direct the parties to undertake a particular course of action, regardless of their views on the matter, when to do so is in the interests of the efficient conduct of the litigation. In contrast, the present manner in which costs are assessed does not provide for the court to inject or, when necessary, impose its opinion as to the appropriateness of the parties' conduct.

This idea was expressed in one of the many issues papers accompanying Lord Woolf's report as follows:

The failure of the present system to curb costs is due to two factors. First, costs are determined by reference to what is considered by the profession to be reasonably necessary work and by the prevailing standards of hourly fees and overheads. In other words, the judicial pitching of costs follows the forensic practices and expectations and not the other way round. Secondly, taxation is conducted retrospectively so that it reflects the way in which the parties choose to conduct the case. In other words, retrospective taxation does not influence the steps which are pursued in litigation.[45]

To this end the new Civil Procedure Rules based upon Lord Woolf's findings, while retaining the general rule that costs should follow the event, contained the following rule 44.5, to be applied when the court is exercising its discretion as to costs:

(1) The court is to have regard to all the circumstances in deciding whether the costs were:

(a) if it is assessing costs on the standard basis [i.e. a party/party basis]:

(i) proportionately and reasonably incurred; or

(ii) were proportionate or reasonable in amount.

In effect, therefore, rule 44.5 permits the court (or taxing officer or master) to look not only to each individual item on the bill in assessing costs, but also at the bill as whole so as to determine whether, at that general level, the total amount of costs charged is proportionate to the amount of money at stake, the importance and complexity of the case and the financial position of the parties. This conclusion is confirmed by rule 48.3(2), which provides that '[w]here the amount of costs is to be assessed on the standard basis, the court will ... only allow costs which are proportionate to the matters in issue'.

Clearly, therefore, this new power requires—at the risk of an adverse costs order—parties

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and their legal representatives to consider before commencement the most appropriate and efficient method of proceeding, in light of the matter's importance and complexity. In Jefferson v National Freight Carriers Plc,[46] a case in which a bill for some £7000 was handed up in a matter settled for £2275, Lord Chief Justice Woolf endorsed the following (unreferenced) passage from a County Court judgment:

In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial, and the likely overall cost.

This is not to say, however, that an examination of the reasonableness of each item on the bill has no role to play or that the court is permitted to make a capricious lump sum judgment as to the appropriate measure of costs whenever a bill appears to be in excess of a 'proportionate' rate. Rather, in Home Office v Lownds[47] the Court of Appeal explained that the Civil Procedure Rules require a two–stage test to be applied to the process of assessment. First, the assessor examines the bill at a 'global' level to determine whether the total sum claimed is disproportionate in the relevant sense; if not, then 'all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable'. But if the bill is indeed disproportionate, then second stage requires the court to determine whether 'the work in relation to each item was necessary and, if necessary, that the cost of each item is reasonable'. That is to say, it is only if the total sum claimed is disproportionate that each reasonably incurred and costed item will not be allowed.

Clearly, then, the concept of costs proportionality under the Civil Procedure Rules does effect a significant departure from the traditional common law approach to cost shifting. Equally, it must be conceded that the scope of the proposed s61 of the New South Wales Civil Procedure Bill falls short of the reforms implemented in the United Kingdom. On its face, s61 will presumably be capable of influencing the court in the exercise of its general discretion as to the nature of any costs order to be made; for instance, the issue of proportionality might impact upon the costs order to be made resultant upon a successful application which was extremely time consuming in respect to minor matters. Proportionality can also be the basis for the court requiring the use of a particular form of dispute resolution where there will be cost advantages.

What the proposed New South Wales reforms do not do, however, is inject the concept of proportionality into the process of assessment itself. Proposed s91(1) of the Civil Procedure Bill dictates, consistent with the present s76 of the Supreme Court Act, that costs are ordinarily to be assessed in accordance with Division 6 of Part 11 of the Legal Profession Act 1987 (NSW). In turn, s208F of that Act provides that the principal consideration to be taken into account on the assessment of a bill of costs is 'whether or not it was reasonable to carry out the work to which the costs relate'.

Nevertheless it is submitted that the adoption of an approach

to the assessment of costs which travels beyond mere reasonableness is a matter warranting further investigation in Australia. Bringing the issue back to the construction context, I emphasised at the outset my view that the key to the effective management of construction disputes is the availability to the court of a range of procedural devices capable of effecting, where applicable, time and cost savings potentially forgone if the forensic decisions of the parties were to predominantly guide the conduct of the litigation. Additionally there is the consideration that the court requires the power to impose, again where applicable in the circumstances, such measures on the parties regardless of their consent. Thus it is more than a little incongruous that in the very area commonly identified as the principal barrier to the more efficient disposal of litigious disputes—namely costs—the court is largely bound to the judgments of the parties as to the amount of costs to be incurred. Rather, it is submitted that to provide the court with power to reach its own conclusions regarding the appropriateness of the amount of costs actually incurred would be entirely consistent with modern conceptions of managerial judging.

CONCLUSION

It is beyond doubt that construction disputes in the Supreme Court of New South Wales are already subject to an intensive degree of management and control by the judges and masters before whom they are listed; as, I expect, is the case with other jurisdictions across Australia. In view of the particular need to control the length and cost of such disputes, it is submitted that such a high degree of Bench supervision is both necessary and desirable.

By way of summary, it is my view that the critical elements of the management of construction disputes are as follows:

(a) the availability of a range of different procedural devices capable of being utilised to ensure the quick, just and cheap disposal of proceedings;

(b) the court having power to direct parties to adopt a particular procedure or course of action, regardless of whether consent is procured to same;

(c) the effecting of attitudinal change on the part of parties, practitioners and judicial officers alike as to the need to both prioritise efficiency over excessive strategic manoeuvring and embrace alternative dispute resolution mechanisms capable of assisting in the achievement of that goal; and

(d) the active use by judges of proportionality of costs to achieve the most efficient disposal of cases.

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2. Construction Agency Co–ordination Committee, Construction Industry Activity Forecasts, April 2004 available at (www.construction.nsw.gov.au)

3. Professor Ian Scott, 'Adjusting the Interests of Parties and Courts: Uniformity, Diversion and Proportionality', Keynote Address, 22nd Annual AIJA Conference, Sydney, 17–19 September 2004, page 26 available at (www.aija.org.au/ac04/papers.htm)

4. For a more comprehensive discussion of this Act, see: Justice R McDougall, 'The Building and Construction Industry Security of Payment Act 1999' available at www.agd.nsw.gov.au/sc/sc.nsf/pages/mcdougall_020904

5. Building and Construction Industry Security of Payment Act 1999, Pts 2 and 3

6. Transgrid v Siemens & Anor [2004] NSWSC 87 at [56] per Macready M

7. Building and Construction Industry Security of Payment Act 1999 ss 9, 1, 11 and 22

8. Building and Construction Industry Security of Payment Act 1999 s25

9. Building and Construction Industry Security of Payment Act 1999 ss 4(b) and 32 (triggering of adjudication procedure does not preclude subsequent court proceedings) and 21 (normally, the adjudicator is to make a determination within 10 business days after accepting the claim).

10. Building and Construction Industry Security of Payment Act 1999 s12

11. This being the upper limit of the civil jurisdiction of the District Court of New South Wales: District Court Act 1973 (NSW) s44(1)(a)

12. www.agd.nsw.gov.au/sc%5Csc.nsf/pages/Bergin_050504

13. Practice Note 100 at par 13(3)

14. Practice Note New South Wales, Practice Note 127 at par 11

15. [2001] NSWSC 1208

16. See: Morrow v chinadotcom Corp [2001] ANZ Conv R 341

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18. UNCITRAL Model Law on International Commercial Arbitration (1985). By virtue of s21 of the International Arbitration Act 1974 (Cth), the Model Law applies by default to all 'international arbitrations' (as defined in Art 1 of the Model Law) conducted in Australia, unless the parties otherwise provide.

19. Csarnikow v Roth Schmidt & Co (1922) 2 KB 478 at 488

20. Commercial Arbitration Act 1984 (NSW) ss 40 and 55

21. Abignano Ltd v Electricity Commission of New South Wales (1986) 3 BCL 290 at 297

22. [1982] AC 724 at 737

23. (1988) 8 BCL 300 at 308–9

24. (1991) 26 NSWLR 184 at 189–195

25. (1992) 26 NSWLR 203 at 222–3.

26. For a more comprehensive discussion of the history of the reference out system in the United Kingdom and New South Wales, see: Justice RD Giles, 'The Supreme Court Reference Out System' (1996) 12 Building and Construction Law 85; Justice PA Bergin, 'Methodology of the Management of Construction Disputes in the Supreme Court of New South Wales', Address to the Law Council of Australia's Construction and Infrastructure Seminar, Melbourne, 5 May 2004.

27. Note, however, that both the Common Law and Chancery courts were long considered to have an inherent power to refer proceedings to arbitration: Buckley & Anor v Bennell Design & Construction Pty Ltd & Anor (1977) 140 CLR 1 at 28–9 per Jacobs J

28. See in the rules of the various State and Territory Supreme Courts: ACT O 83 r13; SA R 76.06; Tas r574; Vic r50.01; Qld UCPR rr 501–506. See also Supreme Court Act 1979 (NT) s25; Supreme Court Act 1935 (SA) s67; Supreme Court Act 1935 (WA) s50; Supreme Court Act 1995 (Qld) s255

29. See also: Supreme Court Act 1970 s124(2)

30. [1980] Qd R 355 at 360

31. (1991) 23 NSWLR 13 at 23

32. [1877] 3 CPD 142 at 162

33. 'Arbitration Rules', Bar Notes, Summer 1985 at 4

34. See Honeywell Ltd v Austral Motors Holdings Ltd [1980] Qd R 355 at 359–60 per Campbell J; AT & NR Taylor & Sons Pty Ltd v Brival Pty Ltd [1982] VR 762 at 765 per Beach J; O'Brien Lovrinov Crafter Pty Ltd v Corradini [1999] SASC 159 at [30] per Martin J; Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd & Ors (1997) 19 WAR 281 at 285 per Ipp J

35. (1987) 8 NSWLR 123 at 126

36. (1992) 29 NSWLR 549 at 562–563

37. New South Wales Supreme Court Rules Pt 72, r13

38. Lord Woolf, Access to Justice: Final Report, HMSO, London, 1996 at 274. See also the 'overriding objective' of the United Kingdom Civil Procedure Rules, r1.1

39. (2000) 49 NSWLR 51

40. For a more comprehensive overview of the project, see: Justice John P Hamilton, 'The NSW Civil Procedure Bill 2004 and the Uniform Civil Procedure Rules', Speech to the 22nd AIJA Annual Conference, Sydney, 17–19 September 2004 available at (www.aija.org.au/ac04/papers.htm)

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44. Woolf, Access to Justice at 87.

45. A.A.S. Zuckerman, 'Devices for Controlling the Cost of Litigation Through Costs Taxation', in Access to Justice Inquiry Issues Papers, Lord Chancellor's Department, London, January 1996

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