Methodology of the management of construction disputes in the Supreme Court of New South Wales

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Justice P.A. Bergin[2]

My role in this seminar is to outline the "methodology" for the management and disposition of construction disputes in the Supreme Court of New South Wales. In doing so I thought it may be of some interest to consider the history of some of the mechanisms that are utilised in this regard because I understand that there is, at least in some unidentified quarters, a desire to consider the adoption of a uniform approach to the disposition of construction cases throughout Australia.

In New South Wales, a number of Courts and Tribunals deal with construction disputes and disputes in relation to the construction industry. In February 2002 the Fair Trading Tribunal and the Residential Tribunal amalgamated to constitute the Consumer, Trader and Tenancy Tribunal, known as the CTTT. The CTTT has jurisdiction to hear claims arising under the Home Building Act 1989 (NSW) in addition to a vast jurisdiction covering areas such as consumer credit, fair trading, motor vehicles, residential parks and retirement villages. The jurisdiction under the Home Building Act is in respect of claims up to $500,000 and is administered by the Home Building Division of the CTTT.

The Consumer, Trader and Tenancy Tribunal Act 2001 (NSW) provides power for the CTTT to transfer matters to either the District Court or the Supreme Court[3], the District Court having jurisdiction in matters up to $750,000[4]. The District Court or the Supreme Court may transfer proceedings instituted in the court to the Tribunal if the Court is satisfied that the Tribunal has jurisdiction to hear the matter.[5] It also provides a mechanism for referring any matter of law arising in proceedings in the CTTT to the Supreme Court[6]. There is a limited right of appeal to the Supreme Court if the Tribunal has decided a question of law.[7] The Court can also grant administrative law relief in certain circumstances. [8]

The Administrative Decisions Tribunal, the ADT, constituted under the Administrative Decisions Tribunal Act 1997 (NSW), has jurisdiction under the Home Building Act to hear appeals from a decision of the Director-General of the Department of Fair Trading relating to contractors' licences; supervisor and tradespersons certificates; owner-builder permits; and building consultancy licences.

Large and/or complex construction disputes involving claims over $750,000 are dealt with in the Supreme Court of New South Wales. The Supreme Court has two trial divisions: the Common Law Division and the Equity Division[9]. The business of each of those divisions is administered in Lists. Construction disputes are administered in the Equity Division in the Technology and Construction List. The List Judge of the Technology and Construction List is also the List Judge of the Commercial List and Practice Note 100 - Commercial List and Technology and Construction List governs the operation of the List (PN 100).

Overriding purpose
Part 1 rule 3 of the Supreme Court Rules 1970 (the Rules) provides:

(1) The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.
(2) 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.
(3) A party to civil proceedings is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.
(4) A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in (3).
(5) The Court may take into account any failure to comply with (3) or (4) in exercising a discretion with respect to costs.

Case Management
The form of the Summons to be filed in construction disputes is annexed to PN 100 and requires the plaintiff to state in Part A, the nature of the dispute, in Part B, the issues likely to arise, in Part C, the contentions upon which the plaintiff relies and in Part D, any questions appropriate for referral. The referral referred to in Part D is a referral pursuant to Part 72 of the Rules to which I shall refer later.

The case management of the matters in the List occurs on Fridays when both the Commercial List matters and the Technology and Construction List matters are listed for the disposition of Notices of Motion and for directions to prepare matters for hearing, reference or alternative dispute resolution. On the first return date of the Summons the defendant(s) is/are expected to be able to inform the Court whether or not there is agreement with the plaintiff's contentions and, if not, to be in a position to outline the defendant(s) proposed contentions. The parties are also expected to be in a position to inform the Court whether the dispute is or will be suitable for mediation and whether there is consent to that

process being adopted. The suitability of a matter for referral to mediation is kept under constant review. If there is no agreement to mediate the Court has power to order it (s 110K Supreme Court Act 1970).

The parties prepare timetables for the process of joining issue in point of defence, cross claims and defences, and for discovery and witness statements (both lay and expert) that will take them up to a point when the matter is either ready for hearing before the Court or for reference pursuant to Part 72 of the Rules. Should there be slippage in the timetable the parties are able to exercise the liberty to approach the List Judge to obtain a Consent Order in chambers for the adjustment of the timetable. That places an administrative burden on the staff of the List Judge and of course on the List Judge, but saves a great deal of costs in litigation by avoiding numerous appearances. However there are times when the parties are unable to reach agreement as to the adjustment of the timetable for case preparation and the matter will be re-listed on application for argument.

The 114 cases presently pending in the List include general commercial building and/or construction projects disputes, including public utilities, infrastructure, educational institutions, sporting facilities and the like; disputes in relation to the development of apartments and other residential developments; contractual disputes for supply of construction and construction-related materials and goods; disputes in relation to the development and/or refurbishment of retail premises and the development of car park complexes.

In more recent times applications relating to the Building and Construction Industry Security of Payment Act 1999 have come into the List either directly or by transfer from the Administrative Law List of the Common Law Division. Presently these cases constitute approximately 10% of the business of the List. They are cases in which administrative law relief is sought to set aside or quash adjudicators' determinations of the value of progress claims under the Act in a scheme set up to enable prompt, interim determination of disputes about the value of progress claims in construction contracts.

Part 72 References
Part 72 of the Rules commenced operation on 1 January 1986[10]. Rule 2(1) gives the Court power to refer the whole of the proceedings or any question or questions arising therein to a referee for inquiry and report. The "Usual Order for Reference" is annexed to PN 100.

Some history[11]
Section 3 of the Common Law Procedure Act 1854 (UK)[12] empowered applicable courts to compulsorily[13] refer either the whole or part of proceedings to arbitration on the proviso that "the Matter in dispute consists wholly or in part of Matters of mere Account which cannot conveniently be tried in the ordinary Way". In this regard it is appropriate to note Campbell J's observation over one hundred years later in Honeywell Pty Ltd v Austral Motors Holdings Ltd [1980] Qd R 355 at 360, that "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".

Lopes and Fry LJJ issued the following warning in relation to the operation of section 3 of the Common Law Procedure Act in Knight v Coales:[14]

We are of [the] opinion that this [s 3] discretion should be exercised with extreme caution, regard being had to the relative importance of that which is matter of account as compared with that which is not. The matter of account giving the jurisdiction should not be incidental or subordinate to the other questions in dispute, but should be a substantial element to be decided in the action to justify a compulsory reference.

In 1873 the reference powers contained in section 3 of the Common Law Procedure Act were supplemented with the passage of the first Judicature Act[15], section 56 of which provided for what might roughly be designated a "reference for report" mechanism and section 57 a parallel "reference for trial"[16] mechanism. More precisely, section 56 permitted the High Court or Court of Appeal to compulsorily refer "any question" to a "special Referee" for "inquiry or report", whereas section 57 provided for the consensual trial before a referee of "any question or issue of fact or any question of account", or the compulsory reference of such questions or issues when they required a "prolonged examination of documents or accounts, or any scientific or local investigation" which could not conveniently be made by the court or through its ordinary officers.

The operation of these sections was not free from controversy. In Longman v East[17], for example, the decision of a judge of the Court of Common Pleas to refer an entire matter to a referee pursuant to section 57 was overturned by the Court of Appeal, Cotton LJ stating (at 160-1) that:

If we look at s 57, we see how clearly there is to be no reference or transfer of the cause. I think that the Court has no power, taking the words of that section in their ordinary meaning, to transfer the cause to be dealt with as a whole before a different tribunal: it is simply questions or issues of fact ... to say that the words "on such terms as may be thought proper" [in s 57] give to the Court the power to substitute a referee for itself as judge of law would be entirely altering the section.[18]

Similarly, Bramwell LJ (at 149) emphasised that section 56 permitted the Court to obtain a mere opinion from the referee in the sense that:

He is not to dispose of the action, and I do not think he is even to determine any matter in issue between the parties ... his duty is, instead of determining issues of fact or of law, to find the materials upon which the Court is to act. [19]

The intention of sections 56 and 57 was not to provide an alternative forum for the conduct of whole proceedings, but rather to facilitate the provision of assistance to the Court in respect of its determinations on matters so beyond its expertise as to pose a significant inconvenience. Cotton LJ said at 162:

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.

Section 3 of the Common Law Procedure Act and sections 56 and 57 of the Judicature Act were repealed by the Second Schedule to the Arbitration Act 1889[20], with the reference powers consolidated in sections 13 and 14 of the latter Act. In turn, sections 13 and 14 of the Arbitration Act were repealed by the Sixth Schedule of the general restatement of the judicature system effected by the Supreme Court of Judicature (Consolidation) Act 1925[21] and replicated in sections 88 and 89.

In the New South Wales context the first statutory power to appoint special referees was contained in sections 12 to 14 of the Arbitration Act 1892 (NSW)[22], subsequently repealed and substituted by sections 15 to 17 of the Arbitration Act 1902 (NSW) (No 29). The operative provision was section 12 (in almost identical terms to section 14 of the Arbitration Act 1889):

In any cause or matter (other than a criminal proceeding by the Crown), -
(a) If all the parties interested who are not under disability consent: or,
(b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury or conducted before the Court through its other ordinary officers; or,
(c) If the question in dispute consists wholly or in part of matters of account;
the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before a referee appointed by the Court or a Judge for the purpose.

In Sydney & Suburban Hydraulic Power Co v Mercantile Mutual Insurance Co[23] the Full Bench of the Supreme Court held that a report of an 'arbitrator' appointed under section 12 could be set aside only upon the grounds permissible in respect of consensual arbitrations, rather than in the manner of a jury verdict. Darley CJ said at 328-329:

Before the present Arbitration Act it was often felt that the Court ought to have the power of sending cases to arbitration, and consequently s 12 was enacted, which enabled the Court, in certain cases, to refer the matter to arbitration. But the law of arbitration has not been altered with respect to setting aside an award. If a matter is referred to arbitration by consent under the first ten sections of the Act, the award is binding, and the Court cannot interfere, except in certain specific cases, such as if the award is not final or it is uncertain. The parties having made the arbitrator judge of the law and facts, the Court cannot set aside the award because it is erroneous in point of law or on the facts. It is said, however, if the reference to arbitration be by the Court then the Court can deal with the award as if it were the finding of a jury. In my opinion that is not so. A reference to arbitration by the Court stands in the same position as an arbitration under the earlier part of the Act, and as it was before this Act came into force. Sect. 16 provides against any danger of the arbitrator giving a wrong decision in law, because that section enables either party to obtain an order from the Court directing the arbitrator to state a special case for the opinion of the Court on any question of law arising in the course of the reference. But if no action is taken under that section during the reference, it is too late after the award has been made to ask for an order under that section. With respect to the power of the Court to set aside the award of a referee appointed by the Court, it is not necessary to say anything. The point does not arise in this case.

In Buckley & Anor v Bennell Design & Constructions Pty Ltd & Anor[24], the High Court referred to Sydney & Suburban as "stultifying". Jacobs J said:

The power to refer should have been one which the Court could frequently exercise. As it is, I do not recall in my years on the bench any order of reference under these powers being sought from me at common law or in equity.

Stephen J observed:

When the compulsive power conferred by ... [s 12] is exercised, the legal rights and obligations of a party to litigation then being determined by extra-curial arbitral process, the resultant award will attract to itself all that relative immunity from judicial review which surrounds a conventional award. This immunity is well enough in a case of a conventional award, being explained by the consensual character of conventional arbitrations. But in a compulsory reference the consensual element is wholly absent. The party, whether plaintiff or defendant, will never have consented to any such determination of his rights or obligations but will nevertheless find himself denied judicial review of an award which he may regard as palpably wrong in fact or in law.[25]

Aickin J expressed the view that "the likely consequence will be beneficial in allowing a useful and flexible procedure to be adopted"[26]. However Stephen J emphasised that:

In such a reference the court's procedures of adjudication are not abandoned in favour of extra-curial settlement of the

dispute by arbitration. Instead the court directs that, for the better resolution of the particular proceedings initiated before it, resort should be had to this special mode of trial which the legislation has made available.[27]

Seven years after Buckley the Arbitration Act was repealed and replaced by the far more comprehensive Commercial Arbitration Act 1984 (NSW). For present purposes, of particular importance was the jettisoning of the reference procedure from the new Act in light of the fact that "a deliberate decision was taken to provide a new system of reference by the court for non-judicial decision, separate and distinct from consensual or compulsory arbitration."[28] To this end the Commercial Arbitration Act was to deal exclusively with such 'consensual or compulsory' arbitrations, with Schedule 1 of the Supreme Court (Commercial Arbitration) Amendment Act 1984 (NSW) completing the separation by enacting the following provisions as section 124(2) of the Supreme Court Act 1970 (NSW):

(2) The rules may make provision for or with respect to -
(a) the cases in which the whole of any proceedings or any question or issue arising in any proceedings may be referred by the Court to an arbitrator or referee for determination or for inquiry or report.
(b) the appointment of a Judge, master, registrar or other officer of the Court or other person as an arbitrator or referee;
(c) the fees to be paid to such an arbitrator or referee;
(d) the persons by whom the whole or any part of such fees are
payable;
(e) the consequences of a determination or report by an arbitrator or referee;
(f) the manner in which such a determination or report may be called into question;
(g) whether or not, or to what extent, a determination or report may be called into question on a matter of fact or law;
(h) the provision of the services of officers of the court and the provision of court rooms and other facilities for the purpose of a reference of any proceedings or any question or issue arising in any proceedings to an arbitrator or referee; and
(g) any other matters associated with such a reference.

Some controversy
This expanded rule-making power facilitated the promulgation of Part 72 on 11 November 1985, coming into effect on 1 January 1986. The introduction and operation of Part 72 was not free from controversy. In the Summer 1985 edition of the Bar News the editors wrote:

The 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.[29]

...

The Bar Council considers these steps also represent serious threats to the proper administration of justice. Parties are entitled to have their cases heard and determined in open court and not to be the subject of deliberation by decision makers behind closed doors with relation to matters (eg the lay arbitrator's or expert's opinions) not the subject of sworn and tested evidence.[30]

On 10 April 1986 the then New South Wales Shadow Attorney General, the Honourable John Dowd (as his Honour then was), moved a motion of disallowance in respect of Part 72 in the Legislative Assembly. He said:

It is the right of the parties to have matters determined in accordance with the law, not by means of informal arbitration procedures which rarely satisfy all parties. Such procedures are extremely expensive and, correctly, are avoided by the legal profession.[31]

In reply, Attorney General, the Hon Terry Sheahan, (as his Honour then was) emphasised the enduring nature of reference as a feature of civil procedure in that:

Frankly the rules are not very innovative at all. The power of the court to refer proceedings to arbitration without the consent of the parties has existed since 1892. Indeed, section 15 of the Arbitration Act of 1902 was in force for more than eighty-two years in this State without there being a glimmer of concern from the Bar Association.[32]

The Attorney further underscored the continuing supervisory role of the Court in controlling the conduct and legal effect of the reference:

Even if the rules are mildly innovative- and I accept that the rules in part are broader than their original counterparts- there are a number of protections afforded within the rules. These protections are important indeed. The court remains at all times responsible for the supervision of its proceedings. That responsibility is unaffected by any reference to an arbitrator or a referee. The proceedings remain on foot despite any reference, and the conduct of any arbitrator or referee is at all times subject to the direction of the court. Further, the court has power under Part 72 rule 13 to adopt, vary or reject any report or award in whole or in part. The court may call for an explanation or a further report from a referee or an arbitrator, or it can make any other order it thinks fit.[33]

Writing extra-curially in 1996, marking the tenth anniversary of the introduction of Part 72, Giles JA (who was at that

time Chief Judge of the Commercial Division, a Division now subsumed into the Equity Division) proffered as an anodyne for those concerned about the effect of Part 72 on the administration of justice the fact that "reference by a court for non-judicial decision is not new"[34] and expressed the view that "it is not correct to see reference under Pt 72 as an illicit deprivation of a right to trial and decision by a judge and of traditional procedures and appellate rights"[35].

Undoubtedly, the use of court rules as a means of establishing a distinct reference procedure was, in a purely formal sense, an idea that was not novel; as first mooted by Jacobs J in Buckley (at 38):

It appears worthy of consideration whether the Rules of Court are not desirable to provide definitive procedures and practices and a specific statement of the authority of referees and arbitrators and of the limitations on that authority (with consequent power in the Court). Then these potentially useful provisions of the Arbitration Act may well bear the fruit which the legislature intended.

Some success

In addition to providing a more procedurally functional reference mechanism, Part 72 was a direct regulatory response to the requirements of a changing commercial world. It was no coincidence, by way of illustration, that the Commercial Division of this Court was established barely one year after the implementation of the reforms effected by the new commercial arbitration legislation. As stated in 1986 by the Chief Justice overseeing this process of change, Sir Laurence Street:

[i]n the last few years there has been a significant expansion of commercial activity in Australia. The floating of the dollar and the admitting of foreign banks has brought Australia into more direct participation in international commerce ... An essential facet of the promotion of the free and efficient flow of commerce is a dispute resolution mechanism providing a wide range of options structured to meet specific requirements of varying types of disputes.[36]

Similarly in 1988, in the context of a discussion regarding the growth of arbitration as an alternative dispute resolution forum in Australia since the mid-1970s, the Chief Justice expanded upon this theme:

Australia is geographically remote from the centres of world trade and commerce in the Northern hemisphere. This no doubt contributed to the lateness of arbitration coming on to the scene out here in comparison with its advanced state of development in England and Europe. The remoteness of earlier years has now been replaced by recognition that Australia is a part, a potentially focal part, of a rapidly developing major trading region of the world- the Pacific. There has also developed a realisation of the world-wide policy shift in favour of arbitration and an awareness that properly structured professional arbitration can play an invaluable role in the resolution of disputes.[37]

Part 72 was posited at the heart of this shift towards the promotion of alterative dispute resolution, the increased case management of proceedings and the more efficient use of scarce court resources in the interests of the demands of both a new economy and a changed commercial litigation context. The breadth of the power in Part 72 rule 2(1) has led to the emergence of a reference consulting industry dominated by eminent members of the legal profession, whose capacity to control proceedings (subject, of course, to the terms of the order of reference) and thus conduct quasi-curial hearings has reinvigorated the debate concerning the supposed right of parties to the judicial determination of litigious disputes. As asserted by one recent commentator, in noting that "historically the notion of the "reference" was much more limited than the present New South Wales application":

There has been another related development which has significantly influenced the evolving jurisprudence of references and referee reports. ... Former judges are now often called upon to act as referees. In place of the wig and gown there is the lounge suit, but otherwise the issues are just the same as in a courtroom. When the parties want their dispute determined as quickly as possible [or, it must be noted, if the court on its motion so desires], one solution to the problem of a far-off hearing date is to ask the court to refer the matter to a former judge. The parties are choosing this method of court reference, and the court's adoption of the referee's report, in preference to following the more traditional path of a commercial arbitration.

The effect of the growth of this latter type of legal issue reference is subtle but significant. To achieve the primary aims of diverting issues away from the judges and of saving time, the courts resist any attempt to build a de facto "second tier" into the hearing process whereby the referee's report is routinely challenged by the loser. It is one thing to object to the trial judge's adoption of a report prepared by an architect, chemist or engineer, quite another to object to a report prepared by a recently retired judge or chief justice.[38]

In Xuereb & Anor v Viola & Anor[39], Cole J held that referees are able to conduct proceedings as they see fit and are not bound by the rules of evidence (in Super Pty Ltd (formerly known as Leda Constructions Pty Ltd) v SJP Formwork (Aust) Pty Ltd (1992) 29 NSWLR 549, Gleeson CJ, at 563, described it as a "right" of the referee to adopt that approach). In Xuereb Cole J said:

The clear purpose of Pt 72 as substituted in 1985, and as amended on 22 September 1989, is to enable the Court to have the facility to obtain a report from a referee, which report may be obtained in the most efficient, expeditious and least expensive method available. This is particularly so where technical or accounting issues are involved and where it may be considered inappropriate or unnecessary for the processes normally adopted in the conduct of a trial to be availed of to obtain a just opinion upon the question referred. It is for those reasons that r 8(6) stresses the prohibition upon a party wilfully delaying or preventing a just opinion being reached.[40]

Similarly in Beveridge & Anor v Dontan Pty Ltd[41], Rogers CJ Comm D relied on the purpose of Part 72 as a means of increasing the speed and efficient disposal of commercial litigation at minimal cost to the parties. His Honour said that "in the more enlightened climate of legal thinking today it should be accepted that there is not one exclusive method of dispute resolution that will lead to a just result"[42], particularly considering that:

One 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. Again, in the case of a technical expert it is inappropriate that the rules of evidence should be applicable. Although from time to time, due to pressures of congested court lists, orders for reference are made, usually to persons who have formerly held high judicial office, or to senior counsel of eminence at the Bar, of the entirety of the dispute, generally speaking, references are confined to matters of technical expertise or perhaps of manifold detail. It would be to pervert the rationale which underlies such references to impose upon an expert referee the requirement that in discharging the obligations demanded by the rules of natural justice he, or she, should be required to act as a court of law.[43]

It is settled law in New South Wales that the discretion of the court to adopt, vary or reject the final report of a referee pursuant to Part 72 rule 13(1) must not be exercised in the manner of a de novo hearing of the issues referred out[44]. In Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd Giles J said:

The purpose of Pt 72 is to provide, in appropriate cases, an alternative form of dispute resolution, not simply to add an extra level to the hierarchy of decision makers, and the purpose of the reference should not be rendered futile by a judge who considers the report substituting a fresh assessment of the facts for that of the referee unless the proper exercise of the discretion so requires.[45]

In Super Pty Ltd, Gleeson CJ set out the following principles germane to the exercise of the court's discretion in this regard, emphasising the role of Part 72 in facilitating alternative dispute resolution and increasing the time and cost effectiveness of commercial litigation:
I am unable to accept, either as an absolute rule, or as a prima facie rule subject to defined or definable exceptions, that a party who is dissatisfied with a referee's report is entitled as of right to require the judge acting under Pt 72, r 13, to reconsider and determine afresh all issues, whether of fact or law, which that party desires to contest before the judge.

My reasons are as follows:
1. Such a conclusion finds no support in the language of Pt 72 and is inconsistent with the discretionary powers conferred by Pt 72, r 13.

2. The history of the rule tends against such an approach. The present rules replaced provisions dealing with decisions of arbitrators and referees to whom matters were referred by order of the court. Those decisions were given the effect of a verdict of a jury. The provisions were interpreted by the High Court as meaning that such decisions could be reviewed for error of law, perversity or manifest unreasonableness. There was no general right of review or appeal by way of re-hearing. The modern rules are expressed in language which provides wider discretionary flexibility, but it would be a radical departure from the history of the rules to treat them as giving a dissatisfied party an automatic right to a hearing de novo.

3. If one were constrained, by weight of authority or practical necessity, to admit exceptions to such a rule, then it becomes difficult to identify the principle underlying the exceptions and to reconcile that principle with the rule. However, unless one can identify such a principle, it is impossible to decide, other than on pragmatic grounds, whether a new case is to be treated as an exception.

4. It would be inconsistent with the object and purpose of the rules, and potentially productive of delay, expense, and hardship, that the practical effect of appointing a referee should be simply to add an extra level to the hierarchy of decision-makers in a given case.

5. That consequence would also be inconsistent with the modern trend towards encouragement of alternative dispute resolution, as reflected, for example, in the provisions of the Commercial Arbitration Act 1984: see the discussion by Sheller JA of developments in relation to minimising judicial intervention in commercial arbitration in Promenade Investments Pty Ltd v State of New South Wales (1992) 26 NSWLR 203.

What is involved in an application under Pt 72, r 13 is not an appeal, whether by way of a hearing de novo or a more limited re-hearing. This is consistent with the right of the referee to conduct the reference as the referee thinks fit and unconstrained by the rules of evidence. Rather, the judge, in reviewing the report and deciding whether to adopt, vary or reject it, has a judicial discretion to exercise in a manner that is consistent both with the object and purpose of the rules and with the wider setting in which they take their place.[46]

In his 1996 article Giles JA declared that, "references are here to stay" and that the task is to make the system of references pursuant to Part 72 work to "maximum advantage as part of the administration of justice in this State".[47] I agree. It seems to me that that its value as a means of achieving the "just, quick and cheap resolution of the real issues"

in certain matters is beyond question.

It is interesting to reflect upon the nature of the present environment in which a consulting industry has developed around Part 72 with retired judges with no specific technical expertise in the construction industry sense conducting the references. It is the parties who chose to have particular questions or matters referred to the retired judges. Mr Selby suggested that objection to a report from a retired judge acting as a referee is "another matter entirely". That suggestion is not consistent with the experience in the List. It is exactly the same process in which objections that may be available are taken and the trial judge exercises the discretion in either adopting, rejecting or varying the report in exactly the same way irrespective of whether the referee was once a judge.

Judges who retire or resign and return to the Bar are precluded from appearing before the Court in which they served for a period up to 5 years[48]. There is no restriction upon retired judges accepting references from the Court upon which they served, not the least because the Bar Council does not have any jurisdiction over referees who do not have practicing certificates. The Guide to Judicial Conduct[49] suggests:

7.2.3 Alternate dispute resolution - mediation and arbitration
It has become quite common for judges who have retired, whether early or at full retirement age, to be appointed or to offer their services as mediators or arbitrators. Although some judges do not approve of such activities, they are not at present subject to any legal or professional restraint.

The work of the referee is different from the barrister in that the referee is deciding issues rather than seeking to persuade the Court that his or her client should be successful in a particular case. Although it is obviously different in substance, having regard to the nature of the discretion to be exercised, it is helpful for the purposes of this debate to see the process of the Court deciding whether to adopt, reject or vary the report of a referee who is a retired judge, as similar to the process of the Court of Appeal or a Full Court deciding whether to uphold or dismiss an appeal from a trial judge. The reference process is kept under the review and control of the Court and this aspect of the process is but one new development in the changing environment in which complex disputes are resolved.

Mediation
The commencement of the Supreme Court Amendment (Referral of Proceedings) Act 2000 on 1 August 2000 introduced ss 110K-110M into the Supreme Court Act 1970, giving the Court power to refer proceedings, or parts of proceedings, to mediation, irrespective of the consent of the parties. Section 110K provides:

(1) 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.

(2) The mediation is to be undertaken by a mediator agreed to by the parties or, if the parties cannot agree, by a mediator appointed by the Court, who may, but need not, be a person nominated and appointed in accordance with the provisions of a practice note issued under section 100O.

The stated reason for the amendment was to improve the operation of the Court in the pursuit of the just, quick and cheap resolution of disputes.[50] The introduction of these changes was also not free from controversy. They were described as radical and most undesirable as a matter of principle, with a suggestion that the power would be exercised frequently in times of pressure on the Courts institutionally to 'up their productivity' and on judges individually to deliver judgments expeditiously. [51] I expressed the view at the time that the suggestion that discretions might be corrupted by pressures of workload was surprising and wholly unwarranted.[52] Experience since 2000 has supported that latter view with very few compulsory mediations being ordered, with those that have been ordered being, in the main, successful.

The parties in the Technology and Construction List utilise the alternative of mediation when the case reaches a point when all the issues are clear. It is interesting to note that experience shows that those cases that do not settle at mediation and either go to trial or are the subject of a reference, seem more likely to settle that than those that have not been to mediation.

Conclusion
Complex construction disputes can be the subject of lengthy delays if they are not handled with sensible and fair processes. The range of alternatives available for the resolution of these disputes under the control of the Supreme Court of New South Wales has seen the statisticians report that the case disposal times are ahead of or close to the tentative standards. May I suggest that statistics are not the true guide as to whether the List is operating successfully. As Chief Justice Spigelman said[53]:

Not everything that counts can be counted. Some matters can only be judged, that is to say they can only be assessed in a qualitative way.

The compilation and publication of statistics relating to the measurement of delay is a perfectly appropriate activity. Nevertheless, the most important functions performed by a court are not capable of measurement. In particular the fundamental issue of whether or not the system produces fair outcomes arrived at by fair procedures is not capable of quantification at all.

As can be seen from the potted history of the introduction of Part 72 References and the compulsory mediation power in s 110K, change can engender fears that are at times quite unfounded. On the other hand it seems to me that the legal profession whose members deal on a daily basis and have a wealth of experience with clients, who find themselves in the midst of complex construction disputes, should be consulted in relation to the consideration that may be given to any changes in the way in which construction disputes are resolved. May I also suggest that Spigelman CJ's words of wisdom be kept firmly in mind in that regard.

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1 Construction and Infrastructure Seminar. Law Council of Australia. 5 May 2004. Law Institute of Victoria.
2 List Judge of the Commercial List and the Technology and Construction List of the Supreme Court of New South Wales. I record my thanks to Mr Sandy Phipps, the Researcher to the judges of the Commercial List and Technology and Construction List, for his assistance in the preparation of this paper
3 s 23 (1).
4 District Court Act 1973 (NSW) s 44
5 s 23 (2)
6 s 66.
7 s 67
8 s 65.
9 Prior to 1998, when the changes were announced, there were additional Divisions, including the Commercial Division that administered the Construction List, as it was then known.
10 Part 28B of the District Court Rules (1973) mirrors Part 72.
11 This history is recounted with heavy reliance on the article by Giles JA referred to later in this paper: The Supreme Court Reference Out System.(1996) 12 Building and Construction Law 85
12 17 & 18 Vict Ch 125.
13 Knight v Coales (1887) 19 QBD 296 at 298, per Lopes and Fry LJJ; at 302, per Lord Esher MR.
14 (1887) 19 QBD 296 at 300.
15 36 & 37 Vict Ch 66.
16 Justice RD Giles, "The Supreme Court Reference Out System" (1996) 12 Building and Construction Law 85 at 86.
17 [1877] 3 CPD 142.
18 See also at 149, per Bramwell LJ; at 153, per Brett LJ.
19 See also at 153, per Brett LJ; at 159, per Cotton LJ.
20 52 & 53 Vict Ch 49.
21 15 & 16 Geo Ch 49.
22 55 Vict No 32.
23 (1896) 17 NSWLR 323.
24 (1977) 140 CLR 1 at 37.
25 (1977) 140 CLR 1 at 21.
26 (1977) 140 CLR 1 at 39.
27 (1977) 140 CLR 1 at 15.
28 Justice RD Giles, "The Supreme Court Reference Out System" (1996) 12 Building and Construction Law 85 at 91.
29 "Arbitration Rules", in Bar News, Summer 1985, page 4.
30 Ibid.
31 New South Wales Parliamentary Debates, Legislative Assembly, 10 April 1986, pages 1699-1700.
32 Ibid., 1701.
33 Ibid.
34 Justice RD Giles, "The Supreme Court Reference Out System" (1996) 12 Building and Construction Law 85 at 85.
35 Ibid., at 92.
36 Sir Laurence Street KCMG AC, Official Opening of the Residential Course on Dispute Resolution Sponsored by the Australian Commercial Disputes Centre, 28 January 1986.
37 Sir Laurence Street KCMG AC, Court Review of Awards: An Australian perspective, International Arbitration Conference of the Institute of Arbitrators Australia, Sydney, 7 September 1998.
38 Hugh Selby, "Referees", in; Ian Freckelton and Hugh Selby, Expert Evidence: Law, Practice, Procedure and Advocacy, 2nd Ed. Lawbook Co. Pyrmont, 2002. p 627.
39 (1989) 18 NSWLR 453.
40 (1989) 18 NSWLR 453 at 466.
41 (1991) 23 NSWLR 13.
42 (1991) 23 NSWLR 13 at 24.
43 (1991) 23 NSWLR 13 at 23.
44 Super Pty Ltd (formerly known as Leda Constructions Pty Ltd) v SJP Formwork (Aust) Pty Ltd (1992) 29 NSWLR 549.
45 (unreported, New South Wales Supreme Court, 14 October 1993, BC9302150) at 3.
46 (1992) 29 NSWLR 549 at 562-563.

47 Justice RD Giles, "The Supreme Court Reference Out System" (1996) 12 Building and Construction Law 85 at 92-93.
48 Barristers Rules Rule 87 (j).
49 Published by the Australian Institute of Judicial Administration Incorporated for The Council of Chief Justices of Australia in 2002
50 Supreme Court Amendment (Referral of Proceedings) Bill. Second Reading Speech, Legislative Council, 8 June 2000, p.6845.
51 B Walker SC and Andrew S Bell: Justice According to Compulsory Mediation. Bar News. Spring 2000 p.8
52 Interlocutory Procedures. College of Law CLE 28 November 2000.
53 Chief Justice JJ Spigelman AC Quality in an Age of Measurement: The Limitations of Performance Indicators: The Sydney Leadership Alumni Lecture. The Benevolent Society 28 November 2001.