The Honourable Justice Stynes

Judge of the Supreme Court of Victoria

The Society of Construction Law Australia: Stynes' Address 2023:

Disrupting how we use pleadings in complex construction disputes[1]

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A Introduction

1 Good evening. Thank you for that kind introduction.

2 I am honoured to have the opportunity to address you this evening for the inaugural Stynes' Address entitled: ***Disrupting how we use pleadings in complex construction disputes***.

3 I am truly flattered this lecture series bears my name, and maybe also a little embarrassed – although not enough to decline the honour. My thanks to the Society of Construction Law Australia (**SOCLA**) and its members.

4 SOCLA provides numerous events for the purpose of education and connection. It is my hope that this series of lectures offers something a little different – specifically, a formal and ongoing opportunity for us to come together to share ideas that challenge industry views and norms. Ideas that cause us to question how we do our work, how we serve our industry and whether there is a better way.

5 I am excited to go first and put forward an idea that has been brewing for some time – an idea that challenges how we deploy pleadings – specifically, the timing and form of them.

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1 A speech delivered at the inaugural Stynes' Address for the Society of Construction Law Australia on 28 November 2023. I would like to express my appreciation to my Associates, Sam Moulton and Yazmin Judd, for their assistance preparing this speech.

6 Before I do, let me provide some context. The traditional sequence of events in any litigation is, in overview:

(a) pleadings;

(b) discovery;

(c) lay evidence;

(d) expert evidence; and

(e) trial.

7 Some of you may have attended the presentations I have given at SOCLA events over the last two years where I have explained a number of case management techniques that I have introduced into the Technology, Engineering & Construction (**TEC**) List of the Supreme Court of Victoria which have disrupted that traditional sequence.

8 These case management techniques are as follows:

(a) *First*, by-passing discovery and instead requiring the preparation and filing of lay evidence together with tender bundles of documents that the parties intend to rely upon. This step currently follows the close of pleadings.

(b) *Second*, requiring experts of like-discipline to participate in two conclaves shortly after the close of pleadings. The purpose of the first conclave is for the experts (in the absence of the parties and their legal representatives) to confer, agree and then set out in a joint report:

(i) issues to be addressed by them;

(ii) the methodology they propose to adopt to address those issues; and

(iii) the categories of documents they require to attend to that task.

(c) The second conclave occurs once the categories of documents identified by

the experts have been collated and provided to them (usually around six weeks after the first conclave). The purpose of that second conclave is for the experts to confer in relation to the issues to be addressed by them and to identify areas of agreement and disagreement. Following that second conclave, the experts then proceed to prepare a second joint report setting out those areas of agreement and disagreement. This sequence of early conclaves ensures the expert briefing process is transparent and results in the experts giving evidence:

(i) on the same questions;

(ii) based on the same materials; and

(iii) employing the same methodology.

(d) If there is any difference of opinion between the experts, each expert files an individual report in the ordinary way addressing the issues that remain in dispute.

(e) *Third*, what I have been referring to as a Case Management Conference (**CMC**). These CMCs are fixed for one or two days (depending on the complexity of the matter), after the exchange of evidence and typically between two and four months in advance of trial. The purpose is to provide each party with an opportunity to address the key issues in dispute – that is, the three to five most critical issues - to facilitate:

(i) a narrowing of issues in dispute; and

(ii) a better understanding of how each party puts its case and the key evidence in support of it.

9 Each of these techniques was introduced for the paramount purpose of assisting the parties and the Court, faced with complex construction disputes, to identify and narrow the issues in dispute as early as possible in the proceeding. They have

disrupted the traditional sequence of events by bringing forward the preparation of lay and expert evidence and largely dispensing with the traditional notion of discovery.

10 I foreshadowed at a recent presentation that the next interlocutory process that I planned to tackle was pleadings. And here we are - that is what I will be addressing this evening.

11 As constructions lawyers, we are well familiar with the challenge of pleading claims and defences at the commencement of a proceeding, at a point in time when we often do not have a handle on the very large volume of documentary material and do not have in hand the necessary expert opinions that are part and parcel of TEC disputes. Yet that is what is currently required.

12 There must be a better way.

13 Let me expand a little on two key problems I see with the current requirements of pleadings, and the timing of them, as they apply to complex construction disputes. I stress here that I am concerned with how pleadings operate in complex construction disputes.

14 The **first problem** is the time and money spent producing pleadings. My associates have undertaken a review of my current and finalised TEC List matters and have managed to isolate some important data.

15 On average, in a TEC List proceeding:

(a) the parties will spend just shy of 18 months in the pleadings phase; and

(b) over those 18 months, there will be over three rounds of amendments to those pleadings, including requests for further and better particulars and joinder applications. Over half of those amendments will occur after at least one party has filed lay or expert evidence.

16 It is also worth noting, in relation to TEC List proceedings that resolve before trial,

almost 80% of them settle after evidence has been exchanged. That is probably not so surprising given that the parties are unlikely to be in a position to assess the merits of the claims and defences until lay and expert evidence is in hand.

17 This is the reality of TEC List matters. Obviously, each case is unique and this data does not tell you the reasons why pleadings were amended. But they do reveal what we already know to be true: it is a challenging, time consuming and expensive task to plead a claim or defence in a complex construction dispute ahead of lay and expert evidence.

18 The **second problem** with pleadings in complex construction disputes is that, in their current form, and notwithstanding all of the time and money spent on them, they do not always (or often) serve the purpose of a clear articulation of the claim or defence. What is my evidence in support of this proposition? The steps we all take to reshape the information in the pleading for our various purposes:

(a) We produce a summary of the pleadings in a narrative form to advise our clients of the case they have to meet and the merits of it. I do not believe for a moment that any one of you simply send a copy of a pleading to your clients for them to read and digest.

(b) We produce pleadings matrices and tables for the purpose of analysing the evidence.

(c) We produce Scott Schedules of defects and variations to pinpoint relevant materials – evidence and opinion.

(d) Ahead of trial we have become accustomed to conferring for the purpose of identifying and agreeing lists of issues in dispute.

19 The central thesis of this address is that a traditional approach to pleadings in terms of the timing and form of them is not the best or most efficient way to identify the real issues in dispute in complex construction disputes. To the contrary, such an approach can serve to cause delay. If that is right, it is incumbent on us to find a

solution.

B What are pleadings and what purpose do they serve?

20 So what are pleadings and what purpose do they serve?

21 Put simply, pleadings are formal documents exchanged between parties to civil litigation which are intended to contain in a summary form a statement of all the material facts on which a party relies. The exchange of pleadings is intended to define the issues in dispute and the parameters of the litigation and has been employed for that purpose for more than five centuries.[2] To this day it is a process perceived by many as essential to the proper and just determination of civil disputes.

22 In my view it is possible and important to distinguish between the form and function of pleadings. The central contention of this presentation and my current thinking as Judge in Charge of the TEC list, is that while the function served by pleadings is essential, the form and timing of the material that serves that function may be ripe for change in relation to complex construction disputes.

23 When I refer to 'form', I mean the document itself – the statement of claim, a defence, usually a reply, perhaps a counterclaim, followed by a defence to the counterclaim and then a reply to that defence, perhaps a third party claim, or multiple as we often see in construction disputes and then a related defence and so forth. Each of these documents is invariably long, legalistic, formulaic and employs a strictly formal register.

24 When I refer to timing of a pleading I am referring to the current requirement that the pleadings be produced at the commencement of the proceeding, ahead of lay and expert evidence.

25 The function of pleadings is simple and widely accepted: to define the issues in dispute and to provide notice of those issues **at the earliest possible stage**.

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2 *Fieldturf Inc v Balsam Pacific Pty Ltd* [2003] FCA 809, [3].

26 By defining the issues in dispute, pleadings also serve to:

(a) define the range of admissible evidence; and

(b) define the scope of discovery (where discovery is still provided for – not in my list).

27 There is a presumption inherent in the institution of pleadings that the parameters of the issues in dispute are fully capable of identification at the outset of the proceeding. In my experience, that presumption almost never holds for complex construction disputes which rely so heavily on expert opinion and large volumes of documentary evidence for issue identification.

28 Nevertheless, we have pressed on with the form and timing of traditional pleadings, imposing a significant burden on drafters.

C **Problems with traditional pleadings in complex construction disputes**

29 Before they have the benefit of lay and expert evidence, drafters must proceed to commit to a set of facts said to underpin their client's claim. Understandably, they err on the side of caution by over-including *potentially* available causes of action and facts that are *potentially* material. This caution is understandable and born out of fears that, pending the completion of evidence, they may omit critical details that may lead to losses for clients. Herein lies a conflict between a lawyer's duty to advance their client's interests and the objective of pleadings – to identify those issues that are genuinely in dispute.

30 Pleadings are frequently formulaic. A classic formula for a statement of claim in a complex construction dispute is:

(a) Parties;

(b) Project;

(c) Contract;

(d) Terms;

(e) Performance;

(f) Breach; and

(g) Relief.

31 There is a comfort in that list of headings for the drafter but may I suggest it is not the most efficient presentation of the claim made. If a statement of claim set out in that way is, say, 50+ pages, and I start reading on page one, I may not know the causes of action relied on until pages 35 or later. Personally, I will usually start reading a pleading from the back; first, to see who drafted it and then, to read the prayer for relief. I am trying to work out if this is a claim in contract, under statute or in equity.

32 I will then scan the paragraphs under the heading "Breach" to see how the breach is described. I will then scan the paragraphs describing the chronology of events to identify the specific conduct said to constitute the breach.

33 Just imagine for a moment, how you might describe a breach of contract claim you are about to plead to your plaintiff client. I sincerely doubt you commence by identifying the parties or by reading to them the numerous terms of the construction contract that might be relevant. To the contrary, I imagine you would explain that:

(a) the claim is for money in the sum of around $1 million;

(b) the defendant may be liable to you because they breached the contract;

(c) specifically, they breached clause 12 which required them to deliver the necessary materials by a particular date;

(d) they didn't provide the materials by that date. Instead they provided the materials over time; and

(e) that caused a series of delays in the work which will need to be assessed and

quantified by an expert. Our best estimate at this time is that it caused a total delay of one month.

34 This is a rather simplistic example but it makes the point that:

(a) you don't need to employ formal or complex language; and

(b) you don't need 30 or more pages of facts to convey the nature of the claim (breach of contract), the specific conduct relied upon (delay in the delivery of material) or to reveal the types of expert evidence that may be required (delay and potentially a quantity surveyor).

35 While we continue to employ pleadings in the traditional way, we will continue to expend significant time and money:

(a) drafting pleadings;

(b) amending pleadings;

(c) resolving applications for further better and better particulars or for strike-out of pleadings; and

(d) reviewing pleadings and reformulating them for our various purposes including in an effort to identify the issues in dispute.

36 As I have said, the function served by pleadings - to define the issues in dispute – is important. But are pleadings the best vehicle to achieve that result? My observations and concerns about pleadings are not novel. They have been highlighted in academia,[3] in law reform proposals,[4] and even by judges[5].

37 The limitation of pleadings was identified some years ago by the Full Court of the Federal Court in the case of *Betfair Pty Ltd v Racing New South Wales* which stated that

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3 See E Thornburg and C Cameron, *Defining Civil Disputes - Lessons from two jurisdictions* (2011) 35 MULR 208.

4 See Law Reform Commission of Western Australia, Review of the Criminal and Civil Justice System in Western Australia, Report No 92 (1999) 72 [10.4]–[10.6].

5 See *Fieldturf Inc v Balsam Pacific Pty Ltd* [2003] FCA 809, [6] (Finkelstein J).

'**pleadings are a means to an end and not an end in themselves**'.[6] A question of concern to the Court in that case was 'whether the respondents knew of the case they had to meet'. Their Honours said:[7]

> Betfair's opponents sought to rely at the trial on the general proposition that Betfair would be "held" to its pleaded case.
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> An announcement of that kind by a party misstates that party's capacity to direct the course of the proceedings. The course of proceedings is in the control of the Court. That control is to be exercised for the attainment of a just outcome.
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> There will obviously be cases where a pleaded case does not raise an important fact for attention. If that remains the position at the end of the case, the case may be lost on that basis, so far as it depends on that fact.
>
> Sometimes it would be unfair to allow a party to amend a case, or a pleading, to raise a new matter which could have been, but was not, raised earlier**.**
>
> **On the other hand, mere infelicity of drafting will rarely be allowed to defeat a case on its merits if the merits of the case have been made apparent on the evidence without unfairness to the other party**. (emphasis added)

38 Their Honours went on further to highlight a tension between:

(a) the notion of restricting disputes to pleaded matters; and

(b) section 22 of the *Federal Court Act 1976* (Cth). That provision requires that the Court is, as far as possible, to determine all matters in controversy completely and finally. This provision is mirrored by subsection 29(2) of the *Supreme Court Act 1986* (Vic) which, relevantly, requires the Court to exercise its jurisdiction in every proceeding before it, to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and all multiplicity of proceedings concerning any of those matters is avoided.

39 The High Court has also emphasised the paramountcy of the 'real controversy' over

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6 *Betfair Pty Ltd v Racing New South Wales* [2010] FCAFC 133, [52] (Keane CJ, Lander and Buchanan JJ) citing *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 292–3 (Dawson J).

7 *Betfair Pty Ltd v Racing New South Wales* [2010] FCAFC 133, [55] (Keane CJ, Lander and Buchanan JJ).

any rigid rules around pleadings in *Vale v Sutherland*[8] where it cited with approval the following passage of Justice Dawson in *Banque Commerciale SA, En Liquidation v Akhil Holdings Ltd*:[9]

> But modern pleadings have never imposed so rigid a framework that if evidence which raises fresh issues is admitted without objection at trial, the case is to be decided upon a basis which does not embrace the real controversy between the parties … cases are determined on the evidence, not the pleadings.

40 The principle to be drawn from these cases is that pleadings are only a means to an end. If evidence raises fresh issues for determination without unfairness to the other party, then that evidence serves to frame the dispute.

41 This principle is significant to those of us involved in complex construction disputes where evidence, both lay and expert, is exchanged well before trial and, currently, quite some time after the close of pleadings.

42 In my experience, the identification and narrowing of issues in dispute in complex construction disputes is more readily achieved as a result of the following interlocutory steps, each of which post-date the close of pleadings:

(a) exchange of witness statements;

(b) exchange of expert evidence;

(c) the identification by each party of documents they intend to rely upon;

(d) maybe mediation; and finally

(e) the CMC.

D <u>Solution</u>

43 Before addressing what may be a way forward, I want to highlight a few important examples of reforms to pleadings in other jurisdictions so I might dispel the idea that

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8 (2009) 237 CLR 638.

9 (1990) 169 CLR 279 at [41].

my suggestions for reform are in any way radical.

44 Alternative forms of pleadings in construction disputes have already been trialled and tested with great success in other jurisdictions and forums.

45 A simple and well known example is the Scott Schedule – a simple table in which the plaintiff itemises its allegations and the defendant then inputs its responses, each with reasons. In this form, there is no room for non-specific allegations or bare denials. Scott Schedules are most useful in cases with a large volume of claims of a similar nature, such as variations or defects. They enable extensive and complex information to be summarised succinctly and clearly. Scott Schedules have been used in the Technology and Construction Court in the UK for decades and have been implemented in other Australian jurisdictions: New South Wales;[10] and in my list. Usually a Scott schedule will form part of a pleading. In certain cases, the Scott Schedule may completely substitute pleadings.[11]

46 For civil litigation more generally, many of you will be aware of the Federal Court reforms which saw the trial and then widespread implementation of the Fast Track program which has laid the ground for proceeding by way of Concise Statement. In the Federal Court, Concise Statements can be used either in lieu of a formal pleading or as a triaging mechanism which precedes a formal pleading. The Federal Court's implementation of Concise Statements and Concise Responses has been varied. In more recent cases, Justices Derrington, Button and Beach have cautioned against use of Concise Statements in substitution of pleadings in complex cases where precision, clarity and rigidity, they say, are required to fairly inform the opponent of the case made against them.[12] Those cases serve to remind us that pleadings serve an important function and the function must be maintained, even if the form is changed.

47 In commercial cases concerning claims of oppression under the Corporations

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10 See *Uniform Civil Procedure Rules 2005* (NSW) r 15.2.

11 Paula Gerber and Diana Serra, Construction Law Litigation - Are We Doing it Better (2011) 934 *Melbourne University Law Review* 35, 960-961.

12 See *ASIC v Australia and New Zealand Banking Group Limited* [2023] FCA 1150; *ASIC v Diversa Trustees Limited* [2023] FCA 1267; *ASIC v National Australia Bank Limited (No 2)* [2023] FCA 1118.

Legislation it is common place for proceedings to be commenced by originating motion. The matter then moves swiftly to hearing following the exchange of affidavit material and in some cases the development of a list of issues in dispute.

48 In complex construction disputes that proceed to arbitration, it is common place for the parties to exchange memorials comprising their evidence together with their pleading. I use the term "pleading" here loosely. It is often presented as a summary of the issues in dispute in a narrative form. The drafting of it is obviously informed by the lay and expert evidence – that is a critical difference between memorials and our traditional pleadings.

49 I should mention one final proposal of law reform. In 1999, the Law Reform Commission of Western Australia, at the time chaired by the Honourable Wayne Martin AC KC, proposed to do away with pleadings in all but exceptional cases and to implement narrative form case statements. For reasons that are unclear to me, this proposal never got off the starting block. Western Australian courts as far as I know continue to utilise traditional pleading arrangements.

50 Before I move to propose what may be a better way forward for complex construction disputes, I want to repeat that the purpose of this address is to open up a dialogue between us about how we might do better than traditional pleadings to efficiently identify the issues in dispute between the parties. I do not profess to have the best ideas. I do not profess to have thought of every issue that may arise from my ideas. I am using this platform to invite suggestions and criticisms from all of you. I am inviting you to consider: *How can we do better*?

51 So, following a broad review of academic papers, law reform materials and judicial decisions, and upon reflection of my own experience as a practitioner in construction litigation and arbitration – this is what I think might work.

(a) Proceedings would be commenced by a generally endorsed writ.

(b) The defendant would enter a notice of appearance.

(c) The parties would attend Court for directions for the purpose of timetabling the exchange of a concise statement of case and concise statement of defence.

52 That statement of case would have the following features:

(a) ***One***, it would identify the cause(s) of action and, at a high level, the material facts supporting the elements of the cause(s) of action. It must:

(i) identify with sufficient precision the right to the relief sought and co-locate the cause of action with the material facts which support it, for example:

> *to the extent this is a claim for breach of contract, these are the material facts we rely upon …*
>
> *to the extent it is a claim in equity, these are the material facts we rely upon …*; and

(ii) significantly, the statement of case must provide sufficient detail of the cause of action so as to reveal the issues in dispute that may be the subject of expert evidence and the expert disciplines that may be required.

(b) ***Two***, it would adopt a concise narrative style, avoiding legalese. A document in the style of the summary of the pleadings that you might provide to a client you are advising on the merits of the case.

(c) ***Three***, it would reference by footnote or annexure those documents critical to the matters in dispute. That is, the kind of documents you have an obligation to disclose under s 26 of the *Civil Procedure Act 2010* (Vic).

53 The concise statement of defence would adopt the same or corresponding features. There will be no bare denials or non-admissions. The defendant is expected to share what it understands are the material facts relevant to the issues articulated by the plaintiff and which may support a defence of the claim. Of course any counterclaim

and response to counterclaim would adopt a similar form.

54 I think it is significant to note that these documents are not being produced in a vacuum. Complex construction disputes only get to court following:

(a) first, the completion of lengthy alternative dispute resolution procedures imposed by contract which serve to inform the parties, to a significant extent, of the issues in dispute between them. Indeed, those procedures invariably require as a first step, the production of a notice of dispute and response.

(b) Second, litigation usually follows the engagement of the relevant experts to assist the parties to comply with their contractual obligations and to meaningfully participate in those dispute resolution procedures.

55 As a consequence, I do not anticipate that the production of a concise statement of claim and defence will take much time – a matter of weeks, not months.

56 The purpose of these concise statements is not to once and for all time define the issues in dispute. Instead they are designed to facilitate the commencement, at the earliest possible time, of the interlocutory steps that do in fact enable us to fully identify the issues in dispute:

(a) the exchange of critical documents;

(b) the exchange of lay evidence and the documents each party intends to rely upon; and

(c) the early expert conclaves that I have introduced to the TEC List that see the experts:

(i) have input into issues they can usefully address;

(ii) discuss and agree the methodologies they will employ to address those issues;

(iii) identify categories of documents they require to attend to the task

ahead of them; and

(iv) once in possession of those documents, to determine if there are areas of agreement between them before producing a report.

57 Following those interlocutory steps, on a case-by-case basis, the parties and the Court may consider what, if any, further steps are required to ensure that the parties are properly informed of the case they have to meet. The timing of this consideration may follow the production of the plaintiff's materials, or it may follow the production of the defendant's materials.

58 Maybe a party, now armed with all of the evidence it intends to rely upon, should be required to prepare a more formal pleading in order to clearly articulate the parameters of the case agitated. It is my expectation that if such a pleading were required, it would be quite a different beast to the pleading that would have been produced at commencement without the benefit of lay evidence and expert opinion.

59 Maybe the parties would be better assisted by an agreed list of issues in dispute?

E Conclusion

60 So to summarise: the reason why I suggest there is a need to reconsider the form and timing of pleadings in relation to complex construction disputes is that, in most cases:

(a) the parties are simply not in a position to fully plead and particularise their claims or defences ahead of the preparation of lay and expert evidence; and

(b) the form of the pleadings currently produced in the absence of evidence are often legalistic, formulaic, expensive to produce and, understandably, not fit for the purpose of identifying issues in dispute.

61 The mischief I am seeking to address is the 18 months spent by parties, on average, in pleading complex construction disputes.

62 My vision for complex construction disputes in my list is simple:

(a) commence proceedings;

(b) identify concisely the nature of the dispute; and

(c) complete the exchange of lay and expert evidence (with or without a more formal pleading) within six to 12 months from the commencement of the proceeding.

63 Compare this vision to what I have experienced in relation to complex disputes employing a more traditional approach:

(a) 12 to 18 months in pleading;

(b) six to 12 months in discovery;

(c) six to 12 months in lay evidence; and

(d) six months in expert evidence.

64 It seems like I have repeated this ad nauseum, but I cannot stress enough that the TEC List is unique and demands an appropriately tailored procedure to dispute resolution. It may be that this proposal would be suitable beyond the TEC List. That is for someone else to consider and test. My focus and passion is directed to optimising procedures for resolving construction disputes by determination or negotiated settlement in the Victorian Supreme Court TEC List. And I am asking you to consider my proposal and the mischief I am seeking to address and to let me know what you think. **How can we do better?**