

**Early Judicial Intervention in Building Cases –  
a pilot program trialed in Victoria, Australia**

**Presented by: Judge Suzanne Kirton, Judge in Charge  
Building Cases List, the County Court of Victoria**

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## Why did we try something new?

- The traditional litigation processes (at least in common law jurisdictions) for the resolution of major building disputes has never been efficient or economical
- Time = cost
- For parties and the Court
- Number of new initiations is rapidly increasing
- No increase in resources

## What can we control?

The Court has limited options to contain the amount of time spent in litigation:

1. Reduce the complexity of the factual dispute – **not achievable**
2. Reduce the complexity of the law – **not achievable**
3. Encourage early settlement – **achievable**
4. Simplify the pre-trial procedures so as to reduce professional time and consequent cost and delay – **achievable**
5. Simplify the trial so as to reduce lawyer and support time and consequent cost and delay – **has probably gone as far as it can**
6. Prepare shorter judgments so as to reduce judge-time and consequent delay – **a work in progress**

## The CCV Pilot - Early, active case management

- A pilot of 40 proceedings
- Judge-led case management from an early stage to the end of the life of the case
- Starting with a case management conference (“CMC”) soon after proceeding commenced
- Conducted by a reserve Judge, assisted by the Commercial Division Lawyer (“CDL”)
- Cases were selected from those issued within the preceding 3 months
  - before pleadings (claims and defences) were finalised

## **The CCV Pilot – conduct of the case management conference (CMC)**

- 10 cases listed each week, 2 per day
- Each CMC listed for a minimum of 3 hours
- The parties and their legal representatives must attend the CMC and be ready and able to discuss and agree to the resolution of their dispute
- A corporate party or insurer must have an officer in attendance with full authority to settle the proceeding

## The CCV Pilot - Prior to the CMC

- The plaintiff must file a single page document briefly describing:
  - the context of the dispute (e.g. “the construction of a domestic dwelling for the plaintiffs by the defendant”), and
  - each cause of action, and
  - the approximate quantum (e.g. “Defective workmanship - \$230,000, Delay damages for late completion - \$50,000)
- A defendant must file:
  - advance notice of any proposed unusual defence (e.g. “the correct builder was XYZ P/L”), and
  - the basis and quantum of any counterclaim

## The CCV Pilot – the CMC

- The CMC commences in open court.
  - The judge explains the process
  - The judge may ask the parties' legal representatives to briefly address the background to the dispute and their client's expectations for the hearing that day
- The hearing then usually moves into a closed confidential discussion.
  - The judge will engage directly with the parties about the matters in dispute and their desired outcomes
  - This process will continue for however long the judge considers that there is a reasonable chance of resolving the dispute

## The CCV Pilot – if no settlement reached

- The judge and parties will then concentrate on the pre-trial processes that appear to be required to efficiently and effectively bring the dispute to a just resolution
- If the parties agree, orders will be made for the management of the pre-trial procedures
- Apart from the content of those orders, any confidential discussions will remain confidential
- The parties will be encouraged to resume private discussions or to seek further dispute resolution assistance from the Court at a later time

## Procedural steps - tailored to the case

- Take only the steps needed to get parties in a position to continue their settlement talks
  - the steps to prepare for trial will be ordered only after further ADR
- Allocate a trial date (about 10 months away)
- Also allocate a date for further ADR (either with the pilot Judge, the CDL, or a private mediator) once parties have the information necessary to realistically assess their strengths and weaknesses

## Procedural steps – discovery of documents

- Limit the amount of discovery – instead of general discovery, parties are required
    - “to disclose the existence of all documents that are, or have been, in that party’s possession, custody or control of which that party is aware and which that party considers, or ought reasonably consider, are critical to the resolution of the dispute”
- s 26 *Civil Procedure Act 2010* (Vic)

## Procedural steps – expert evidence

- Obtain expert evidence before pleadings are finalised
- Consider appointing a joint expert
- If separate experts, make sure they are briefed with the same materials and questions
- Once their reports are in, they will usually be ordered:
  - to participate in an expert witness conference or ‘conclave’ (which may be with an independent person to facilitate that conclave in appropriate cases)
  - to prepare a joint experts’ report (including, where appropriate, a Scott Schedule ), setting out the items on which they agree and disagree, and the basis of the disagreement

## The CCV Pilot - the results

- Over the pilot period of 5 weeks:
  - 24 CMCs were held
  - 4 matters settled
  - a further 3 settled soon after the CMC
  - effective pre-trial processes were put in place in over 20 matters
- Of those 20 matters, all settled within the following 6 months, with fewer costs and delays than comparable matters

## The CCV Pilot - the lessons

*It was hoped that a reasonable proportion of the CMCs would result in a settlement of the whole proceeding. This proved to be a totally unrealistic expectation.*

*The more realistic aim of the Pilot Program then became to endeavour to assist the parties to define the matters in dispute and to devise a program for the exchange of information that would give the parties the best and earliest opportunity to undertake settlement discussions that might have a reasonable chance of success*

## The CCV Pilot - the lessons

- Major benefit is to pre-empt or fast track common pre-trial issues
- Requires Court resources early – but saves resources later
- Requires involvement and co-operation of the parties and other decision makers
- Requires preparation for the CMC - by the parties and the judge
- Logistics - CMC in person (need for several rooms) or by video-link
- Issue of Judge's conflict - mediation or adjudication modes

**Questions?**

**Thank you.**