WHAT THE COURTS EXPECT OF REFEREES' REPORTS

by

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I should point out, at the outset, that Pt 72 of the Supreme Court Rules has recently been amended so that the anomaly of referees being asked to make a determination and an award has been removed. Therefore, the situation today is that parties may agree to an arbitration, the outcome of which will be an award which will not be reviewed by a court, unless leave to appeal is granted, in accordance with the provisions of the Commercial Arbitration Act. Alternatively, the Court may, in respect of proceedings properly instituted, refer either the whole of the proceedings or selected issues in the dispute to a referee for report.

The initial significant difference between arbitration and a reference is that the referee's report has no force, or effect, until it is adopted by the Court. The other side of the coin, however, is that in a very real sense, the referee is a delegate of the Court. Although the referee is paid by the parties, in other ways the referee becomes part of the Court structure. I will discuss the practical implications of this shortly.

The practice of sending issues to a referee for a report goes back to the Common Law Procedure Act enacted in England in the middle of the last century. The power has been a feature of Common Law Procedure Acts in the various Australian States for at least the whole of this century [cf e.g. Arbitration Act, 1892 (NSW) s 12]. However, not much use was made of the power which, in any event, was very restricted. It was one of the hallmarks of Pt 72, passed in 1984, in exercise of the rule making power conferred by s 124(2) of the Supreme Court Act, 1970, that it extended the power to refer matters across the spectrum of civil litigation. The most frequent use of the power to refer is in the Construction List. Almost as a matter of course, technical issues involving engineering, building, architectural or other expertise are referred to appropriately qualified persons for report. Generally, the parties select their own referee, whether from a list supplied by the appropriate Professional Institute, the Australian Commercial Dispute Centre, the Institute of Arbitrators or, indeed, from the list of persons who have volunteered to act as referees maintained by the Commercial Division of the Court. If appropriate, more than one person may be appointed as the referee. This occurs where the matters in dispute and the subject of the reference cover more than one area of expertise. Sometimes the joint referees may be a lawyer and an expert. At the time the appointment is made, the parties

are required to advise the court of the date when the referee can commence the hearing and the expected duration of the reference. The judge then fixes a date some time after the conclusion of the reference hearing, by which the referee's report is required. A further, later, date is allocated at which time the report comes before the Court to be appropriately dealt with. At the time that the appointment of a referee is made, the judge makes a number of other orders. These orders generally follow a standard form. A copy of the Usual Order has been distributed. It will be observed that paragraph 3 directs that a copy of the completed order be delivered to the referee forthwith.

There are a number of significant matters, in the Usual Form of Reference, to which I should draw attention. By the time the referee is appointed, the Court will have subjected the dispute to considerable preparation. First, the issues will have been identified with precision and particularity. Any necessary discovery of documents will have been carried out. Statements of the evidence proposed to be adduced by each of the parties will have been ordered to be exchanged. Similar orders will have been made for experts' reports. As well, the judge may have directed the experts to confer with one another in an attempt to further refine the points of disagreement and attempt to reduce the points in issue. It seems to me that the referee, being himself an expert, could usefully attend

such a conference in its concluding stages, in order to determine whether there is any further room for the differences to be narrowed. It will not have escaped your attention that for the referee to complete the assignment within the time specified, if an oral hearing is required and barristers will participate, they have to make themselves available. To assist the referee in this regard, the Court will fix the time for commencement of the reference. In order to adhere to the timetable, the referee cannot afford to grant extensions of time and is not expected to seek one for his own report either. It is up to the referee to ensure that all steps necessary to complete the report can be transacted in the available period. Obviously there will be unusual circumstances, e.g. sickness, where an adjournment cannot be avoided. The point I am making is that the barristers' availability is not one.

Another significant feature of the proceedings is that the referee is not bound to adhere to the rules of evidence. I draw particular attention to the provisions of par 4(c) of Usual Order for Reference. The judges will fully support referees in all attempts to achieve a quick and just result. On the other hand, the referee is required to afford the parties natural justice. What is required in this regard is usually encapsulated in the phrase that natural justice is nothing more nor less than what fairness demands. By way of

illustration, fairness demands that each party have a proper opportunity of presenting its case. This does not mean that the parties are entitled to waste time, to conduct cross examination which is repetitive, or proceed at a tedious length. The judges are conscious of the fact that not all parties, to a reference may be equally desirous of obtaining an early report. Regrettably, some barristers are unable to accept that the rules of evidence do not apply, or proceed at a pace which is appropriate to the circumstances. It is, no doubt, very difficult for a referee, no matter how distinguished in the profession which he or she practices, to exercise the necessary control over an obstructive barrister. Nonetheless, it is necessary that this be done.

Perhaps the best way to illustrate the dictates of natural justice is to take the authority given to the referee by par 4(c) of the Order to make enquiries by telephone and to communicate with experts retained by the parties. Obviously all parties are entitled to know of the information obtained by the referee in this fashion. The purpose is clear enough. The parties must know what the referee is told in order to provide information to the contrary should that be appropriate. Thus, it may be possible to have any conversations over the telephone in the presence of the parties with a conference telephone enabling all to hear the responses of the person on the other end of the line. However, this is

not absolutely necessary as long as the referee tells the parties accurately what had been said, by the other person, and if appropriate, also by the referee. Pflieger v Sparks files J 9/3/89 (pro).

I should tell you that, in Clark Equipment Credit of Australia Ltd v Como Factors Pty Ltd [1988] 14 NSWLR 552 Powell J, a judge of the Equity Division, said that, although a referee may dispense with the strict rules of evidence, he should generally conduct the enquiry as if it were a trial by a judge. With the greatest respect, I could not be in more emphatic disagreement with that proposition. I believe that the other judges of the Commercial Division also take that view. Although Giles J, in his judgment in Pflieger v Sparks (unreported 9 March 1989) did not refer to the judgment of Powell J, the tenor of it is entirely inconsistent with Mr Justice Powell's view. Powell J states that Brownie J, a Judge of the Commercial Division, had, in Primas Constructions Pty Ltd v Metropolitan Waste Disposal Authority 4 August 1988, expressed the same view as his. With due respect, I do not share that view of what Brownie J had said. Brownie J was concerned with the question whether there had been a denial of natural justice by the referee and whether, for that reason, the referee ought to be removed. The contention of the applicant was that the referee, a former Judge of the New South Wales Court of Appeal, by his comments during the case, had caused a party to have a reasonable apprehension that he might

not bring an impartial and unprejudicial mind to the resolution of the question involved. As well, complaint was made that he had abandoned the mantle of a judge and assumed the role of an advocate by asking too many questions. It is in this context that Brownie J said:

> "The defendant's submission is that what Mr Reynolds did was to inform himself as referee in the course of the reference as he thought fit. The plaintiff's submission is that what he did was, to put it in a nutshell, to infringe the rules of natural justice in that the referee entered into the arena, particularly so far as it concerned questions going to the credit of witnesses.
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> It seems to me that there is a marked difference to be drawn in the conduct of a referee on a reference, in relation to different parts of his task as referee. On the one hand, he may properly do such things as consult reference books, he may measure and weigh objects, and he may, in a proper case, conduct scientific tests himself, but when it comes to deciding questions of fact which are in dispute or to deciding which witness he will believe or not believe, a referee is in no real way in any different position to a judge in an ordinary court case. He is, in my view, bound by the same rules as a judge. In particular he should act in the manner set forth in the decisions in Butler and in Tousek."

It may be that even that concedes too much. For a referee to participate with vigour in the conduct of the reference, in my view, does not necessarily infringe the rules of natural justice. It is only if that participation transgresses into partisanship that difficulty may arise.

The foregoing brings me to the next point. As I have said, a referee is properly described as a delegate of the court. This involves mutual rights and obligations. The court regards it as its duty and obligation to assist the referee in return for the assistance which it derives from the referee's work. If a referee encounters difficulty, of one kind, or another, in the handling of the reference, it is always open to him to approach the court, on short notice, or no notice at all, and in as informal a fashion as may be appropriate, in order to obtain further direction or guidance. For example, it seems to me that there is absolutely no reason why contact should not be made with the judge by way of a conference telephone if there is some short point on which guidance is required. This is the purpose of Order 6.

On a somewhat more homely topic, I should mention the question of fees. These should be agreed between the parties and the referee prior to the appointment being made. In the first instance, the court is unconcerned with the question of quantum, or with payment. That is a matter for the parties. However, the court customarily directs that, in the first instance, the parties be jointly and severally liable for the fees. The parties usually agree to pay the referee in equal shares and, ultimately, when the referee's report is dealt with, the question of the liability for the referee's fees will also be covered by the court's order. In the ultimate order,

as between the parties, the Court may determine the question of fees [Pt 72 r 6(1)(a)] which may be different from the amount actually paid.

In an endeavour to make the referee's task easier, we made a very important change to Part 72. Rule 8(5) now requires each party, within a time fixed by the referee, but in any event before the conclusion of the evidence, to give to the referee and each other party a brief statement of the findings of fact and law for which that party contends. If I may say so, this is a provision that the Institute could, with advantage, consider incorporating in its own rules. The purpose of the new rule is to avoid, what to a judge is a distressing situation, where a party claims to have led evidence on some topic or other, or made a submission of law, which earns no mention of any kind in the referee's report. This new provision, of course, does not mean that the referee is necessarily required to make a finding of fact on some topic he thinks is a complete irrelevance.

I should perhaps sound one cautionary note. Apparently, under the old special case procedure in England, it was the practice for parties to submit draft findings after the conclusion of the hearing. This was described by Lord Justice Donaldson as "one of the most pernicious features" of that procedure. Delivering the judgment of the Court of Appeal in Bremer

Handelsgesellschaft v Westzucker GmbH [1981] 2 Lloyd's Rep 130 he said (p 132):

> "The practice of the parties submitting draft findings after the conclusion of the hearing was one of the most pernicious features. These findings often related to matters which the arbitrators did not consider relevant since otherwise the arbitrators could have been left to find the facts unassisted. In consequence there was a tendency for arbitrators to regard them as of secondary importance and perhaps sometimes to accept them too readily. The purpose for which the findings were used subsequently would on occasion have astonished them. In fact, this was part of the object of submitting the draft findings, particularly in the case of the party whose arguments had not appeared to appeal to the arbitrators. And this process of evolving draft findings and submitting them seemed to take an inordinate amount of time during which the arbitrators' recollection of the evidence and of the arguments began to fade."

Accordingly, whilst we believe that the procedure will pay dividends, great care must be taken to see that it does not become an instrument of delay.

The referee's report need not be a formal document. What is required is a statement of the facts and the referee's conclusions. Obviously, the referee should not be required to make findings of law if he is not legally qualified. However, if legal difficulties arise, then the referee may seek assistance from the court.

In Strbak v Newton, a decision of the Court of Appeal given on 18 July 1989, Mr Justice Samuels said (speaking of the reasons for judgment of a District Court Judge):

"... It is going too far to suggest that in every case a Judge must submit the material before him or her to the most meticulous analysis and carry into judgement a detailed exposition of every aspect of the evidence and the arguments. What is necessary, it seems to me, is a basic explanation of the fundamental reasons which led the Judge to his conclusion. There is no requirement however, that the reasons must incorporate an extended intellectual dissertation upon the chain of reasoning which authorises the judgment which is given. In the present case, the reasons are certainly succinct; but that is often to be regarded as a judicial virtue. Trial Judges must always endeavour to balance their duty to explain with their duty to be brief."

In his judgment in Bremer (supra), Lord Justice Donaldson speaking of an award said (p 132):

"Yet another feature of the old special case procedure which made for delay was the form of the award. This was necessarily stylized, being divided into four parts - preamble, findings of fact, submissions of the parties and conclusions. It was not something which most arbitrators felt that they could draft without professional assistance and those who provided such assistance had other clients and commitments to consider. This produced still further delay.

It is of the greatest importance that trade arbitrators working under the 1979 Act should realize that their whole approach should now be different. At the end of the hearing they will be in a position to give a decision and the reasons for that decision. They should do so at the earliest possible moment. The parties will have made their submissions as to what actually happened and what is the result in terms of their respective rights and liabilities. All this will be fresh in the arbitrators' minds and there will be no need for further written submissions by the parties. No particular form of award is required. Certainly no one wants a formal 'Special Case'. All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a 'reasoned award'.

For example, it may be convenient to begin by explaining briefly how the arbitration came about - 'X sold to Y 200 tons of soyabean meal on the terms of GAFTA Contract 100 at US$Z per ton c.i.f. Bremen. X claimed damaged for non-delivery and we were appointed arbitrators'. The award could then briefly tell the factual story as the arbitrators saw it. Much would be common ground and would need no elaboration. But when the award comes to matters in controversy, it would be helpful if the arbitrators not only gave their view of what occurred, but also made it clear that they have considered any alternative version and have rejected it, e.g. 'The shippers claimed that they shipped 100 tons at the end of June. We are not satisfied that this is so', or as the case may be, 'We are satisfied that this was not the case'. The arbitrators should end with their conclusion as to the resulting rights and liabilities of the parties. There is nothing about this which is remotely technical, difficult or time consuming.

It is sometimes said that this involves arbitrators in delivering judgments and that this is something which requires legal skills. This is something of a half truth. Much of the art of giving a judgment lies in telling a story logically, coherently and accurately. This is something which requires skill, but it is not a legal skill and it is not necessarily advanced by legal training. It is certainly a judicial skill, but arbitrators for this purpose are Judges and will have no difficulty in acquiring it. Where a 1979 Act award differs from a judgment is in the fact that the arbitrators will not be expected to analyse the law and the authorities. It will be quite sufficient that they should explain how they reached their conclusion, e.g., 'We regarded the conduct of the buyers, as we have described it, as constituting a repudiation of their obligations under the contract and the subsequent conduct of the sellers, also as described, as amounting to an acceptance of that repudiatory conduct putting an end to the contract'. It can be left to others to argue that this is wrong in law and to a professional Judge, if leave to appeal is given, to analyse the authorities. This is not to say that where arbitrators are content to set out their reasoning on questions of law in the same way as Judges, this will be unwelcome to the Courts. Far from it. The point which I am seeking to make is that a reasoned award, in accordance with the 1979 Act, is wholly different from an award in the form of a special case. It is not technical, it is not difficult to draw and above all it

> is something which can and should be produced promptly and quickly at the conclusion of the hearing. That is the time when it is easiest to produce an award with all the issues in mind."

Although Lord Donaldson was speaking of an award, what he said has substantial application to a report by a referee. For the purposes of a report under Part 72, reasons are required by Rule 11.

In Chloride Batteries Aust Ltd v Glendale Chemical Products Pty Ltd (unreported 16 December 1988) Cole J gave careful consideration to the approach to be made by the Court to a referee's report and, in the course of his comments, threw considerable light on how a report should be prepared. He said:

> "The Court will have regard to the futility of a process of relitigating an issue determined by the referee in circumstances where parties have had an opportunity to place before the referee such matters as they desire. It will also have regard to cost. If the report shows a thorough, analytical, and scientific approach to the assessment of the subject matter of inquiry, the Court will have a disposition towards acceptance of the report, for to do otherwise would be to negate the purpose of and the facility of referring complex technical issues to independent experts for inquiry and report. This disposition may be enhanced in circumstances where the parties, as a consequence of the operation of r 8, have had the opportunity to place before the referee such evidence and technical reports as they may wish. The Court may be more hesitant in its disposition if the report is provided by the expert in the absence of the parties having been given such an opportunity. The disposition must always yield to the requirements of justice, if it becomes apparent for any reason that to adopt the report would result in an injustice or unfairness to a party."

He also quoted from an unreported judgment of Marks J of the Supreme Court of Victoria, where that Judge said:

> "In my opinion, the Court takes care, when it is in the position it now is, to ensure that its processes have been safely entrusted to a tribunal not necessarily tutored in the law. But it is wrong to think that the interests of justice can only be met in the curial environment. In the present case, the curial system could not match the investigation which a highly qualified scientific mind of independent spirit was able to apply in the field to the resolution of what was wrong, if anything, with the computer.
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> The exercise involved highly technical matters and interpretation of technical written material.
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> The plaintiff had the opportunity and took advantage of it, to put before the special referee all the matters put to me. It would be mischievous and, indeed, wrong to allow, certainly at the great expense which inevitably would be involved, the parties to put at nil so much of the exploration already done. Even if I was persuaded, which I am not, that this Court might well reach a different conclusion in some respects from that of the special referee, it would not be proper to allow territory to be re-explored by qualifying adoption of the reports."

There seems to me to be one almost universally true proposition: a judgment, or statement of reasons for judgment or Award, or report, is likely to seem convincing and, therefore, unlikely to be the subject of variation, largely to the extent to which it sets out in clear language a statement of the issues posed for decision, a summary of the evidence for and against each proposition so argued, a statement of the decision and a statement of the reasons which led the decision maker to form the view reached. There are, of course, a

variety of points along the way at which error may creep in, but the point is that, a judgment, or statement of reasons, which clearly identifies issues, records the evidence and the arguments in relation to each such issue and then gives a reasoned decision on that point, is one which is likely to seem to the reader to avoid error. It is a technique for writing reports which is to be commended.