Part 72 of the Supreme Court Rules - Rejection of Referee's Report

Hughes Bros Pty Limited v The Minister for Public Works ,
unreported, Supreme Court of New South Wales, Rolfe J, No 55011 of 1991, 17 August 1994; 31 August 1994.

17 August 1994 Judgment

Introduction

A dispute had arisen between the parties out of a contract to construct government office buildings at Wollongong. The whole of the dispute was, on 19 July 1991, referred out to a referee pursuant to Part 72 of the Supreme Court Rules. Eventually the referee produced a report, dated 3 December 1993.

The defendant submitted before Rolfe J that the report, or alternatively many paragraphs of it, should not be adopted because of the referee's failure to give reasons, or proper reasons, and, either for that reason or as an additional reason, failure to reach proper legal and factual conclusions.

The plaintiff, while supporting the adoption of the report generally, submitted that a number of paragraphs should not be adopted because in these paragraphs the referee had acted under a "patent misapprehension of the evidence" and was in error on matters of legal principle.

Principles relating to the adoption of the report

The principles governing the consideration of whether a report should be adopted were authoritatively set down in the decisions of the Court of Appeal in *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 and *Nine Network Pty Ltd v Kennedy Taylor Television Pty Ltd* (unreported, NSW Court of Appeal, 8 June 1994).

The obligation to give reasons

The referee was under an obligation to give reasons because:

(a) Part 72 rule 11 obliges the referee to give reasons;
(b) the giving of reasons is an incidence of the requirements of natural justice;
(c) the court must have a report that is capable of consideration pursuant to Part 72 rule 13; and
(d) the report, if adopted, becomes a judgment of the court, and is then susceptible of appeal in accordance with the principles in *Nine Network*.

Generally, if not invariably, it should be possible for the court to discern from the report the reasoning processes which led the referee to his or her conclusions. The court should be able to see and follow the reasoning process. The performance of that task is not fulfilled by ultimate conclusions unsupported by reasoning.

In the case of reports to the court where it is necessary for the court to decide what should be done with the report to give it legal effect, there should be, at least, sufficient reasons indicating what has led the referee to his conclusion. In the absence of reasons the court is left to speculate how the referee arrived at a decision.

Rolfe J referred to *Xuereb & Anor v Viola & Ors* (1988) 18 NSWLR 453, *Strbak v Newton* (unreported, NSW Court of Appeal, 18 July 1989), and *Thiess Watkins White Construction Limited (Receivers and Managers Appointed) (In Liquidation) v Commonwealth of Australia* (unreported, Sup Ct of NSW, Giles J, 23 April 1994) as cases where the obligation to give reasons was considered.

He concluded that the present case offered examples of a failure to provide acceptable reasons.

A further consideration of the reasons for rejecting the cross claim

Subject to a claim for liquidated damages, the court was of the opinion that no reason was given for the rejection of the cross claim. The court was left to speculate as to the view the referee took of the evidence. The fact that he heard no argument other than by way of written submission did not acquit the referee of the responsibility of giving reasons sufficient to demonstrate why he reached his conclusion.

Rolfe J held that the portion of the report that dealt with the cross claim, (subject to that part of it that dealt with the claim for liquidated damages) should be rejected.

Claim for interest

The plaintiff had made a claim for interest in accordance with the principles enunciated in *Hungerfords v Walker* (1984) 84 ALR 119. The claim was the subject of detailed submissions by the parties. The referee appeared to have overlooked the submissions and had found that interest was payable on the basis he determined because the amounts "are in fact damages". This misconceived the correct legal principles and disclosed legal error.

Rolfe J held that the portion of the report that dealt with the plaintiff's claim for interest on the *Hungerford v Walker* principle should be rejected.

Paragraph 31: the Limitation Act

The referee found that the statute of limitations did not bar matters after 19 April 1985.

The question for decision, which was put to the referee, was when the cause of action arose. This required a decision as to when the defendant was in breach of its contractual obligations.

The referee had failed to disclose any reasoning process which lead to the conclusion that the "statute of limitations" was inapplicable and he had not identified when he found that the causes of action arose.

The referee had failed to state the reasoning process that led him to the conclusion that the Limitation Act was not applicable, and, for that reason, Rolfe J declined to adopt paragraph 31 of the report.

Paragraph 34: notification of claims: clause 48

The defendant had submitted that as claims were not brought within the 28 day time limit required by clause 48 of the contract (NPWC3) they were barred in accordance with the decision in *Jennings Construction Limited v QH & M Birt Pty Limited* (1986) 8 NSWLR 18. The question arose whether clause 48 had application in respect of claims for monetary compensation for delay consequent upon an extension of time claim pursuant to clause 35.4, or for damages over and above the amounts payable for variations, or for interest claims.

Clause 35.4 claims

In accordance with the decision of Giles J in the *Thiess Watkins* case Rolfe J held that off-site overheads and loss of profits were not recoverable under clause 35.4. Therefore, the right to recover off-site overheads fell within the residual provision of clause 48. The failure to observe clause 48 would mean that the claims were barred.

The claims for delay in the present case included substantial sums for off-site overheads and loss of profits. The defendant asserted that the claims were barred by the operation of clause 48. The referee had failed to make a determination on that point.

Further, the referee had allowed claims for loss of profits and off-site overheads, without stating any reasons establishing that they had been proved.

Variation claims

The referee gave no consideration to the submission that costs attributable to variations should not include off-site overheads and loss of profits, a submission which Rolfe J thought was correct.

The referee, so far as his reasons disclosed, gave no consideration to this submission, and there was no suggestion in his report that clause 48 did not apply either by reason of an estoppel, or as a question of construction, as was submitted by the plaintiff. The view for which the plaintiff contended could only be correct when the precise nature of and basis for each claim was articulated, which the referee had failed to do.

Accordingly, the referee rejected paragraph 34 of the report.

Paragraph 36: category 1.1: The programmes

To determine the issue of the cause of delay to the works the referee had considered construction programmes.

He found that the plaintiff's programmes were fair estimates of projected progress from status dates, and showed the anticipated critical paths from status date to practical completion.

The referee applied times based on those programmes, rather than considering what had actually occurred or at least comparing what had actually occurred with the construction programme.

Rolfe J referred to the difficulty faced by a person in the position of the referee in seeking to calculate time or delays by reference to what was planned, from time to time, rather than by reference to what happened, or rather than by what happened compared to the projections as to what was anticipated to happen. The referee was in a position of determining what happened. That is the way the defendant's programming expert looked at the matter, but the referee found his evidence to be "irrelevant".

The judge declined to adopt paragraph 36 category 1.1 because he could not be satisfied as to the process of reasoning that led to the referee's conclusion in that paragraph. In particular the judge was hesitant to adopt the finding of the referee which involved treating as irrelevant the evidence of one expert. It might have been that the referee was merely choosing one set of expert evidence over another, but this was not revealed in the report, and the judge did not feel that such an inference should be drawn.

Paragraph 38: category 1.3: basement delays

The referee found that this item of delay resulted from the defendant's delay in approving documentation and costs of a variation, and thereafter delaying in relation to a sewer which traversed the site. Other delays were also experienced by the plaintiff.

He set out what he found to be an entitlement to an extension of time giving a total delay over and above the 47 days allowed of 9.5 working days making a total delay of 56.5 days, which was in addition to the 18 days granted by the defendant for industrial disputes.

The referee said that he did not accept the contention that clauses 35.4 , 48 or the statute of limitations defeated the plaintiff's claim.

He found that the plaintiff's costs were "reasonable as claimed and should be applied to the net delay".

Rolfe J said that he did not know whether the referee had made the distinction in considering clause 35.4 between loss suffered by reason of delay and extra costs suffered by reason of delay. (A distinction drawn by Giles J in the T*hiess Watkins* case). "Loss" might encompass off-site overheads and loss of profit: "extra costs" will not.

The referee had not disclosed how he arrived at figures for claimed costs arising from the delay, so that the applicable law could be determined.

Accordingly, and also because of the failure to consider defences based on the Limitation Act and clause 48, paragraph 38, and also paragraphs 40 to 43 of the report were rejected.

Paragraph 78: category 6: interest

For reasons expressed in relation to the "claim for interest" referred to above, and also because:

(a) the claim for interest under the *Hungerfords v Walker* principle was a claim comprehended by clause 48; and

(b) the referee had failed to find the dates from which interest should be calculated;

this paragraph of the report was rejected.

Paragraph 82: extensions of time

The referee awarded extensions of time and extended the date for practical completion.

It was submitted by the defendant that the referee had failed to take into consideration the effect of clause 35.4 as a result of which he had wrongly granted certain extensions of time, with a consequential effect on the date for practical completion.

The referee found that the strict time limits imposed by clause 30.5 of the contract (sic - there is no clause 30.5 - presumably the referee intended to refer to clause 35.4) should not bar or invalidate the actions of either party.

The referee had four difficulties with the referee's reasoning.

First, the referee did not identify, because he regarded it as of "no concern", when the defendant required strict compliance with the contract.

Second, the referee's finding that there was a reversion to the strict terms of the contract was inconsistent with the plaintiff's submission that there was informality as far as the strict letter of and time limits in the contract were concerned.

Third, the referee did not state why his finding that the time limits did not apply was made. The reference to what may have been a waiver or variation of the strict terms of the contract were for a limited period only, and did not support the conclusion that the time limits did not apply at all.

Fourth, the referee had made reference, which the judge did not understand, to an "inequitable action" on the part of the defendant, which seemed to have nothing to do with the point being discussed.

Accordingly, the judge proposed to reject paragraphs 82 to 84 of the report.

Conclusions

Other paragraphs of the report were also rejected, or not adopted, by Rolfe J, for a number of reasons.

The plaintiff had submitted that the court should not adopt paragraphs 50, 57, 67, 68, 75, 78 and 81.

The defendant had submitted that the court should not adopt the whole report, or alternatively paragraphs 31, 32, 34, 38 to 43, 50, 55, 75, 78, 80, and 82 to 85.

The judge said that the reason for the parties' approach was the desire, if possible, to derive a benefit from the days of hearing and the enormous expense to which they had been put. But for his desire to assist the parties he would have been minded to reject the report in totality. However he determined instead to state portions he rejected and hear further submission on how the matter should proceed.

Findings

Paragraphs 31, 32, 33, 34, 36, 38 to 43, 68, 78 and 81 to 85.were rejected.

Rolfe J declined to adopt paragraphs 50, 55, 57, 75 and 80 on which further submissions were to be heard.

The matter was stood over for further directions.

31 August 1994 Judgment

The plaintiff submitted that the matter should be remitted to the plaintiff so that he could give reasons where he had failed to do so.

The defendant submitted that proceedings should not be remitted to the referee, and instead a regime could be put in place pursuant to which the parties could identify the matters truly in issue, with the intention of having the Court decide such matters. It was submitted that some matters might have to be referred to a referee, but that a different referee should be chosen.

Rolfe J said that the shortcomings in the report gave him no confidence that, if the matter was remitted back to the referee, the referee would be able to determine the numerous matters necessitating attention.

In the absence of agreement as to how the matter should now proceed the only alternative was to reject the whole report, with the court to decide the proceedings.

Comment

The considerable resources that must have been expended by both parties in the conduct of the reference would appear to have been, at least in part, wasted.

One response to this case would be to dismiss it as an aberration, with responsibility to be borne by the referee. But the court appointed the referee, presumably in full confidence that he could perform the reference satisfactorily.

Another response may be to re-examine the system whereby construction disputes are referred out to referees for report.

Once a reference has been embarked upon, the courts are unwilling to intervene with the conduct of the reference. The rules provide that subject to the court's express direction, where the court makes an order for reference, the referee may conduct the proceedings under the reference in such manner as the referee thinks fit. (Part 72 rule 8(2)(a) of the Supreme Court Rules). Further, the effect of the decisions in *Super Pty Ltd v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549 and *Nine Network Pty Ltd v Kennedy Taylor Television Pty Ltd* (unreported, Court of Appeal, 8 June 1994) is that the courts will not lightly refuse to adopt the report of a referee.

In short, at the time the court makes the decision to refer out a dispute to a referee, the fate of the parties very much depends upon the capacity of the referee to conduct the reference in a satisfactory manner.

It is one thing to hold, as the court has, most recently in *Natoli v Walker* (unreported, New South Wales Court of Appeal, 26 May 1994), that where parties have voluntarily decided to have their disputes resolved by an arbitrator, chosen for his expertise in the industry, rather than his legal knowledge, that courts should be most reluctant to interfere with the arbitrator's award.

It is another thing where the parties have submitted their dispute to the court, and the court refers out the dispute to a referee, again selected primarily on the basis of industry expertise, rather than legal knowledge. Where such a person is appointed, it can be predicted that any

report may fall short of the standards that would have prevailed if a judge had conducted the hearing. The practice of referring complicated questions of law to non-legally qualified referees, when the only occasion for rectifying any errors is at the conclusion of an expensive reference, can be seen to carry considerable risks.

Consideration could perhaps be given to the court retaining complicated legal issues and questions of contractual construction, and only referring genuine issues of fact or technical questions to a technical referee. (Possibly, a solution might also lie with referees who combine technical and legal qualifications.)

Consideration could perhaps also be given to the court supervising the conduct of references more closely, so that the court can be assured that references are being conducted satisfactorily.

In the course of this reference, either party may have realised that something was amiss. But the system as it stands inhibits parties from invoking the intervention of the court in such circumstances. The judgment of Rolfe J indicates that the matters which the referee should have considered were put to the referee in submissions. The difficulty was that the referee did not appear to deal with the matters raised in those submissions. But the referee was expressly empowered to conduct the reference as he saw fit, and it would be very hard for one of the parties to make an application to the court on the basis of a suspicion that the referee was not fully comprehending the real issues in the case. The parties in such a situation are effectively powerless, even though the emergence of a flawed report after a protracted and expensive reference could be predicted.

Objections may well be raised to the suggestions mentioned above. Other, better, suggestions may well be made. But it is hard to accept that the system of referring disputes out to referees is not capable of improvement, and it would be a good thing if the judgment of Rolfe J stimulated an examination of the system and resulted in the implementation of improvements to the way in which construction disputes are resolved in the courts.

- Tom Davie, Barrister.