Ex Parte Proceedings

by MR JUSTICE DOWSETT, Supreme Court, Queensland

IT is fundamental to our legal system that the determination of rights by judicial or quasi-judicial bodies (including arbitrators) be carried out only after hearing all parties affected by the determination sought. Further, this right is not by any means a mere formality involving an enquiry as to whether any particular person has anything to say. It has been clearly established that the right to be heard involves at least the following:

(a) Notice of proceedings, including reasonable time to prepare;
(b) Sufficient particularity as to the case to be met to enable adequate preparation of an answer;
(c) Conduct of the proceedings at a time and place at which it is reasonably possible for parties to attend and appropriate notice thereof;
(d) An opportunity to hear or see all of the evidence and an opportunity to cross-examine witnesses;
(e) An opportunity to call evidence;
(f) An opportunity to hear all submissions made by the other side;
(g) An opportunity to make submissions;
(h) A determination of the case on the issues of fact and law raised by the parties with reasons, and not upon some other basis discovered by the Tribunal. This latter point is not so clear as the others. It is sufficient to say at this stage that while judges may occasionally decide cases on bases not argued, it is a dangerous course. It is unlikely that an arbitrator will get away with it.

These considerations are sometimes called the rules of natural justice, although they are in fact only some of those rules. They are also sometimes described as "audi alterem partem", literally "hear the other side". It is impossible unduly to stress the importance of these rules. They are at the very foundation of our system. They are closely tied to the distinction between our adversarial system of jurisprudence and the Continental inquisitorial system. They are also closely associated with that notion which is critical to the checks and balances built into our constitutions, state and federal as well as into the constitutions of the other great parliamentary democracies and also that of the United States of America — the separation of the judicial power from the executive and legislative branches. Any variation from those rules will not only probably render the proceedings void, but is a fundamental attack on our whole system of governance.

It is against this background that ex parte proceedings must be considered. In a sense, any such proceedings must breach these rules, but even brief reflection or a passing familiarity with judicial or arbitration proceedings will indicate that this cannot be so. There are two broad areas where courts at least regularly proceed ex parte. They are firstly, the situation in which one party chooses not to participate in the proceedings and secondly, the situation in which there is

such urgency surrounding a particular application that the delay necessarily associated with giving notice of the proceedings to the other side would be such as to render of no effect the relief sought.

I will deal with the latter situation first and shortly because it is of little relevance to arbitrations. In some cases, conduct is threatened which will seriously and irreversibly affect the rights of another. One example often used is the demolition of a building in which another person claims an interest, that latter person not wishing the building to be demolished. The courts have long claimed the power to prevent unlawful acts by restraining such conduct by injunction. However, sometimes there must be short term relief given to hold the situation in suspense until there can be a full court hearing. In the case of the building, it may well not be possible to give adequate or any notice of an application for such short-term or interim relief to the person initiating the demolition simply because to do so would necessitate a delay in obtaining the order, resulting in the top floors or more being gone before the order takes effect. Thus the whole action might be rendered pointless and the rights of one or other of the parties irreparably prejudiced. In such a case, the court will intervene on the application of the party seeking to stop the demolition without hearing the other party, but only upon very stringent conditions. They would be:

(i) Evidence is available to show that the applicant has a right to stop the conduct of which complaint is made;
(ii) There is evidence showing that the threatened damage to the applicant's rights should the conduct continue would outweigh the prejudice to the rights of the other party should the injunction be granted and subsequently be shown to be unjustified;
(iii) The evidence shows that it is impracticable to serve the other party in time to allow the court to intervene efficaciously, either because of the inevitable delay or because notice will prompt the respondent to act in the way threatened before the court has an opportunity to prevent him from so doing;
(iv) The order will go for only a very short time sufficient to enable there to be a more extensive hearing at which all parties will have the opportunity to be heard;
(v) The applicant will be obliged to give to the court an undertaking as to damages such that should the injunction go and subsequently be shown to have gone wrongfully causing damage to the respondent, the applicant will pay those damages;
(vi) The applicant must take the place of the respondent at the hearing and make full disclosure to the court of all matters known to him which might affect the court's view of his entitlement to relief, thus putting the contrary case to the best of his knowledge.

In a sense, this latter requirement is particularly designed to deal with the inherent breach of the rules of natural justice. The requirement for full disclosure, coupled with the short duration of the order and the undertaking as to damages minimizes the likely adverse consequences of such a procedure, even if the theoretical breach of the order remains. As I have said, this situation is not one

which is likely to concern an arbitrator. Although it may be theoretically possible for the parties by their agreement to clothe the arbitrator with such powers, it is most unlikely that they would do so effectively or that the arbitration process could ever be expeditious enough to give appropriate relief. Section 18(11)(e), (f), (g) and (h) might also involve considerations of the kind discussed above.

I turn now to consider the other situation—failure by a party to participate in the hearing.

Needless to say, the objective of any arbitration is to resolve the dispute between the parties. As with judicial proceedings, this is achieved by a combination of formal and informal procedures. Only rarely are *all* matters in dispute resolved solely by decision of the judge or arbitrator. More often, some of the issues are resolved between the parties or their legal representatives in the procedures leading up to the hearing, leaving only a number of specific points for determination. This is a most desirable course. The solutions which are agreed by the parties are more likely to be satisfactory to them both and are less likely to be the subject of appeal or reference. Experience indicates, however, that it is the existence of the proceedings which leads to the process by which the parties agree these matters. For as long as there is no clear course of action in train leading to a hearing, the incentive to resolve any issues at all is very small. Thus the very fact of being involved in judicial or arbitration proceedings will lead to the resolution of some or all of the matters in dispute, possibly even without a hearing.

I believe that this fact highlights the desirability of achieving active participation by all parties in the proceedings. Proceedings in which one party does not participate will have to go the full distance on all issues because there will be no resolution of the matters in dispute. For this reason too, we should all try very hard to avoid proceeding ex parte.

Theoretically, it should be easier to guarantee participation in an arbitration than it is in a court hearing. This is because the parties have expressly agreed to resolve their differences in this way. Of course, the arbitration clause is often taken for granted at the time of execution of the agreement without any real belief that there will be a dispute upon which it will operate. Further, a party may sometimes see a tactical advantage in trying to avoid an arbitration. Whatever the reason, it is often clear that continued participation by one party or the other is either doubtful or will be reluctant. What is to be done?

Firstly, it is critical that you start from a position of strength. There must be no doubt about the validity of the submission to arbitration. If there be any doubt, then it should be resolved at once. Assuming this is not in doubt, then it is desirable to encourage an atmosphere of confidence in the proceedings. If the parties have faith in the arbitrator and the way he is conducting the arbitration, it will be less likely that either will seek to abandon the proceedings. Further, your attempts to encourage confidence will probably provide powerful evidence to rebut any suggestion of misconduct made to justify withdrawal.

Secondly, ensure that the first hearing is held at a time and place of which adequate notice has been given to both sides. Ensure, if you are giving the notice,

that evidence of service or despatch is available should it be necessary to prove such matters at any subsequent time. When possible, make the time and place of each hearing matters of agreement between the parties rather than deciding them yourself, although you will record the terms of the agreement in an order. Insist that any party seeking an order give appropriate notice to the other side, specifying the exact nature of what is sought. I would suggest that at least a week's notice is desirable for most applications which do not involve the main hearing itself. For the main hearing, the length of notice will vary, depending upon the complexity and likely length, but a minimum of a week and a maximum of several months may give you some very broad guidance.

If the hearing is not the final hearing, it is also desirable that the opposition be provided in advance with any affidavits or statutory declarations to be used. They should usually also be given the right to cross-examine the makers of such documents, if the truth of the matters therein is in issue. At the final hearing, it is necessary that proceedings be conducted according to the pleadings. Thus any attempt to go beyond the pleadings should be prevented on objection by the other side. If the matter is beyond the pleadings, then the party must seek to amend. You must consider that matter on its merits. Should an amendment be allowed at this stage? Will the non-amending party be prejudiced? Can that prejudice be remedied by an order for costs or by an appropriate adjournment?

So far, the matters I have dealt with have been designed to assist in avoiding the need to proceed ex parte or so to set the stage that if you are forced to do so, you can justify that course. I turn now to the procedure you should follow.

By virtue of appointment as an arbitrator there is a power to proceed ex parte in appropriate cases. In any event, the power can be found in Section 19(1) of the Act. That section provides as follows:-

> "If any party to a reference who has been given reasonable notice of the heaing of such reference shall at any time neglect or refuse to attend on such hearing without having shown to the arbitrator or to a majority of the arbitrators and their umpire, if any, good and sufficient cause for such neglect or failure, it shall be lawful for the hearing of the reference to proceed ex parte and for an award thereon to be made in the same manner as if the party had attended."

The section contemplates a number of factors being shown in order to justify ex parte proceedings. They are:-

"(i) Reasonable notice of the hearing, including time and place;
(ii) Neglect or refusal to attend;
(iii) Failure to show good and sufficient cause."

As I have said before, probably the best mechanism for preliminary and subsequent hearings is to treat them all as the hearing of the reference and adjourn it from day to day. Do not adjourn any hearing until there is a time and place fixed for the next hearing. Ensure that the parties agree a method for communicating notices of applications and such matters. An address for service is vital. If there is a need to arrange a further hearing before the next day to which the hearing had been adjourned, ensure that adequate notice can be given before fixing the date.

If on any date a party does not appear and the other side asks you to proceed ex parte, they will have to satisfy you by admissible evidence that the other side has had notice. This may be proven by sworn evidence or affadivat. If service has been other than actual personal service, you should ask yourself whether the method adopted has probably conveyed to the party noticed of the time, place and nature of the proceedings. You must be so satsified before proceeding ex parte.

If service has been by post, that should be proven in a similar way—that is the contents of the notice, the fact and time of posting and why the address was chosen. Except as between solicitors, posting is probably not satisfactory unless there has been an express agreement to accept service in that way. Notice of the hearing may have been given orally at the last hearing. That should also be proven by evidence or affidavit by somebody who was there other than the arbitrator. In each case, of course, the evidence must be by somebody with personal knowledge of the facts to be proven.

There must be a failure or neglect to attend. In court this is proven by the bailiff's calling the name of the party three times outside the court room and reporting "no appearance" to the court. Some similar course should be followed in an arbitration. Also be sure that you are at the place nominated in the notice.

Finally, failure to give good and sufficient cause must be shown. Often, there will be no excuse. Sometimes you will receive a letter with a doubtful claim of illness. Other times, somebody may appear and withdraw. In each case you must decide what is good and sufficient cause.

Even after all of these things have been established, I would counsel against proceedings ex parte, although the section contemplates your so doing. Firstly, I would urge a telephone call to ascertain whether the non-attendance is accidental or deliberate. I would suggest you then proceed as outlined by Russel at pp. 263-4 of the 20th edition. This would involve:-

> "(1) Fixing another hearing date and place with the attending party;
> (2) Writing to the non-attending party informing him of your intention to proceed on the date and at the place so fixed. Include details of the orders sought and indicate that if he fails to attend, you will proceed ex parte."

This letter should be despatched in such a way that postage can be proven if necessary at a later time. I think it is better to get the attending party to send such a letter also so that he can then prove such notice without your own involvement.

Note that if after such notice you do not proceed ex parte at the adjourned hearing, but fix another date, another such notice is necessary.

As I have said, this procedure does not seem to be contemplated by s.19(1). However it has two advantages. Firstly, it is the old common law approach and so cannot be impeached for failure to follow a settled practice. Secondly, the more chances you give the offending party, the better the prospects of upholding any ex parte order. Sometimes the non-offending party will want you to proceed strictly in accordance with s.19. If he cannot be dissuaded by counsels of caution,

and if you are satisfied of the various matters prescribed by the section, you should probably do so.

The key to ex parte proceedings is to ensure that the circumstances giving rise to the power have arisen. Be careful and thorough in investigating this matter. Remember that little is gained by so proceeding if the result may be set aside. Finally, remember that no result will satisfy the parties so well as an agreement reached by themselves or a decision after a hearing of both sides of the argument.

Editors Note: References to legislation in this article refer to the Queensland Arbitration Act, 1973, No. 34 of 1973. This is *not* the "Uniform Act" which has been enacted in all States and Territories *except* Queensland but principles discussed are still relevant.

Text of an address delivered at a function arranged by The Institute's Queensland Chapter in Brisbane, 1987.

Legislation Update

SOUTH AUSTRALIA

Commercial Arbitration Act 1986,
No 1 of 1986

This legislation has been proclaimed and became operative on *9 July 1987.*

NEW SOUTH WALES

Commercial Arbitration Act 1984,
No 160

This Act became operative on *1 May, 1985* and not 25 November 1984 as indicated at p. 28 of the May 1987 issue of "The Arbitrator".