

## REJECTION OF REFEREE'S REPORT

*New South Wales Supreme Court (Construction List),  
Rolfe J  
Hughes Bros Pty Ltd v The Minister for Public Works*

In this case, His Honour Rolfe J of the New South Wales Supreme Court (Construction List) considered the circumstances in which Referee's reports either in whole or in part are to be considered so inadequate that they should be rejected.

The proceedings related to a dispute arising out of a building contract. Pursuant to Part 72 of the Supreme Court Rules, the whole of the proceedings were referred to a Special Referee who was described in the judgment as a highly qualified and experienced architect and an experienced arbitrator.

Both parties were dissatisfied with the Referee's report primarily on the ground that the Referee failed to give adequate reasons. The Referee concluded that the plaintiff was entitled to recover \$3,195,104.00 and rejected the defendant's cross claim which amounted to some \$3,578,752.00. The reasoning given by the Referee in relation to the cross claim was a statement that "that evidence...does not in my opinion convince me of any entitlement of the defendant (cross claimant) to these items".

Rolfe J adopted the Court of Appeal decision in *Super Pty Limited v SJP Formwork (Aus) Pty Limited* (1992) 29 NSWLR 549 and in considering the discretion as to whether to adopt the Referee's findings of fact in whole or in part, and in making that decision (quoting from *Super*):

"he, being satisfied that the Referee had applied his mind to the task of fact finding required of him, carefully and in a manner consistent with legal principle, would not do more than ensure that the Referee had addressed the appropriate questions, and that there was evidence capable of being accepted which if accepted, supported the findings of fact made".

The *Super* case also held that a party who is dissatisfied with a Referee's report is not entitled as of right to require a judge acting under Part 72 Rule 13 to reconsider and determine afresh all issues, whether of fact or law. A judge, in reviewing the report under that rule has a judicial discretion to exercise, in a manner that is consistent both with the object and purpose of the rules and with the wider setting in which they take their place, being the administration of justice according to law.

His Honour adopted the words of Gleeson CJ in that:

"if the Referee's report reveals some error of principle, some absence or excess of jurisdiction, or some patent misapprehension of the evidence, that would ordinarily be a reason for rejecting it,...so as would perversity or manifest unreasonableness in fact finding".

His Honour concluded that the report offered numerous examples of a failure to give reasoning and referred to the Referee's finding in relation to the cross claim as a demonstration of this. The Referee did not state

what exhibits of evidence were disclosed and whether he accepted or rejected the matters within them.

He did not state what view he took of witnesses as a result of cross examination, and did not even briefly state the issues raised by the defendant's written submission, the questions the defendant's sought to have answered or why he found in the way he did. Even though a finding in relation to reasonableness would involve, in part, the expertise of the Referee in determining what was reasonable, on competing evidence, such finding would require, "at the very least, a statement identifying the evidence which satisfied the Referee that the amount was reasonable, his acceptance of that evidence as opposed to any conflicting evidence and reasons for that acceptance".

Where there are substantial questions of law and fact as arose in the case, his Honour held that they cannot be determined by a simple statement that a particular amount was reasonable.

His Honour found that the obligation to give reasons is "undoubted". It is required by Part 72 Rule 11 and is also a requirement of natural justice. The extent of the obligation to give reasons will depend on the matter in issue. His Honour held "the court must be able to see and follow a reasoning process...the nature of what is required is that a reasoning process be disclosed, or sufficiently disclosed, to satisfy the court that the finding was one based on intellectual expertise...(which) is not supposed by conclusions unsupported by reasoning".

In the present case, His Honour held that if no process of reasoning is disclosed there can be no basis upon which the court can evaluate the Referee's report to make the decision required, but stressed that he was not going beyond the principles in *Super* by using the word "evaluate".

Because the referral was so lengthy and expensive, Justice Rolfe agreed with the parties to consider the impugned paragraphs, express his views and give the parties the opportunity to consider the further determination of the matter in light of them.

By further judgment, Rolfe J decided to reject the report in its entirety. The extent of the Referee's failure to give reasons was such as to make it appropriate to reject the report, and inappropriate to remit the report to the Referee. The shortcomings in the report were such that Justice Rolfe was not confident that the Referee would be able some 14 months later to determine the relevant matters. In the absence of any agreement by the parties as to what parts of the report should be adopted and the setting in place of procedures to conclude the proceedings, the only alternative was for the court to determine the proceedings, which would have the discretion to have regard to the report.

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