

expert update

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Judge shows referee the red card

“The Referee ought to have observed concepts of natural justice in preparing his opinion ... his report must be rejected, on the basis of the principles of procedural fairness”

Carbotech Australia Pty Ltd and Anor – v – Ian Kenneth Yates and Ors [2007] NSWSC 1304

This case concerned an allegation against Mr Yates, a former managing director of Carbotech Australia, who was alleged to have conspired with the other defendants to provide confidential information. Carbotech alleged that the confidential information – chemical formulas and recipes – allowed the defendants to produce a product in competition to that produced by Carbotech.

Carbotech sought an order that the Court adopt, pursuant to the relevant UCP rules, a confidential report prepared by the Court-appointed Referee on questions regarding the ‘similarities of and the differences between their respective products’.

Having been provided, as requested, with each party’s formulas and recipes, the Referee proceeded to prepare his report. Initially, this was delivered in draft by email, but the manner in which this was done became the subject of this hearing. This arose from the fact that the Referee emailed his draft report only to the solicitors for Carbotech, and not to solicitors for Yates and the others. This was repeated with the emailing of a further draft some days later.

The solicitors for the defendants became aware of these emails, which in turn referred to some ‘19 emails plus 4 telephone conversations over several weeks’. In opposing the adoption of the Referee’s report, they made reference to, inter alia:

- The Referee’s direct communication with the solicitors for the plaintiff, notwithstanding his knowledge that the defendants also were represented, together with his assertion that he did not know the contact details of the defendants’ solicitors
- The Referee’s sending of the first draft to solicitors for the plaintiff ‘for their comment’, whilst declining to do the same for the defendants’ solicitors

- The Referee's holding of four phone conversations with solicitors for the plaintiff, yet refusing to disclose the substance of these conversations to the defendants' solicitors
- The Referee's 'patent misapprehension of the evidence, or perversity and/or manifest unreasonableness in fact finding', for example incorrectly including a chemical compound in both recipes, failing to state which recipes and formulations were similar or different and the giving of a qualified opinion as to the similarity of the products.

It was submitted that the conduct of the Referee gave rise to a reasonable apprehension of bias, his Honour noting in his judgment that it was the conduct of the Referee, and not that of the solicitors for the plaintiff, which was at issue.

In commenting on the question of procedural fairness and apprehended bias, his Honour considered that it was:

'...the fact of the e-mails and the telephone conversations passing between the Referee and the solicitors for only one party (a fact of which the other party was at the time totally unaware), and not the content of those e-mails and the telephone conversations, which constitutes the ground for apprehended bias in the mind of an objective observer or disinterested bystander.

Similarly, the fact that the draft report was sent to only one party, with an invitation to comment thereon, and not to both parties, is relied upon by [the defendants] as a further ground for such apprehended bias. The Plaintiffs, however, point to the fact that the report in its final form was in identical terms to the draft report which had been sent by the Referee to [the solicitors for the plaintiffs]. That there was no change to the draft report does not appear to me to be relevant to this ground relied upon by the Defendants in respect to apprehended bias. The fact that an opportunity was given to the Plaintiffs to comment upon the draft report is what I consider to impugn the integrity of the procedure. It matters not whether the Plaintiffs chose to comment upon the draft report, or whether the Referee chose thereafter to make any alterations thereto. What matters is that the Referee gave to the Plaintiffs (but not to [the defendants]) an opportunity so to comment and to himself an opportunity to change the draft Report in the light of any such comments.'

This led his Honour to a finding that the Referee ought to have 'observed concepts of natural justice in preparing his opinion', and therefore that his report must be rejected, on the basis of the principles of procedural fairness referred to by Cole J in *Xuereb v Viola* (1988) 18 NSWLR 453:

'I am satisfied that the Referee, by the fact of the foregoing communications passing between himself and only one of the parties (irrespective of the content of those communications) and the opportunity which he gave to only one of the parties to comment upon the draft Report, has so compromised the integrity of the procedure, and has so contravened the concept of natural justice, by disregarding the principles of procedural fairness, that he has given rise to a perception of apprehended bias which, in the interests of natural justice, requires that the report be rejected.'

His Honour also dealt with submissions in relation to the Referee's apparent belief that a retainer existed between himself, and solicitors for the plaintiffs. The defendants' solicitors submitted that, rather than merely perceived or apprehended bias, this belief on the part of the Referee could be regarded as actual bias. His honour commented that:

'I am satisfied that the Defendants have been denied procedural fairness by the Referee on account of the foregoing communications which passed between the Referee and the solicitors for the Plaintiffs. I am satisfied that those communications constituted perceived bias on the part of the Referee. Further, I am satisfied that there is strong evidence supporting the inference of actual bias on the part of the Referee, grounded upon his e-mail of 26 May 2006. In this regard, I consider the following passages from the decision of the High Court in *Re JRL; Ex Parte CJL*, supra, to be relevant. Gibbs CJ said, at 346,

'It is a fundamental principle that a judge must not hear evidence or receive representations from one side behind the back of the other, see *Kanda v Government of Malaya* [1962] AC 322 at 337.'

I consider the foregoing passages regarding the prohibition against a judge receiving representations from one party in the absence of the other to have equal application to a referee in the context of the circumstances of the instant case.'

His Honour did not find it necessary to make a finding of actual bias, although there was evidence to support such a finding. Finally, for completeness, it was recorded that his Honour was in general agreement with the defendants' specific criticisms of the referee's report in relation to the 'fact finding' shortcomings noted above. Those matters alone were sufficient reason to find that the report should not be adopted.



Significance

Those experts taking on the role of Referee will need to have the concepts of procedural fairness and natural justice at the forefront of their mind when conducting the Reference. Clearly, this may be easier said than done as the intricacies of such processes may be somewhat alien to any expert without a solid legal grounding.

Equally, Referees would be well served to be both pro-active and transparent in setting the framework for the reference, in particular the communication protocols which are to apply and the manner in which enquiries by each of the parties are to be dealt with. For example, it may often transpire that the questions which the Referee is directed to address ultimately require modification or clarification, and the Referee should take it upon himself to seek such clarification from the Court, with the knowledge of the parties where appropriate.



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