

Experts - Court Order - Meeting of Experts To Be Held In The Absence of Legal Representation

Triden Properties Ltd v Capita Financial Group Ltd, NSW Court of Appeal, Mahoney, Priestley and Sheller JJA, (1993) 30 NSWLR 403.

The recent NSW decision of *Triden Properties Ltd v Capita Financial Group Ltd* considered whether a judge is permitted to order that a meeting of experts be held in the absence of legal representation. The Court of Appeal held that the judge is allowed to make such an order.

Capita Financial Group Ltd commenced proceedings in the Common Law Division of the Supreme Court against certain defendants in relation to the construction of premises. One of the issues in the proceedings related to the erection of the facade of the premises and certain technical issues arising from this.

Cole J isolated the technical issues in question and ordered that they be “referred out to a referee”. Cole J’s orders provided that the experts attend a meeting chaired by the referee, who would then prepare a report to the court, and that the meeting be held in the absence of legal representation. Triden Properties Ltd sought leave to appeal to the Court of Appeal against Cole J’s orders.

In *Triden Properties Ltd v Capita Financial Group Ltd*, Mahoney AP, Priestley JA and Sheller JA were required to consider the applicant’s submission that it was not within the power of Cole J to direct that the meeting of experts should be held “in the absence of legal representation” and that, if it was within his jurisdiction to make such an order, he had not used his discretion correctly.

The Court of Appeal examined the power of a Supreme Court judge to order that a matter or question be referred for inquiry and report by a referee under Pt 72 of the Supreme Court Rules. The court noted that the terms of Pt 72 construed literally are wide enough to authorise the direction given by Cole J in this instance.

However, the court felt that it was required by the applicant Triden to consider its submission that the terms of Pt 72 should be interpreted as subject to an implication that, in any such inquiry and reporting, there could be no exclusion of legal representation. In support of such an interpretation, Triden contended, firstly, that there is a well-settled principle that, in litigation and similar proceedings, legal representation may not be excluded, and, secondly, that to deny legal representation would be to exclude due process in the conduct of the inquiry.

The Court of Appeal noted that there is no principle of law that, in every case where a party may take part in a proceeding, it may as of right be represented by a lawyer. Ultimately, the parties’ rights depend on the intention of the statute or other document from which the proceedings originate and the requirements of justice in the circumstances of the case.

The judges continued that, in this case, the issue was not whether legal representation would ordinarily be permitted. Rather, it was whether it was open to the judge to

exclude lawyers from a particular part of the proceeding. They held that they could see no reason why, in issues of technicality or expertise, the court could not direct that a report be prepared by an expert and, further, there was no reason why the court could not take the view that representation by lawyers would not assist in the proper preparation of such a report. The Court of Appeal would not accept that, as a matter of principle, proceedings directed by the court cannot be directed to be held in the absence of lawyers.

The Court of Appeal was next required to consider whether, if the court had power to exclude lawyers from a particular meeting and that power was discretionary, the discretion had been used incorrectly. The applicant argued that an order excluding legal representation at the meeting of experts could result in a central issue in the proceeding being decided by a referee who was not legally qualified, upon principles not subject to legal examination before him and on facts not the subject of legally assisted cross-examination. Accordingly, such a result would be evidence that the discretion had miscarried.

In addressing this argument, the Court of Appeal examined the operation of Pt 72. It noted that the court’s power to refer a matter to a referee under Pt 72 or otherwise is a flexible power and that, when the power is used to appoint a referee, the court can scrutinise the procedure to be followed and give appropriate directions. During the course of the reference, the court may intervene to give directions and, after receiving the referee’s report, may reconsider the report or make such further use of it as is appropriate in the circumstances.

For these reasons, the Court of Appeal dismissed the application for leave to appeal.

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