

Referee's Report - Adoption

Barclay Mowlem Construction Ltd v Colvest No 27 Pty Ltd, unreported, NSW Supreme Court, O'Keefe CJ, 1 March 1994.

***Barclay Mowlem Construction Ltd v Colvest No 27 Pty Ltd* gives some insight into the factors a court will consider when exercising its discretion to adopt a referee's report - a developing area of construction law.**

O'Keefe CJ again enunciates the principles that the Supreme Court is to take into account when deciding whether or not to adopt a referee's report.

In this case, the contractor, Barclay Mowlem, sought to have a referee's report adopted. The principal, Colvest No 27 Pty Ltd, opposed its adoption on two bases. The first related to the terms of the contract and the second related to a number of findings made by the referee that were said by Colvest to be manifestly wrong and/or to show a misapprehension of the evidence.

O'Keefe CJ set out the terms of Part 72 rule 13 of the Supreme Court Rules, which deal with the court's power in relation to reports. He noted that the rule confers a judicial discretion, which must be exercised according to reason and justice, consistently and in accordance with law.

In referring to many decisions, the Chief Justice set out a number of principles applicable to the exercise of the discretion. They were:

1. Rule 13(1) confers a wide discretion.
2. However, the rules do not give a dissatisfied party an automatic right to a hearing de novo.
3. An application under Part 72 rule 13 is not an appeal.
4. One cannot closely define the manner in which the discretion is to be exercised. The nature of the complaints made about the report, the type of litigation involved and the length and complexity of the proceedings before the referee may all be relevant considerations.
5. A party who is dissatisfied with the referee's report cannot require the judge acting under Part 72 rule 13 to reconsider and determine afresh all issues, whether of fact or law, that the party wishes to contest.
6. In deciding how to exercise its discretion in relation to a referee's report, the court is bound to decide whether the referee erred in law, and to correct any errors that it finds.
7. If a referee's report reveals some error of principle, some absence or excess of jurisdiction or some patent misapprehension of the evidence, perversity or manifest unreasonableness in fact finding, that would be a reason for rejecting it.
8. It would frustrate the purpose of Part 72 to allow a reference to be treated as some kind of warm-up for the real contest.
9. Where the findings involve a choice between

conflicting evidence, the court will not reconsider questions of disputed fact, particularly where the disputed questions are in a technical area where the referee has an appropriate expertise.

10. If the report presents as a thorough, analytic and (where appropriate) scientific approach to the assessment of the subject matter of inquiry, the court will have a disposition towards accepting it. This disposition may be enhanced where the parties have had an opportunity to place before the referee such evidence and technical reports as they may wish (per Part 72 rule 8).
11. Where the court, having closely scrutinised the referee's report, is satisfied that the factual issues have been properly explored and considered, it should adopt the referee's report on findings of fact.
12. Even if the court might reach a different conclusion in some respects from that of the referee, it would not ordinarily be proper to allow territory to be re-explored in order to qualify the adoption of a referee's report.

On the facts of this case, the issue between the parties, as stated by the referee, was "whether there was a requirement to increase the areas of the building and whether this occurred before or after the date the contract was made. If the increase progressed from being an intention to a requirement after that date it constitutes a variation; if before, then it is included in the contract and there is no variation".

O'Keefe CJ noted that in resolving this issue, the referee had regard to the factual context into which the contract fitted. He looked at the probabilities, viewed objectively. He considered the conflicts in the oral evidence of the parties. He fully and carefully reasoned through the opposing arguments. He tested them and came to a conclusion.

The Chief Justice stated that in his opinion the referee's conclusion was correct. In his opinion, the report met the requirements of the applicable law and there did not appear any proper basis for the court to exercise its discretion against its adoption. Accordingly, he held that the report should be adopted.

The Chief Justice noted that Colvest asserted that a number of the findings of fact were manifestly unreasonable and/or a patent misapprehension of the evidence.

However, Colvest did not put before the court the evidence tendered before the referee.

O'Keefe CJ held that this meant that any assessment by the court of one part of the attack made on the challenged findings would, at best, have to depend on whether the particular finding challenged was manifestly unreasonable on its face. In the absence of the evidence relied upon by the referee, or some internal inconsistency, it was not possible to say that any particular finding involved a patent misapprehension of the evidence.

On examining the challenges to the findings of fact, the judge noted that each ground of challenge involved an interpretation of what the referee said or was based on a conflict between the evidence of one or more of the witnesses, where the referee had preferred one conclusion or inference to that for which Colvest contended or now contended, or involved a process of reasoning or a conclusion none of which on the face of the report appeared to be manifestly unreasonable.

The Chief Justice held that in seeking to challenge a number of findings by the referee, Colvest was effectively saying that the referee should not have found in accordance with the submissions made on behalf of Colvest. He held that such an approach did not accord with authority, and that it is not the function of the court to substitute its own view for that of the referee.

Accordingly, in his opinion, nothing said by the referee in the course of the findings was manifestly unreasonable, nor on the material before him was he persuaded that it involved a patent misapprehension of the evidence. He therefore held that the referee's report should be adopted.

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