References out of the Supreme Court to special referees

by THE HON MR JUSTICE RUSSELL BAINTON
(Judge of Supreme Court of NSW)

The procedure to which the title to this paper refers is provided for and regulated by Part 72 of the Supreme Court Rules 1970.

The present Part 72 was introduced in 1985 and amended (on 22 September 1989) presumably as a result of the criticisms of the 1985 Rules by Cole J. in *Astor Properties Pty Ltd v. L'Union des Assurance de Paris* (1989) 17 NSWLR 483. The procedure is available to all Divisions of the Supreme Court, except in respect of a question required to be tried by a jury (Rule 2(2)).

The Supreme Court is, by s.38 of the *Supreme Court Act* 1970, divided into the Court of Appeal and 11 Divisions, including the Common Law Division (s38(b)(i)) and the Commercial Division (s38(b)(ix)). The Commercial Division was established by the Supreme Court (Commercial Division) Amendment Act No. 28 of 1985. Part 14, r2(1) of the Rules assigns to that Division proceedings "(a) arising out of commercial transactions, or (b) in which there is an issue that has importance in trade or commerce".

The Construction List was established under Part 14A of the Rules of the Supreme Court at the same time as the Commercial List was established. Part 14A r2 describes the proceedings which may (by either the plaintiff or the defendant) be entered in the Construction List. It provides:

> "The following proceedings (unless they are proceedings on a claim for damages in respect of the death of, or personal injuries to, any person) may, subject to this Part, be entered in the Construction List (the 'subject list') kept in the registry –
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> (a) proceedings relating to or arising out of:
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> (i) the design, carrying out, supervision or inspection of any building or engineering work;
> (ii) the performance by any building or engineering expert of any other services with respect to any building or engineering work;
> (iii) any certificate, advice or information given or withheld with respect to any building or engineering work;
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> (b) proceedings on a claim for rectification, setting aside or cancellation of any agreement with respect to matters mentioned in paragraph (a)."

Rule 1 defines "building or engineering expert" and "building or engineering work" for the purposes of Part 14A. It provides:

"In this Part –
'building or engineering expert' includes builder, engineer, architect, designer and quantity surveyor;
'building or engineering work' includes -
(a) any intended building or engineering work;
(b) any building or engineering work in the course of construction and completion or which has been substantially or fully completed; and
(c) any associated work."

The Construction List is technically a 'list' of a particular category of proceedings assigned to the Common Law Division, but it is administered by the judges of the Commercial Division. There are presently four such judges.

For the period for which statistics are available the number of cases commenced in the Commercial List and entered into the Construction List is:

	Commercial List	Construction List
1987	*543*	
1988	*645*	
1989	*717*	
1990	*816*	
1991	*751*	
1992	*572*	*128*
1993	*455*	*103*
1994	*312*	*92*
1995	*269*	*60*
1996	*281*	*65*

The procedures made available by Part 72 of the Rules are not restricted to cases in the Commercial Division, or in the Construction List. An example of its use by another Division and of its utility generally can be found in *Bermria Pty Ltd v. Homebush Abattoirs Corp.* (1991) 22 NSWLR 600 (Powell J.) and (1991) 22 NSWLR 605 (Court of Appeal). Those proceedings were commenced on 17 December 1990 in the Equity Division. The plaintiff was lessee of the old cold stores at the Homebush Abattoirs. The Corporation threatened to cease to supply refrigerant to the cold store, then nearly fully stocked. The vacation judge was unable, through pressure of other matters in his list, to deal with the application. The vacation judge ordered a reference to Sir Laurence Street for enquiry and report on the whole of the proceedings. Sir Laurence inspected the premises (on Christmas eve) and

proceeded to hear the parties. He delivered his report (on the plaintiff's entitlement to injunctive relief) on 9 January 1991. Powell J. heard the application to adopt it on 4 February 1991 and ordered its adoption. The Court of Appeal heard the Corporation's appeal on 23, 24 April 1991 and ordered its dismissal on 3 May 1991.

When the referee presents his report an application must be made to the Court for its adoption, in whole or in part. That is usually made by the party who benefits from the referee's findings and conclusions, but it is not, unless and until it is adopted by the Court (and judgment entered in accordance with the order for its adoption) binding upon the parties.

So in what types of litigation and at what stage of such litigation does the Court refer the determination of the issues in the case or some of them to a referee? The ability to determine those questions is facilitated by the provisions of Practice Note 89. Practice Notes are issued (usually by the Chief Justice) pursuant to s.134(ii) of the *Supreme Court Act* 1970 to regulate practice or procedure of the Court, or of any Division of the Court, or in respect of any class of proceeding in the Court.

Practice Note 89 relates to proceedings in the Commercial Division, and also those entered or to be entered in the Construction List. It enables, and indeed requires, the Court to hold directions hearings designed to reveal what is really in dispute between (or, frequently, among) the parties and thus to form a view as to how it can be best (most expeditiously and economically) resolved. This form of case management usually enables the judge presiding at the directions hearing to discover what is really in dispute at an early stage and to determine whether it is a matter appropriate to be referred out to an expert familiar with the field of expertise involved in the dispute. If it is simply a dispute as to the legal principles to be applied it may be appropriate to refer the matter to a practising lawyer thus enabling it to be dealt with more expeditiously than if it must await its turn in a list that is usually filled up in the order of six months from and after the date on which a hearing date can be allocated. My personal view is that not enough use has been made of Part 72 references in cases in the Commercial Division. If the dispute involves expertise in the fields of building or engineering work those disputes can usually be resolved much more expeditiously (and therefore with less expense to the party ultimately ordered to pay the costs) by an expert who can avail himself of the powers conferred on a referee by the Usual Order for Reference. That procedure does involve the parties having to pay the referee's fees, ultimately to be borne by the loser, but I suspect that in many cases that involves less dollars than are expended by the not infrequent inexpert and useless cross-examination to which a judge must listen.

Let me turn now to what is probably of more importance to participants in this Conference. You have been appointed. What are your powers and duties and how do you go about performing your task?

First, you must acquaint yourself with the ambit of the powers conferred on you. Some of them will be set out in the order appointing you. But the Rules make provisions on this matter; the order appointing you is usually drawn up on the basis that you are or will become acquainted with those provisions. The more important of them are Pt 72, r8 and Practice Note 89.

Part 72 r8 provides:

"(1) Where the court makes an order under r2, the court may give directions with respect to the conduct of proceedings under the reference.

(2) Subject to any direction under subrule (1) –

(a) the referee may conduct the proceedings under the reference in such manner as the referee thinks fit;

(b) the referee, in conducting proceedings under the reference, is not bound by rules of evidence but may inform himself or herself in relation to any matter in such manner as the referee thinks fit.

(3) Evidence before the referee –

(i) may be given orally or in writing; and

(ii) shall, if the referee so requires, be given on oath or affirmation or by affidavit.

(4) A referee may take the examination of any person.

(5) Each party shall, within a time fixed by the referee but in any event before the conclusion of evidence on the inquiry, give to the referee and each other party a brief statement of the findings of fact and law for which the party contends.

(6) The parties shall at all times do all things which the referee requires to enable a just opinion to be reached and no party shall wilfully do or cause to be done any act to delay or prevent an opinion being reached."

Practice Note 89 to which I have earlier referred, in Annexure 2, sets out the Usual Order for Reference, which note 16(c) asserts will normally be the order made if Part 72 of the Rules is to be applied. That normal order is:

"1. Pursuant to Pt 72 r2(1) refer to [state name of referee] for enquiry and report the matter in the Schedule hereto.

2. Direct that (without affecting the powers of the Court as to costs) the parties, namely [state relevant parties], be jointly and severally liable to the referee for the fees payable to him.

3. Direct that the parties deliver to the referee forthwith a copy of this order together with a copy of Pt 72 of the Rules.

4. Direct that:

(a) subject to paras (b) and (c) hereof the provisions of Pt 72 r8 shall apply to the conduct of proceedings under the reference;

(b) the reference will commence on [date] unless otherwise ordered by the referee;

(c) the referee consider and implement such manner of conducting proceedings under the reference as will, without undue formality or delay, enable a just determination to be made including, if the referee thinks fit:

(i) the making of inquiries by telephone;

(ii) site inspection;
(iii) inspection of plant and equipment; and
(iv) communication with experts retained on behalf of the party; (sic).

(d) any evidence in chief before the referee shall, unless the referee otherwise permits, be by way of written statements signed by the maker of the statement;

(e) the referee submit the report to the Court in accordance with Pt 72 r11 addressed to the Commercial Division Deputy Registrar on or before [date].

5. The referee shall have power to permit such amendments or additions to the matter in the Schedule as the referee sees fit in order to dispose of the true issues between the parties.

6. Grant liberty to the referee or any party to seek directions with respect to any matter arising in proceedings under the reference upon application made on 24 hours' notice or such less notice as to the Court seems fit.

7. Reserve costs of the proceedings.

8. Stand the proceedings over for further directions on [date].

SCHEDULE

The whole of the proceedings; or

The following questions arising in the proceedings, namely [state the questions]."

Secondly, you should insist on being furnished with:

(a) a copy of the Court's order appointing you;

(b) a copy of all the pleadings in the matter (you can safely assume that pleadings will have closed prior to the order appointing you, unless all that is referred is some preliminary question; the order for reference out to you will make it clear which it is);

(c) a copy of any witness' statements and experts' reports that have been filed prior to your appointment (except any not relevant to a separate issue if that is all that has been referred to you);

(d) a copy of the documents, particularly the contract, on which either party intends to rely.

What follows is an outline of how I would proceed, if appointed referee. Others may have an equally valid alternative approach as to the order in which the matters I will itemise should be dealt with. What is important is that all of them are dealt with.

First you should inform both parties' solicitors what fees you propose to charge.

Next you should ascertain from the solicitor for the party on whose application you have been appointed what venue he has arranged for the hearing and whether or not he has arranged for a transcript service. If not you should make it clear that it is for him, not for you, to arrange those services.

Then you should arrange a preliminary hearing at which you should ascertain –

(a) That there is no dispute about the fees which you propose to charge. That of course is purely for your own protection. If there is not agreement you should apply to the Court to determine what your fees are to be and how, when and by whom they are to be paid (Part 72, r6(1)(a) and (b)).
(b) That you have been furnished with all statements of evidence and experts' reports on which each party proposes to rely and if not you should set a timetable for the furnishing of such material.
(c) That you have in fact been furnished with a complete copy of the relevant contract and that there is no dispute as to what documents constitute that contract (unless of course that is the question or one of the questions referred to you).

At that hearing you should be able to set a date for the commencement of the hearing of the Reference.

This rather lengthy preamble brings me to what I assume to be the primarily intended subject matter of this paper, namely what must be done to effect a proper hearing of a reference under Part 72 of the Rules of the Supreme Court and how one should go about it. This question is dealt with in r8 of Part 72 of the Rules which I have set out above.

I would think it to be rarely, if at all, that a referee would dispense with requiring evidence (which is not documentary) to be given by persons who have or may acquire a financial interest in the outcome of the dispute, otherwise than on oath or affirmation, or by affidavit. The need for the Reference is usually based on a disagreement between the parties as to what has occurred. The requirement for an oath or affirmation in some cases at least must dampen the enthusiasm of a litigant to put forward what he perceives as better for his case than the truth.

That general observation having been made, the course I propose now to take is to refer to a number of cases in which steps taken by a referee have been approved or disapproved. Collectively these cases give plain and unambiguous guidance to referees upon the conduct of the reference and the reporting upon it.

I commence with the decision of Cole J. in *Chloride Batteries Australia Ltd v. Glendale Chemical Products Pty Ltd* (1988) 17 NSWLR 60. The question in issue was whether or not sulphuric acid supplied by the defendant for use in electrical accumulators to be supplied by the plaintiff for use in power stations was of merchantable quality, and reasonably fit for the purpose for which it was to be used. That was regarded as depending primarily upon whether the damage suffered by the batteries in use was in fact caused by the sulphuric acid supplied by the defendant to the plaintiff. This question was referred to Dr Edmund Potter for enquiry and report. Dr Potter wrote a 50 page report. A question arose as to an aspect of it: Dr Potter was asked to reconsider his views in the light of what had arisen: he did and he adhered to his report. The plaintiff sought to have the report

(which included views fatal to the plaintiff's case) rejected, and to have Dr Potter attend for cross-examination on his report and to be allowed to call evidence to the contrary of Dr Potter's views. In refusing the plaintiff's application, Cole J. said (at p66-7):

> "Part 72, r13, vests in the Court wide powers to determine the use it will make of a report of an expert after inquiry. It is clear from the scope of the rule that the Court should not automatically adopt a report received. R13 requires the Court to make a determination whether it will adopt, vary or reject the report or require further consideration of it by the expert. However the requirement that consideration be given to an expert's report before its acceptance or rejection does not necessarily involve the Court conducting a re-hearing of the technical issue the subject of the report and the Court then reaching its own conclusion in relation to that technical issue. Subpara (d) makes it clear that the Court has a discretion whether it will permit further evidence in relation to the question referred for inquiry and report. The width of power and flexibility conferred upon the Court by r13, pars (a) to (d) inclusive would make it not possible in my judgment to determine in advance of a consideration of each issue referred for inquiry and report, and each report itself, what is the proper approach for a court to take in relation to a particular report of an expert. Each instance must be separately considered.
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> This does not mean that certain considerations will not be present when the Court considers each application. The Court will have regard to the futility of a process of re-litigating an issue determined by the referee in circumstances where parties have had an opportunity to place before the referee such matters as they desire. It will also have regard to cost. If the report shows a thorough, analytical, and scientific approach to the assessment of the subject matter of inquiry, the Court will have a disposition towards acceptance of the report, for to do otherwise would be to negate the purpose of and the facility of referring complex technical issues to independent experts for inquiry and report. This disposition may be enhanced in circumstances where the parties, as a consequence of the operation of r8, have had the opportunity to place before the referee such evidence and technical reports as they may wish. The Court may be more hesitant in its disposition if the report is provided by the expert in the absence of the parties having been given such an opportunity. The disposition must always yield to the requirements of justice, if it becomes apparent for any reason that to adopt the report would result in an injustice or unfairness to a party. These matters reinforce the view that each matter requires its own consideration."

In *Xuereb & Anr v. Viola & Ors* (1989) 18 NSWLR 453 at 472 the same Judge said in respect of technical questions arising in the litigation which had been referred with the consent of the parties to a named referee for enquiry and report:

> "I have reached a firm view that the report of the referee should not be adopted. It is sufficient if I indicate two bases for this view although, were it necessary, there are further reasons which support the view I have formed.
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> The first reason is that Pt 72, r11, requires that reasons for the referee's opinion be stated. There are no reasons, or certainly no sufficient reasons. The questions are simply answered. The referee did include in his report a page headed 'Summary of Opinion and Conclusion by Referee' which stated:
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> > 'Having reviewed all the material provided by the plaintiff and the second and third defendants in the form of submission, affidavits, photographs and diagrams, it is my

opinion and firm conclusion that the two most significant occurrences in this entire episode are:

1. The citing of the Viola dam too close to the boundary with Xuereb; and

2. The construction of the 'cut off trench' by Viola along its boundary with Xuereb.

I concur with the plaintiffs' submissions made to me by Mr Ian George of counsel on 11 October 1989, and attached hereto; and I reject with respect the submissions of Mr Garth Blake and Mr Paul Kerr.

It is therefore my conclusion that the responsibility for the damages sustained by Xuereb lies with Viola.'

Some of the answers to questions also refer to Mr Shirley's report. Nevertheless, the passage I have quoted, and the references to Mr Shirley's report do not disclose the reasons for the answers given.

The second reason for rejecting the referee's report is that in answer to an identical question in the sets of questions number one and two, the referee answered the questions in opposite or inconsistent ways. I instance three examples:" [Details of the examples are irrelevant]

Cole J. concluded:

"In consequence, the Court can have no satisfaction that any appropriate process of reasoning was applied in reaching the opinion contained in the answers to the questions referred. Indeed, if the questions I have quoted be relevant to determination of the issues between the parties, the Court would not know which of the conflicting answers to adopt. I accordingly reject the report."

More importantly he drew attention to the necessity for a referee to observe the principles of natural justice. He said, at p469:

"Quite apart from Pt 72, r11(c), natural justice requires that a referee give reasons for his opinion. This is not just to permit the court better to exercise its functions under Pt 72, r13. The deeper reason is that it enables the parties and the disinterested observer to know that the opinion of the referee is not arbitrary, or influenced by improper considerations but is the result of a process of logic and the application of a considered mind to factual circumstances. I adopt, with respect, the passage in the judgment of Samuels J.A. in *Strbak v. Newton* (Court of Appeal, 18 July 1989, unreported), in speaking of the requirements for reasons in the judgment of a District Court Judge, as being an appropriate statement of principle applicable to the statement of reasons required by a referee:

'... it is going too far to suggest that in every case a judge must submit the material before him or her to the most meticulous analysis and carry into judgment a detailed exposition of every aspect of the evidence and the arguments. What is necessary, it seems to me, is a basic explanation of the fundamental reasons which led the judge to his conclusion. There is no requirement, however, that the reasons must incorporate an extended intellectual dissertation upon the chain of reasoning which authorises the judgment which is given.

In the present case, the reasons are certainly succinct; but that is often to be regarded as a judicial virtue. Trial Judges must always endeavour to balance their duty to explain with their duty to be brief.'

Another aspect of natural justice is that the referee must be actually impartial, and must be perceived by a disinterested bystander to be so. Accordingly he must not hear evidence or receive representations from one side behind the back of or in the absence of the other. As Gibbs C.J. said in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 (at 346-7:

> '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. McInerney J. stated the practice as it is generally understood in the profession in *Reg v. Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 at 127 as follows:
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> > "The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined."
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> The principle, which forbids a judge to receive representations in private, is not confined to representations made by a party or the legal adviser or witness of a party. It is equally true that a judge should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views or opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case. Indeed, any interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court...'

And as Mason J. (as he then was) said (at 350):

> 'A central element in the system of justice administered by our courts is that it should be fair and this means that it must be open, impartial and even-handed. It is for this reason that one of the cardinal principles of the law is that a judge tries the case before him on the evidence and arguments presented to him in open court by the parties or their legal representatives and by reference to those matters alone, unless Parliament otherwise provides. It would be inconsistent with basic notions of fairness that a judge should take into account, or even receive, secret or private representations on behalf of a party or from a stranger with reference to a case which he has to decide. This principle immediately distinguishes the judicial branch from other branches of government, except in so far as they may be relevantly affected by the rules of natural justice. In conformity with the principle, every private communication to a judge made for the purpose of influencing his decision in a case is treated as a contempt of court because it may affect the course of justice.'

How are such principles to be reconciled with Pt 72, r8, and in particular r8(2)(b) which permits the referee to 'inform himself... in relation to any matter in such manner as the referee thinks fit'. Further, it has become common for orders made pursuant to Pt 72,

r8(1), to permit a referee 'to communicate with experts retained on behalf of the parties or any of them'. The utility of such a direction is obvious for it enables a person technically qualified who does not understand a particular technical aspect of the report of an expert retained by a party to inquire of that expert what he meant. But such an order is not to be understood as permitting a referee to have a private conversation with one expert. He may call the experts for opposing parties together to seek clarification, or he may arrange a conference telephone discussion with the experts for competing parties. Pursuant to r8(2), the referee may be permitted to carry out his own tests. But if he does so, prior to preparing his 'just opinion' he must give, in most cases, the information so derived to the competing parties to permit them to express their views upon it to him. There is nothing in Pt 72, r8, or in the usual order made by the Court pursuant to r8(1) which permits private discussions between the referee and only one party or his expert. Similarly, normally if communications are received by a referee from a party they should be provided to the other party, unless it has previously been arranged that the party providing a document to the referee will also provide it to his opponent."

In *Homebush Abattoirs Corp. v. Bermria Pty Ltd* (1991) 22 NSWLR 605 to which I have earlier referred the Court of Appeal stated that in deciding what action to take on a referee's report the Court is both entitled and bound to decide for itself whether a referee has erred in law and if so to correct any such error. What flows from that decision is that the referee should require each party's representative to put clearly to him what are the questions of law that he submits arise for decision, and what is the factual material in evidence before the referee which he submits gives rise to those questions. If that course is taken a litigant seeking to raise a question of law for the first time at the hearing of an application to adopt the report may even if successful be ordered to pay the costs necessitated by the need to correct an error of law that may not have occurred had the question been properly raised during the Reference.

Rogers C.J. Com. Div., as he then was, reviewed many of the authorities concerned with the requirement for a referee to observe the rules of natural justice in *Beveridge v Dontan Pty Ltd* (1990) 23 NSWLR 13. His Honour's reasons emphasise that a referee is *not* required to conduct his enquiry as if it were a trial by a judge. He continued, at p23:

"11. What then are the requirements of natural justice in a reference? Cole J. in Xuereb attended to that question as well. His Honour said (at 468-9):

> 'Referees, no doubt, look to the courts for elucidation upon what is meant by "natural justice". Its absence is readily recognised but its constituents are difficult to define. In essence it means fairness between the parties. If an allegation is put by one party against the other, the other should have the chance to respond. Yet the process of responding is not indeterminable. For once a party is aware of the case or argument or fact asserted against him, natural justice is usually satisfied by giving to his opponent the opportunity to respond. The response may, of course, throw up material not adverted to by the first party. It is usual, in the courts, for the first party to be given a limited right of reply to deal with any such new material, whether factual, argumentative or a matter of legal

concept. But it is not always essential that such a right be given. If issues are clearly defined, particularly if they be of a technical nature, and if each party is given a full opportunity to place before the referee that which it wishes in relation to those issues, it does not necessarily follow that there is a denial of natural justice by not permitting each then to respond to any new material advanced by the other. Particularly is that so where the referee is a person of technical competence able to understand and evaluate the material placed before him by each party.'

12. In the more enlightened climate of legal thinking today it should be accepted that there is not one exclusive method of dispute resolution that will lead to a just result. It is true that cross-examination is recognised as an integral feature of adversarial litigation in the legal cultures that have their origin in English common law. It is an undoubted fact that in ordinary court-conducted litigation today to deny to a party completely the opportunity to cross-examine a witness would be a denial of natural justice.

    It is appropriate to mention that the entitlement of the court to restrict the time allowed for cross-examination is another matter altogether. As can be seen from references to the authorities cited in the appendix, where there is no oral evidence given before an administrative tribunal, denial of the opportunity to cross-examine the author of a written submission is not treated as of course as a denial of natural justice. This must be the case where there is a reference by the court. For one thing, if the referee exercises the right conferred upon him, or her, by the usual order, for example, to make inquiries by telephone, any cross-examination would make the order inoperable. At the same time I am conscious of the fact that at times a statement in a document may change its import completely under cross-examination.

13. Ultimately, in a reference, the ultimate test will always be whether, bearing in mind the nature of the issues posed for the referee's report, the expertise of the referee engaged by the reference, the submissions made by the parties and the absence or otherwise of a request for an oral hearing and for an opportunity to cross-examine, has each party been given a fair opportunity to put his, or her, or its case and point of view?"

Rogers C.J. Com. Div. had more to say on this question in *Telecomputing PCS Pty Ltd v. Bridge Wholesale Acceptance Corporation (Aust) Pty Ltd* (1991) 24 NSWLR 513. The Reference under consideration in that case concerned complex accounting between seller and buyer of goods and the financier of the buyer. Brownie J. ordered that questions designed to determine the state of accounts between the purchaser and its financier be referred out to a senior partner of a major accounting firm. The referee reported: the financier moved for the adoption of that report. Adoption was resisted by some of the other parties. That resistance was based on seven grounds, viz:

1. That the referee failed to carry out the task entrusted to him in that he delegated the whole of the question before him to employees (of his firm).
2. That the objectors had a reasonable apprehension of bias on the part of the referee.

3. That the referee was in breach of the requirements of natural justice in that he acted in the preparation of his reports and reached conclusions adverse to the objectors on advice which he sought and information which he obtained from third parties, which the objectors were not given any opportunity to challenge or comment upon.
4. That the referee acted upon a reconciliation provided to him by one of the non-objecting parties which "dealt with a large number of transactions not the subject of the order for reference" notwithstanding that certain of the plaintiffs objected to this course.
5. That the referee failed to consider each separate payment of a particular description, but instead utilised a sampling technique.
6. That the referee erred in calculating interest from a date earlier than sought in the pleadings.
7. That certain of the referee's 'comments' under the heading 'Contention' in his report purported to deal with a legal issue which had not been referred to him.

There was in fact an eighth objection, but on a basis not relevant for present purposes.

Rogers C.J. Com. Div. said of the first of these grounds that it became a question of whether or not what the referee had delegated in the preparation of his report was "beyond permissible limits". What appears to have been done was to have all the transaction processed by some computer programme which sorted out which were and which were not in dispute. The referee personally examined each of those shown to be in dispute for the purpose of reporting. Rogers J. said "Not only do I see nothing wrong with the course that the referee adopted in that regard, but indeed it was the only way of tackling the problem of thousands of transactions..."

The second ground arose out of an asserted statement by the referee in a conversation with an officer of the buyer accusing that officer of delaying tactics (accurately I would have thought on the facts recorded). That asserted statement was claimed to reveal a prejudgment. Rogers C.J. Com. Div. dealt with this contention by saying:

> "In a perfect world, the remark complained of might have been better left unsaid. In the less than perfect world in which we live, it is not unknown for judges to get testy with litigants, or even counsel, who they consider is deliberately delaying disposal of the proceedings. Counsel and litigants generally accept some criticism of this kind from judges. As members of the community become more assertive complaints also increase. Litigants are not prepared to accept criticism of their conduct from non-judicial persons. This fact of life highlights a fundamental issue. If the courts are to continue to make use of the expertise of skilled persons, knowledgeable in matters other than the law, a realistic view needs to be taken of what is expected of them. It is unrealistic and inappropriate to expect, or require of them, the behavioural standards commonly expected of the ideal judge. All that can fairly be required of expert referees is that they approach with fairness the problems into which they were assigned to inquire and report."

Later he said:

"It is established, by judgments by each of the judges of the Commercial Division, that referees are required to afford to parties, natural justice. What natural justice may require in a given case, may vary substantially. There is no better guide, however, than the test of fairness. Fairness demands that each party be afforded a proper opportunity of putting before the referee particulars of the contentions relied upon and an opportunity to comment, not just on the information adduced by the other side, but also any information on contentious matters which may have been gathered by the referee. Further it means that a referee should not form a concluded opinion, or close his or her mind to the contentions of the parties before all the evidence is in."

The third ground of objection to the report was dealt with by saying:

"I turn to the third complaint by the plaintiffs that the referee acted upon information obtained from third parties which the plaintiffs were not given an opportunity to challenge, or comment upon. The principles which guide me are once again traversing well travelled ground. In *Pflieger v. Sparks* (1989) 6 BCL 188, Giles J. said (at 195):

> 'The basis on which the referee was proceeding must be seen against the background of Pt 72, r8 of the Rules. The referee was thereby empowered to conduct the proceedings under the reference in such manner as he thought fit, was not bound by the rules of evidence, and was able to inform himself in relation to any matter in such manner as he thought fit. It does not, of course, follow that the referee was absolved from compliance with the rules of natural justice by way of, for example, making known to one party or his expert what had been ascertained from the other party or his expert in order that there be an opportunity to deal with its substance. But it does follow that whether or not there was irregularity must be considered in the light of the agreed basis on which the reference was to proceed."

He then referred to what Cole J. had said on this subject matter in *Xuereb v. Viola* (1989) 18 NSWLR 453 at 470. After an examination of the material relied upon to found this complaint Rogers C.J. Com. Div. found it not to have been established.

[Complaints 4-7 inclusive were rejected as not made out in fact.]

The next case to which I wish to refer is *Najjar v. Haines & Ors* (1991) 25 NSWLR 224, a decision of the Court of Appeal. The facts and the conclusion are stated concisely in the headnote as follows:

"Where a referee appointed under Pt 72 of the Supreme Court Rules 1970 to report on a dispute between a builder and a government department failed to disclose that he was the director of a company which was a party to and was negotiating substantial contracts with that government department, a case of apprehended bias was made out and the report so made should be declared void."

This was because "the rules which govern judicial officers (relevantly) as to the disclosure of financial interests must also govern referees". Kirby P. described what had happened at p.229 as follows:

> "I am fully prepared to accept (as was finally conceded) that the referee had no actual bias against the appellant and was not actually influenced by the commercial involvement with the department of the company with which he was associated. However, like the other members of the Court, I have concluded, unfortunate as it may be, that the high standards observed by our system of justice are such that a reasonable observer, knowing the material facts, would share the apprehension about them voiced by the appellant. The sense of disquiet would derive from the fact that, at the very time he was conducting this protracted, hard-fought investigation towards his report, the referee's company was negotiating a large contract with the very department which was in contest with the appellant. The contract was signed soon after the referee's report was delivered. The department knew of this relationship. The appellant then did not. There was no disclosure of it to the appellant either by the referee or by the department."

In this matter an attempt was made to join the referee as a party so as to secure against him an order relating to the costs of the twenty-four hearing days lost because of the referee's failure to disclose his financial interest. The conclusion reached by the Court of Appeal was that the common law immunity from an order for costs of a proceeding which miscarries, enjoyed by judicial officers, extends to a referee appointed by the Court under Part 72 of the Rules. That is an additional reason why a referee should be at pains to reveal *any* relationship to or dealings with either party to the Reference. Usually if the relationship or dealings are unlikely to influence the referee the other party will not in fact object to his continuing to act.

I will deal briefly with the preparation of the required report. It should deal with each of the following topics (which is not to say that should not deal with anything else), not necessarily in the order in which I am now about to do so –

1. As a convenience to those who will read the report, often unacquainted with what has preceded the Reference, it is a helpful start to set out the terms of the Reference pursuant to which the report is furnished.
2. Next I would suggest the report should set out the referee's findings on each question referred. It will aid the reader's understanding (and I would suggest facilitate the referee's task) were he to set out with respect to each question referred to him – first the respective parties' contentions, then his findings of fact on each, indicating where appropriate what evidence he has accepted and what he has rejected, in each case with his reasons for so doing. Not infrequently a referee will be relying on his own expertise in technical matters. It is desirable that wherever he does so his report should state that he has. Often also he will be relying, in part if not entirely, on what he has ascertained by enquiries authorised by para 4(c) of the Usual Order for Reference (when of course that is included in the order actually made, or the order in fact made contains an equivalent provision). Whenever he does so his report should record that as a source of his findings. Prudence dictates that he should also record his reason for that reliance, whether it be that person's superior expertise

or personal experiences or whatever. May I repeat here that a referee contemplating relying on material in that category should tell both parties what he has ascertained and from what source and afford to each side an opportunity to dispute it or call contrary evidence upon it.

Whenever necessary, he should set out his findings on any questions of law arising for determination. In that part of his report the referee would be wise to record each side's submissions as to the principles of law on which his decision is required. In most cases these will relate to the proper construction of the contract out of which the dispute has arisen and to the effect on the parties' rights of his decisions on disputed questions of fact.

Finally, I remind referees that Order 72 r11 requires (unless the Court otherwise orders) that the referee deliver his report to the Court. Rule 12 requires the Court to serve it on the parties (I assume that means that the Court is to serve a copy on each party). Experience indicates that not infrequently referees give a copy of the report to each party prior to delivering the original to the Court. I can see no reason why that should not be done, if the referee thinks fit to do it.