

Arbitration - Legal Advice and Arbitrators - Practice and Procedure

Tiki Village International Ltd v Riverfield Tiki Holdings,
unreported, Queensland Supreme Court, Byrne J, 30 July 1993.

In *Tiki Village International Ltd & Riverfield Tiki Holdings* it was considered whether an arbitrator can be guilty of misconducting proceedings by acting on legal advice without giving the parties an opportunity to be heard on such advice.

The case involved a dispute over the land tax liabilities under a lease. The arbitrator was required to decide on the lessees' "fair proportion" of land tax in relation to "demised premises" (clauses 2K and 7).

Before delivering his award, the arbitrator consulted a solicitor. The applicants did not find this out until after the award was made, when their solicitors received a statement advising that the arbitrator had been charged an amount by his solicitor "for clarification ... of certain clauses in the lease agreement".

The applicants asked who the solicitor was and what the advice was about. The arbitrator identified the solicitor and said that the questions on which advice was sought involved an interpretation of "demised premises" and clauses 2K and 7 of the lease.

The arbitrator acknowledged that the advice was of assistance in formulating his decision, but gave no further information. He claimed legal professional privilege for communications with the solicitor.

Byrne J noted that an arbitrator's entitlement to consult lawyers privately may pose no problems where confidential communication is sanctioned by the arbitration agreement, an established trade usage or takes place with the consent of the parties. However, the situation is different where an arbitrator secretly obtains legal advice and the potentially influential communications are withheld from the parties.

The judge noted that the arbitrator must apply the law and is not bound to accept it as the parties or their lawyers propound it. Accordingly, an arbitrator without legal qualifications may often need a lawyer's assistance, even - perhaps especially - where the parties are legally represented.

It is one thing to acknowledge that, in general, an arbitrator is impliedly authorised to seek guidance on points of law. It is another to conclude that the arbitrator is entitled to rely on such advice without disclosing it to the parties.

The judge suggested that there is unlikely to be any difficulty where a commercial arbitrator who is legally qualified and familiar with the law relevant to the dispute discusses a point of law with a colleague. The appearance of fairness in the process of decision-making is not compromised by such a casual discussion.

However, there is a difference where an arbitrator who

is not legally qualified seeks legal advice from a stranger to the arbitration. There may be difficulties in that:

- the legal adviser selected by the arbitrator may have a personal or professional association with one of the parties that would make the choice inappropriate;
- there may be a miscarriage of justice if, in instructing the lawyer, the arbitrator mis-states the facts or arguments;
- where the advice is sought after lawyers have debated legal points, the losing party may suspect that the dispute has really been decided by the new lawyer; or the lawyer has raised new matters that the arbitrator has considered persuasive; or the lawyer's intervention has led to a mistake that might have been corrected had the advice been disclosed.

Byrne J said:

"The need to accord procedural fairness should incline an arbitrator to obtain legal advice only with the informed consent of the parties and usually the advice should be disclosed."

Otherwise, he said, the process of resolving the dispute is likely to be regarded as unfair.

The judge noted that in this case the arbitration was to be conducted in a manner similar to judicial proceedings. Accordingly, secret communication with an influential third party on an issue important to the decision would not appear to tend towards a fair hearing. Therefore, the procedural rules regulating this arbitration impliedly required the arbitrator to disclose his intention to obtain legal advice and, at least, the substance of the advice received.

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