CASE NOTES

CANCELLATION FEES – REFEREES/ARBITRATORS

Supreme Court of New South Wales
Cole J
29 April,1993 (unreported)

Amec Construction Pty Limited v Coal & Allied Operations Pty Limited

The matter in issue between the referee appointed pursuant to Part 72 of the Supreme Court Rules and the parties was the referee's claim to payment of a cancellation fee in respect of fifteen days hearing time which he had, at the parties request, set aside, but which were not utilised because the matter was settled.

As is usual the Court left it to the parties and the referee to agree upon fees.

Agreement was reached at the preliminary conference as to the referee's fees and costs. Cancellation fees were not included in the agreement.

His Honour stated:

> "Part 72 Rule 6 confers upon the Court a power to 'determine the amount of fees to be paid to a referee and to direct how, when and by whom the whole of part of such fees are to be payable.'
>
> The Court thus has adequate power to determine the quantum of fees in this instance. The Court also has a power to disallow excessive fees charged.
>
> The practice of the Court, however, is not to interfere in arrangements made by agreement between a referee and the parties to litigation. Any agreement freely made between those parties should be adhered to and enforced. If the parties are unable to agree upon fees with a referee, that may be a ground for revoking the reference. Alternatively, the court may appoint a referee who is prepared to conduct a reference charging fees acceptable to the parties, or alternatively acceptable to the Court. Absent any agreement regarding fees, a referee, as is an arbitrator, is entitled to be paid a reasonable fee for his services. *Commercial Arbitration: Mustill and Boyd* 2nd Ed at 233. The practice is, however, for the parties to agree with the referee on his fees in advance. The merit of this arrangement is explained in *Mustill and Boyd* at 236. It avoids a 'nasty surprise" to the parties at the end of the reference.
>
> It also indicates the wisdom of fees being agreed on an hourly or daily basis because the parties are them aware of the costs involved in conducting the reference. In commercial litigation, the parties are well able to recognise when the referee's proposed fees are reasonable in quantum."

After quoting with approval *Mustill and Boyd* at 243-244, his Honour stated:

> "... any agreement for a cancellation fee should be enforced. If there is no such agreement, in my view no fees should be charged by a referee. Nor should a Court in exercise of its power under Part 72 Rule 6 determine that, absent any agreement between the referee and the parties, fees be paid in respect of time set aside but in

> fact not spent upon a reference. That is principally because the Court should permit and require the payment of fees for work done, but not for time set aside in which no work material to the arbitration is performed. Cancellation fees should not be permitted, in my view, unless there is a clear agreement for their payment."

J.A. MORRISEY

ARBITRATION – duty of arbitrator to find facts necessary in law to support conclusion.

DAMAGES – multiple causes, party liable for one cause liable for all damages.

New South Wales Court of Appeal, Unreported
Kirby P: Clarke J A : Sheller J A - 24 November 1993

Friend & Brooker Pty Limited - v - Council of the Shire of Eurobodalla

This was an appeal from a decision of Cole J refusing leave to appeal pursuant to Section 38 of the Commercial Arbitration Act 1984 (see vol 12, The Arbitrator Page 231)

The argument on appeal focussed primarily on one paragraph, F6.24, of the Award. Friend & Brooker had asserted that the breaches of contract relied upon with respect to this project ("the Narooma Project") had caused it to incur additional costs and, in addition, caused it to suffer a near complete loss of ability to continue trading with the resultant loss of profits.

The issue was complicated by another contract of Friend & brooker described in the Award as the Bridge Street Project. This was a project in which a company called Ilenance Pty. Ltd, which was owned by the principals of Friend & Brooker, entered into a contract with that company for the construction of a series of townhouses at Neutral Bay which it was intended would be sold by Ilenace Pty Limited at a profit. The Arbitrator found that the project was an overall disaster and undoubtedly cost Friend & Brooker a lot of money. In the relevant paragraph of the Award, he said:

> "F & B (Friend & Brooker) attributes this solely to the losses which were incurred on the Narooma Project and which are the subject of this arbitration. Mr Commisso, however, has concluded (Exhibit 177) that F & B (Friend & Brooker) appeared not have had the capacity to undertake the Narooma contract or any other significant contract after the Bridge Street Project. There is considerable force in the latter. Although I concluded earlier that the losses incurred on the development costs of this Project should not be included in the results of F & B (Friend & Brooker) from building and contracting operations per se, the effect of