JUDGES DOING THEIR OWN THINKING

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It not infrequently happens that when a judge has reserved her or his decision, a point occurs to the judge which appears to be of great significance, yet counsel have not addressed on the point at all. The judge is halfway through the prepared judgment and wishes to finish it and has a great temptation to merely trust in a personal knowledge of the law and deliver the judgment. However, most judges in this predicament have found that it is preferable to let counsel know what their idea is. This can be done by telephone calls to both counsel if the matter is a pure question of law, or by having the associate formally write to both counsel inviting written submissions within a set time frame, or alternatively, by relisting the matter for further argument. On at least a couple of occasions when I have done this, I have been convinced by counsel that there is nothing in the point: sometimes embarrassingly by both counsel. Apart from this procedure being a safety valve to ensure that a judge does not get carried away with his own cleverness, it sometimes leaves a bad impression in the litigants' minds that a case has been decided on a point that was not argued. The losing litigant may well feel that had the point been properly argued that litigant would not have lost the case. Whilst ringing up both counsel may offend the purist, it really does no harm to say to each counsel:

> "I am worried about *Bloggs v Smith* (giving the reference), I think it might be significant in the decision. If you have anything to say about it, please get back to me by tomorrow."

If an identical message is given to all counsel without further discussion the aims of both getting counsels' input and finishing off the judgment can both be served.

There is little written about this problem. However in *Belan v Liner Freight Services Pty Ltd* (unreported, Court of Appeal, NSW, 15 July 1994), Mahoney JA did deal with the point. He said:

> "If an appeal is decided on the basis of an issue not argued, that may be a ground for concluding that there was procedural unfairness such as requires that the order made be set aside: cf *Manufacturers' Mutual Insurance Ltd v John H Boardman Insurance Brokers Pty Ltd* (1994) 68 ALJR 385 at 386. I do not mean by this that the mere fact that a particular argument has not been canvassed or a particular basis for decision has not been explored is always a ground for setting aside the order that has been made. Those familiar with decisions in appellate courts know that cases are sometimes decided upon the basis of arguments or for reasons which, though they appear in the material before the appellate court, have not been the subject of detailed or even explicit argument. Some courts or some judges have been of the view that, for example, an argument or a case not advanced by counsel must be referred to their attention and that, if necessary, the proceeding must be relisted for

the purpose. Megarry J was, I believe, of the view that a case found by the judge's research should, if relevant, be referred to counsel for reargument, cf *In re Malpass (deceased)* [1985] Ch 42, 47; compare the views of Bridge W and Denning MR dissenting in *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 at 508, 486. This, in my experience, has not been generally the practice in this country. In each case, the court must determine whether the argument or the case in question is of significance such that to determine the proceeding by reference to it would be to defeat the 'legitimate expectation' of those concerned... It is to be emphasised that it is not every case in which a finding is made or an argument is upheld which has not been explicitly dealt with below which will involve a denial of procedural fairness. Particularly is this so in a court such as the Compensation Court. It is a busy court in which proceedings are dealt with not infrequently at the end of several disjointed hearings. Every argument or every issue relevant in the proceeding may not be explicitly canvassed by counsel. There may be arguments or issues which, though present in the minds of those concerned, are not or need not be explicitly canvassed. It does not follow that a judgment which takes account of such an argument or issue must be set aside. An appellate court must be conscious of the expectations of those who practise in such courts.

... in deciding what procedural fairness requires, one should not, I think turn one's back on reality. The court may expect of counsel diligence but not omniscience. Occasionally, a judge's detachment may enable him to see a point which the dust of the court has obscured. The law as to procedural fairness cannot - - - I think, require that whenever this occurs in the writing of a judgment the matter must be relisted for further argument. Delay and cost are relevant – they are, of course, not determinative – in deciding whether fairness requires that the point be reargued."

REPORTING CASES

From time to time a matter in which an arbitrator has been involved may be subject to an action in the Courts.

Should such a member be so involved or become aware of such cases it would be appreciated if a copy of the judgement could be obtained and forwarded to the Institute's CAO.

Arrangements will then be made for a case note to be prepared and published in "The Arbitrator".

The co-operation of members in this matter would be very much appreciated.