Dealing With Objections To Evidence

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INTRODUCTION

Evidence is the factual material on which matters in dispute between litigating or arbitrating parties are decided. Objections to evidence are assertions by one party that material proferred by another party as evidence ought not be received by the tribunal hearing the litigation or arbitration.

Arbitrators must handle objections firmly and efficiently lest they become disruptive, if not ultimately destructive, of the hearing.

How objections to evidence are dealt with by the tribunal, like most things in forensic life, depends on the circumstances. Those circumstances involve considerations whether the Tribunal is bound by the rules of evidence; whether the objection deals with an issue of form or relevance; whether the objection is taken during evidence in chief, cross-examination or re-examination; whether it deals with a written statement by a witness, or oral evidence; whether it is to an item of correspondence or some other document – and so on.

RULES OF EVIDENCE

In New South Wales, the rules of evidence now mean, mostly, the provisions of the *Evidence Act* 1995.

Justice Giles, now of the Court of Appeal, wrote a well known article "*Dispensing with the Rules of Evidence*" (1992) 7 Aus. Bar Rev. 233, 8 BCL 88, 11 "The Arbitrator" 31 (another article dealing with this area is Campbell, "*Principles of Evidence and Administrative Tribunals*" published in "Well and Truly Tried" Campbell and Waller eds, Law Book Co, 1982). In his article, Giles J dealt with the situation arising in various statutory or consensual contexts such as s.19(3) of the *Commercial Arbitration Act* 1984 which provides as follows:

> "*Unless otherwise agreed in writing by the parties to an arbitration agreement, an arbitrator or umpire in conducting proceedings under an arbitration agreement is not bound by rules of evidence but may inform himself or herself in relation to any matter as the arbitrator or umpire thinks fit.*"

Another such situation is a reference pursuant to Part 72 of the *Supreme Court Rules*, rule 8(2) of which provides:

> "*The Referee may conduct the proceedings under the reference in such a manner as the Referee thinks fit and that 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 a manner as the Referee thinks fit.*"

As is made clear in that article, despite dispensation from application of the rules of evidence, a dominant overriding obligation in the tribunal remains, and that is to afford the parties procedural fairness. Amongst the authorities cited by his Honour were *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 320 and *Pochi v Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482. In the latter case at 492-493 the following particularly relevant and helpful passage occurs:

> "*The Tribunal and the Minister are equally free to disregard formal rules of evidence in receiving material on which facts are to be found, but each must bear in mind that 'this assurance of desirable flexible procedure does not go so far as to justify orders without a basis in evidence having rational probative force', as Hughes CJ said in Consolidated Edison Co v National Labour Relations Board (1938) 305 US 297 at 229. To depart from the rules of evidence is to put aside a system which is calculated to produce a body of proof which has rational probative force, as Evatt J pointed out, though in dissenting judgment, in The King v War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228 at 256: 'Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, 'bound by any rules of evidence'. Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and*

necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer 'substantial justice'. That does not mean, of course, that the rules of evidence which have been excluded expressly by the statute creep back through a domestic procedural rule. Facts can be fairly found without demanding adherence to the rules of evidence. Diplock LJ in R v Deputy Industrial Injuries Commissioner; Ex parte Moore [1965] 103 456 at 488 said: 'These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, have some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for a person to whom Parliament has entrusted the responsibility of deciding the issue.' Lord Denning MR in TA Miller Ltd v Minister of Housing and Local Government [1968] WLR 992 at 995 said much the same: 'Tribunals are entitled to act on any material which is logically probative, even though it is not evidence in a court of law' ... The majority judgments in Bott's case show that the Tribunal is entitled to have regard to evidence which is logically probative whether it is legally admissible or not. Starke J said (50 CLR at 249-250): 'The Appeal Tribunal can obtain information in any way it thinks best, always giving a fair opportunity to any party interested to meet that information; ... it is not bound by any rules of evidence, and is authorized to act according to substantial justice and the merits of the case' ... the relevance of his Honour's judgment is to be found in the procedural flexibility which it assures to Tribunals which are statutorily freed from the rules of evidence, though required to act upon material which is logically probative ..."

In his article, Giles J, at 92, emphasised the important distinction between the stages of reception of evidence and of evaluation of evidence as follows:

"*It may be said with some confidence that where a Tribunal is not bound by the rules of evidence, it is not required to pay regard to legal admissibility – to rules excluding probative material – whether at the stage of reception of evidence or at the stage of its evaluation. At the state of reception of evidence, the criterion is whether the evidence is relevant or probative – not, of course, whether it necessarily establishes or controverts the fact or facts in issue but whether either alone or taken with other evidence it tends to do so.*"

In *ABT v Bond* at 367 Deane J said:

"*If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on preconceived prejudice or suspicion ... When the process of decision-making need not be and is not disclosed, there will be a discernible breach of such a duty if a decision of fact is unsupported by probative material. When the process of decision-making is disclosed, there will be a discernible breach of duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact. Breach of a duty to act judicially constitutes an error of law which will vitiate the decision.*"

EVIDENCE IN CHIEF

General Principle

Consistently with sections 55 and 56 of the *Evidence Act* all evidence that is relevant in a proceeding is admissible in the proceeding except to the extent that is excluded by some other provision in the *Act* and that the evidence that is relevant in the proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a (material) fact in issue of the proceedings. Objections, thus, will be either as to relevance or as to, to repeat a traditional term, "*form*". By "*form*" I think that it is normally meant, now in New South Wales, that one of the rules of exclusion in Part 3 of the *Evidence Act* is said to have been transgressed.

Written Evidence in Chief

It is becoming more common for the evidence in chief of witnesses to be proffered in narrative, written, form either as a statement or an affidavit. From the point of view of an arbitrator or referee, in the interest of expedition, it may be worthwhile making a direction that evidence be given in that form and also to the effect that before the hearing that each party should supply to the other a written note of that party's objections to the other's evidence. The direction can sometimes be taken further by adding that the parties, through their legal advisers, are to confer and endeavour to resolve those objections as much as they can before the hearing. Objections not

resolved between the parties are appropriate to be dealt with at the time the statement or affidavit is tendered at the hearing when the witness is called.

Objections to relevance are sometimes not easy to deal with, particularly in the early stages of the hearing but some guidance is to be found in the following points:

- The material facts in issue are to be determined by the pleadings and discussion of relevance should nearly always include reference to the pleadings.
- What must be guarded against is the admission of evidence which raises an issue of no direct significance or multiple issues.
- Ultimately relevance has to be adjudged by appeal to logic and general experience.
- To minimise laborious debate on relevance it is sometimes helpful for the tribunal to form a tentative view as to relevance such that, for example, you do not necessarily first ask the objector to sustain the objection but ask the party proffering the evidence something *like "How do you make this evidence relevant?"* or *"What is the purpose of this?"*
- Overall, unless material is patently irrelevant, a better guiding approach may be to admit the material or admit subject to the objection. As provided in s.57 of the *Evidence Act* there is now a concept of *"provisional relevance"* whereunder for example an arbitrator might admit evidence the relevance of which is disputed subject to further evidence being admitted at a later stage of the proceeding that will demonstrate its relevance.

Sometimes, the admissibility of evidence can be at the heart of the issue to be decided and in *Dubbo Base Hospital v Jones* [1979] 1 NSWLR 225 at 227, Moffitt P said:

> *"In rejecting the tender of certain evidence, the learned trial judge determined, wrongly, as it now appears, the very question of substance which was at issue between the parties. Ordinarily, error in rejecting evidence leads to a new trial, so as to afford an opportunity to the respondent to challenge evidence, ruled on appeal to be admissible by cross-examination, or by leading evidence in reply ... I would add, with respect, that, in a trial without a jury, the interests of finality and judicial economy usually will be best served by not deciding the question at issue upon an objection to evidence. The evidence can be admitted, so that the Court can determine the question at issue."*

Nevertheless, if material is tendered subject to objection or provisionally its ultimate evidentiary fate should be made clear before the conclusion of the hearing and in *Technilock (Aust) Pty Ltd v Mondami Pty Ltd*, SASC Full Court, 6 August 1999, [1999] SASC 320, unreported, Mullighan J warned:

> *"I merely wish to make a comment about the problem with respect to certain documentary evidence. Rulings should usually be made as to admissibility of any evidence, including documents, when objections are taken. Then the parties know where they stand in relation to proof of facts in issue. What was described to us as a standing objection to the reception of a particular type of evidence usually only creates problems. I make no criticism of the learned trial Judge as counsel seemed to be content with this procedure. However, it is very likely to create problems at the end of the case because the parties will not then be in a position to call other evidence should the rulings, or any of them, be adverse.*
>
> *Also, it is necessary at the point of tender to determine the purpose for which the evidence is admitted. It may be inadmissible for some purposes but admissible for other purposes. In the present case, apparently hearsay evidence was admitted without the purpose of the evidence being identified ..."*

Objections as to form will raise exclusionary rules such as the hearsay rule and the opinion rule and such rules are not appropriate to cover in this article.

Oral Evidence in Chief

Here the objections have to be dealt with in the course of the evidence while the witness is in the witness box. Again, objections based on relevance and form will be taken. Additionally, however, objections may be taken to the form of the questions, in other words, objections may be taken to the questions rather than the evidence.

Objections should be taken by the advocates in a timely, unequivocal and polite way e.g. *"I object to that"* or just *"Objection!"*. The nature of, and grounds for, the objection, if not obvious, should then be explored in short debate with the advocates. The objector should always be ready to state the basis of the objection.

Remember that the objecting advocate is not necessarily at ease in objecting. Counsel has the task as part of his or her advocacy in the proceeding the burden of striking a balance between keeping out damaging material and avoiding creation of an adverse impression in the tribunal by taking what might be perceived to be insignificant objections.

An important practical point to remember is that often once the objection is taken the party calling the evidence will not press the matter or alternatively seek to go about that aspect of the evidence in a different way – encourage the parties to follow such a course of action because it certainly assists the flow of evidence, and it avoids the burden of decision for the tribunal.

Objections to questions in respect of examination in chief often involve leading questions. The Dictionary in the *Evidence Act* provides:

> *"Leading question means a question asked of a witness that:*

(a) *directly or indirectly suggests a particular answer to the question; or*

(b) *assumes the existence of a fact the existence of which is in dispute in the proceeding and as to the existence of which the witness has not given evidence before the question is asked."*

Under s.37 leading questions must not be put to a witness in examination in chief (or in re-examination) unless:

"(a) the Court gives leave; or

(b) *the question relates to a matter introductory to the witness's evidence; or*

(c) *no objection is made to the question and (the) other party to the proceeding is represented by a lawyer; or*

(d) *the question relates to a matter that is not in dispute; or*

(e) *if the witness has specialised knowledge based on the witness's training study or experience – the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts being facts in respect of which evidence has been, or is intended to be, given."*

Normally, advocates are reasonably sensible about leading questions e.g. opposing Counsel might say as the evidence comes into a contentious area something like "*I ask my friend not lead on this topic*" and also, Counsel for the party taking the evidence will often voluntarily rephrase the question (but it should always be remembered that a leading question even if withdrawn and not answered may have already had the effect of prompting the witness in relation to the answer sought).

Glissan and Tilmouth, Advocacy in Practice give other types of objectionable questions (pp170-172) and I reproduce some of those:

> *"**General or Unspecific Questions***
> *(These) ... call for a long narrative response, (or) ... are asked at too general a level. Either is objectionable. General questions which call for long, narrative answers deprive the opposing party of the opportunity to object, and invite uncontrolled and potentially inadmissible or unresponsive evidence from the witness. There is a broad judicial discretion to disallow such questions ... they do not clearly direct the witness' mind to an issue and so create an unfairness to the witness.*
>
> ***Unintelligible Questions***
> *Any question is objectionable as to form if it is not expressed with clarity and in terms that call for and permit a precise answer. So any question which is on its face confusing, misleading, vague or ambiguous is objectionable on that ground. Such questions are frequently encountered where several events or conversations extending over a lengthy period of time are in issue. The aim of objection is to keep the evidence clear and avoid generality.*
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> ***Duplicitous Questions***
> *A duplicitous question asks two (or more) questions disguised as one. It is objectionable for the reason that a simple answer (yes/no) will be unclear or partially inaccurate. Any such question can be rephrased by asking two or more separate questions, each limited to a simple proposition. On occasion (but rarely) duplicity can be let go for tactical advantage.*
>
> ***Argumentative Questions***
> *A question which invites the witness not to give information but to argue with the examiner is objectionable and should always be objected to either as argumentative or as comment.*
>
> ***Erroneous Questions***
> *A question is objectionable if it contains a mis-statement or distortion of evidence or if it is an inaccurate repetition of a witness' previous evidence. Any question which contains this flaw must be objected to immediately, so that the error, mis-statement or distortion is not perpetuated in the evidence of the transcript."*

Then, there is the matter of unresponsive answers or volunteered statements by a witness and objection may be taken to these. *Glissan and Tilmouth* say of these:

> *"This is one of those rare categories where either counsel may object: that is to say, the questioner or the opponent may seek to keep out the proffered evidence. An answer which does not directly respond to a question is objectionable as unresponsive. Where the witness' answer goes beyond the question, the surplusage of the answer is objectionable as volunteered. The rules of evidence and fairness to witnesses do not require the examiner, or the cross-examiner, to accept any statement the witness cares to make in answer to a question which is asked, whether responsive to the question or not."*

Unresponsive material and volunteered material which is objectionable should be disregarded; there is authority that such comments can be struck out: *R v Shaw* (1917) 34 WN 150 at 152.

CROSS-EXAMINATION

Leading questions may be asked in cross-examination but nevertheless, as for example noted in s.41 of the *Evidence Act,* there are still improper questions. That section provides:

> *"(1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:*

(a) *misleading; or*
(b) *unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.*

(2) *Without limiting the matters that the court may take into account for the purposes of sub-section (1), it is to take into account:*
(a) *any relevant condition or characteristic of the witness, including age, personality and education; and*
(b) *any mental, intellectual or physical disability to which the witness is or appears to be subject."*

The matters of other objectionable types of question and unresponsive answers to evidence, as dealt with above, are very much applicable in cross-examination.

Relevance in cross-examination takes on a wider ambit because cross-examination as to credit or credibility is permitted. Under the *Evidence Act* it is provided that evidence relevant only to a witness's credibility is not admissible but that that rule, which is the credibility rule, does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value (s.102). In a paper which he delivered at a seminar conducted by the NSW Bar Association in 1964, Simos J (as he now is) listed '*nine common techniques of impeachment of witnesses*" (*Glass, Seminars on Evidence* at p164):

1. observation (perception);
2. memory;
3. narration;
4. bias, interest or corruption;
5. prior conviction;
6. prior bad acts (bad character);
7. prior inconsistent statements (self-contradiction);
8. specific error (contradiction);
9. reputation for veracity.

These areas are appropriate for a cross-examiner to deal with. The first three of them depend on such matters as the opportunities for, and powers of, observation of the witness, the witness's accuracy of recollection and capacity to communicate and as such, are probably not part of the credibility rule, strictly viewed. They are, however, matters which go very much to the weight of evidence.

RE-EXAMINATION

The purpose of re-examination is to remove ambiguities and uncertainties, and to supplement and explain matters arising out of cross-examination. Leading questions may not be put and the overriding restriction on re-examination is that a witness may be questioned only about matters arising out of evidence give by the witness in cross-examination and other questions may not be put to the witness unless the tribunal gives leave (*Evidence Act* s.39).

DOCUMENTS

Objections can be taken to documents which are tendered as evidentiary material on the same basis as to oral (or written) evidence by witnesses. The same rules of relevance and exclusion apply. A handy way of avoiding problems with the tender of documents is to direct the parties to prepare an agreed bundle of documents before hearing. An agreed bundle of documents is, in any event, a handy tool for the efficient conduct of a hearing. Contentious documents may be included by arrangement and their evidentiary can be argued and ruled on during the hearing.

RENEWAL OF TENDER

A properly persistent advocate may, before the conclusion of the hearing, renew the tender of evidence which has already been rejected unless the advocate is cavilling with an explicit and considered ruling. This is permissible particularly if the tender is coupled with submissions based on other developments in the hearing after the original tender. A serious tender such as this would well deserve a short statement of reasons for rejecting the renewed tender, if rejection were to be its fate; this would explain to a reviewing Court why you felt that the evidence should be kept out. Reasons for rulings as evidence generally are appropriate for only significant matters. This is another example, like revisiting at the end of the hearing material admitted subject to objection/ relevance or provisionally, of tidying up the evidentiary record.

GENERAL DISCRETION TO EXCLUDE OR LIMIT USE OF EVIDENCE

Sections 135 and 136 of the *Evidence Act* provide:

"135. The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing; or
(c) cause or result in undue waste of time.

General discretion to limit use of evidence

136. The Court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:
(a) be unfairly prejudicial to a party; or
(b) be misleading or confusing."

Section 135 was called in aid in *O'Brien v Gillespie* (1996) 41 NSWLR 549 at 557-8 to sustain the rejection of opinion evidence which went more to the ultimate issue and to advocacy in support of the party who called the expert. The judge felt that it would cause or result in an undue waste of time as envisaged in s.135.

QUESTIONS BY TRIBUNAL

Objections can of course be made to questions by arbitrators or referees who must be sufficiently disciplined such that certainly they form no adverse view of the objector or his client and that the objection is ruled upon in accordance with law. You may recall that Cole J delivered a paper to this Chapter in November 1990 "*Arbitrators and permissible Questions*" 9 The Arbitrator 198. In that paper he included various citations two of which I repeat in part to assist your appreciation of objections to questions you might ask as arbitrators or referees:

Lord Denning, *Jones v National Coal Board* [1957] 2 QB 55 at 63-4:

> "*In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question 'how's that?'. His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role ... If a judge, said Lord Greene, should himself conduct the examination of witnesses, 'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict' ... Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage around her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales – the 'nicely calculated less or more' – but the judge at the end decides which way the balance tilts, be it ever so slightly. So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties. So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appears to favour one side or the other. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost. The judge's part in all this is to harken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-turned cymbal'.*"

Kirby P in *Galea v Galea* (19990) 19 NSWLR 263 at 281:

> "*1. The test to be applied is whether the excessive judicial questioning or perjorative comments have created a real danger that the trial was unfair. If so, the judgment must be set aside ...*
>
> *2. A distinction is drawn between the limits of questioning or comments by a judge when sitting with a jury and when sitting alone in a civil trial. Although there is no relevant distinction, in principle, between the judicial obligation to ensure a fair trial whatever the constitution of the court, greater latitude in questioning and comment will be accepted where a judge is sitting alone. This is because it is conventionally inferred that a trained judicial officer, who has to find the facts himself or herself, will be more readily able to correct and allow for preliminary opinions formed before the final decision is reached ...*
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> *3. Where a complaint is made of excessive questioning or inappropriate comment, the appellate court must consider whether such interventions indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and 'into the perils of self-persuasion' ...*
>
> *4. The decision on whether the point of unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. It is important to draw a distinction between intervention which suggests that an opinion has been finally reached which could not be altered by further evidence or argument and one which is provisional, put forward to test the evidence and to invite further persuasion ...*
>
> *5. It is also relevant to consider the point at which the judicial interventions complained of occur. A vigorous interruption early in the trial or in the examination of a witness may*

be less readily excused than one at a later stage where it is designed for the legitimate object ... namely of permitting the judge to better comprehend the issues and to weigh the evidence of the witness concerned. By the same token, the judge does not know what is in counsel's brief and the strength of cross-examination may be destroyed if a judge, in a desire to get to what seems crucial, at any stage prematurely intervenes by putting questions ...

6. *The general rules for conduct of a trial and the general expression of the respective functions of judge and advocate do not change. But there is no unchanging formulation of them. Thus, ... at least in Australia, in this jurisdiction and in civil trials, it has become more common for judges to take part than was hitherto conventional. In part this change is a response to the growth of litigation and the greater pressure of court lists. In part, if reflects an increase in specialisation of the judiciary and in the legal profession. In part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the part affected then has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of proceedings for the avoidance of the injustices than can sometimes occur from undue delay or unnecessary prolongation of trials deriving in part from new and different arrangements for legal aid. The conduct of criminal trials, particularly with a jury, remains subject to different and more stringent requirements ..."*

Those comments have, however, to be balanced with due regard to the special role of arbitrators and referees. Cole J's concluding comments included these:

"*Some comments are worthwhile concerning the position of arbitrators. First, an arbitrator is in a similar position to a judge sitting without a jury. Second, the point made by Kirby P in para 6 above is of importance. Arbitrators or referees are now expected to deal with matters before them with an efficiency and concern for length of hearing, and thus costs, which did not always exist in the past. Thirdly, arbitrators are appointed because of their particular area of expertise, coupled with their assumed impartiality. Being versed in the technical matters being discussed, they have an understanding of some aspects of evidence which members of the judiciary, or the Bar may not have. That expertise is not to be wasted, nor is time to be spent travelling over ground readily understood by the arbitrator. If a technical matter arises for debate, there is nothing wrong with the arbitrator stating his understanding of the technical issue, or expressing a provisional view concerning a technical matter he is at liberty to indicate that view to the parties as a provisional view and subject to the evidence, and invite the parties to lead evidence or put submissions to him if they wished to seek to persuade him to a different view. Indeed, if an arbitrator is proposing to make a finding based upon his own technical knowledge, he ought to make known that view to the parties so as to enable the party against whom the finding is to be made to comment upon it ...*"

CONCLUSION

By handling objections well the arbitrator or referee keeps the hearing on the rails. To get away from the metaphorical, the tribunal in this way assists the advocates' orderly presentation of their cases, keeps the record of the hearing clear, and ensures that all material which may be logically probative is entered into evidence for later evaluation. ❑