The Duty to Give Reasons – A Robust Affirmation

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Last year I posted on the New Zealand High Court's decision in *Ngāti Hurungaterangi & Ors v Ngāti Wahiao* [2016] NZHC 1486. The High Court rejected the plaintiffs' claim that an arbitral award was inadequately reasoned and should be set aside. The Court described the panel's reasoning as "undeniably sparse" but held by a "fine margin" that the requirements of natural justice had been met. That decision has now been reversed by the Court of Appeal. The Court has delivered a robust affirmation of the requirement for reasons and a stinging critique of the panel's failure to discharge this obligation.

As I explained in my earlier post, the case arose from an agreement to return specified ancestral lands to Māori after 115 years in Crown ownership. Two Māori groups (hapū) had competing claims to exclusive beneficial ownership. The legislation giving effect to the agreement with the Crown provided for the dispute between hapū to be resolved by arbitration. The arbitral panel sat over 13 days and heard very extensive historical evidence. The panel delivered a relatively brief award determining that the land should be apportioned equally. The plaintiffs were given special leave to appeal to the High Court and subsequently to the Court of Appeal.

The Court of Appeal noted the legislative requirement for reasons in New Zealand's Arbitration Act (reflecting the UNCITRAL Model Law) and explained the purpose and nature of that requirement. In doing so, the Court drew on the English Court of

Appeal's decision in *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA). That decision related to the requirement for reasons in the judicial context, holding that reasons are a function of due process and therefore of justice. The New Zealand Court commented that this underlying purpose is common to both arbitral and judicial processes.

Expanding on the purpose of the requirement, the Court emphasised that reasons bring discipline and robustness to the decision-making process. A requirement to give reasons "concentrates the mind" and exposes the parties "to the disciplined thought pattern of the specialist adjudicator".

The nature and extent of the duty varies with context. The most basic requirement is that reasons "must be coherent and comply with an elementary level of logic of adequate substance to enable the parties to understand how and why [the panel reached its decision]". The reasons "must engage with the parties' competing cases and the evidence sufficiently to justify the result." Beyond this, the extent of the reasons required will be dictated by context and "must reflect the importance of the arbitral reference and the panel's conclusion".

In respect of this last point, the Court noted the significance of this particular arbitration to the parties and the fact that the arbitration was the culmination of a long and complex process. The Court drew on the decision of the Permanent Court of Arbitration on appeal from the Abyei Borders Commission. In that case, the Permanent Court had noted the significance of the issues at stake and that the degree of reasoning should be commensurate with the importance of the conclusions. Reasons "dispel any hint of arbitrariness and ensure the presence of fairness". The New Zealand Court adopted the Permanent Court's statements and held that they applied equally to the case at hand.

Having set out the requirements for a "disciplined thought pattern" and "an elementary level of logic", the Court turned to the panel's five paragraphs of reasons. The Court makes clear that these very basic requirements had not been met.

First, the award failed to set out a list of issues which would have provided an "organised framework" for the reasoning process. Instead the panel had identified "three largely uncontentious and formalistic issues". In this regard, the Court commented that recitation of the parties' cases is no substitute for identifying the

true issues.

Second, the panel had failed to address very significant parts of the evidence. Whilst an arbitral panel is “master of the facts”, this evidentiary discretion “does not absolve the panel from stating why it preferred certain evidence”.

Third, the purported findings on significant issues were “conclusory, not reasoned”. The Court held that the “inescapable” inference was that the panel “having concluded the issue was difficult and complex, simply elected to adopt a convenient compromise, one that was not the result of any reasoned or logical process.” The Court quoted Lord Bingham in describing the award as “an irrational splitting of the difference” that could not be sustained on any grounds.

What is ultimately most significant about the Court’s judgment is not its recitation of the requirement for reasons. That has all been said before. Rather, it is the Court’s clinical analysis of the award. Mere words on the page, consisting of repetition of the parties’ arguments and conclusory findings, are not enough. The parties are entitled to see evidence of the disciplined thinking – the hard work – that should form the basis for any difficult decision. Arbitrators who avoid this and take easy shortcuts risk having their awards set aside.