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A Duty to Give Reasons, But Only Just

Stephen Hunter (Shortland Chambers, New Zealand) · Tuesday, November 1st, 2016

Lawyers might sometimes wish for Solomonic justice; that parties would agree to "split the difference" or that someone would do it for them. Where, however, it appears that such an approach has been taken by an arbitral panel—in substitution for a carefully reasoned decision—the lack of engagement with their arguments is likely to leave the parties deeply dissatisfied. This is what occurred in a recent New Zealand case, leading to fresh judicial consideration of an arbitrator's duty to give reasons.

The delivery of a reasoned decision is a hallmark of the judicial process. Reasons show that the outcome is based on analysis rather than whim; they assure the losing party that its case has been considered; and they provide a basis for scrutiny by an appellate court. For the same reasons arbitrating parties typically expect reasons. The UNCITRAL Model Law and Arbitration Rules both provide that awards shall state the reasons upon which they are based (absent contrary agreement). This is reflected in many national laws and rules of arbitration.

Taken too far, however, the duty to give reasons risks undermining the certainty of the arbitral process. National courts generally endeavour to uphold arbitrators' decisions—the conclusions of a decision-maker the parties have selected—and thus avoid imposing too extensive an obligation to explain those decisions.

This tension is evident in the New Zealand High Court's recent decision in *Ng?ti Hurungaterangi & Ors v Ng?ti Wahiao* [2016] NZHC 1486. The case arose from a 2008 agreement between M?ori and the Crown (the State) to return to M?ori certain ancestral lands after 115 years in Crown ownership. Two M?ori groups (hap?) – Ng?ti Whakaue and Ng?ti Wahiao – had competing claims to exclusive beneficial ownership. The relevant legislation provided for the dispute to be resolved by arbitration.

The panel held hearings over 13 sitting days and received very extensive historical evidence. It ultimately delivered a relatively brief award determining that the land should be apportioned equally. Ng?ti Whakaue was given special leave to appeal. The main issue on appeal for the purposes of this post was whether the panel failed to make findings, supported by reasons, as to who the beneficial owners were and instead wrongly allocated beneficial ownership according to broad concepts of fairness. (As an aside for readers interested in issues of customary law, the case also deals with an interesting point as to whether errors by the panel in the identification and application of tikanga – M?ori customary law – were errors of law or fact.)

In respect of the duty to give reasons, the High Court referred to the following much-cited passage

in *Menna v HD Building Pty Ltd* (01/12/1986), a New South Wales decision:

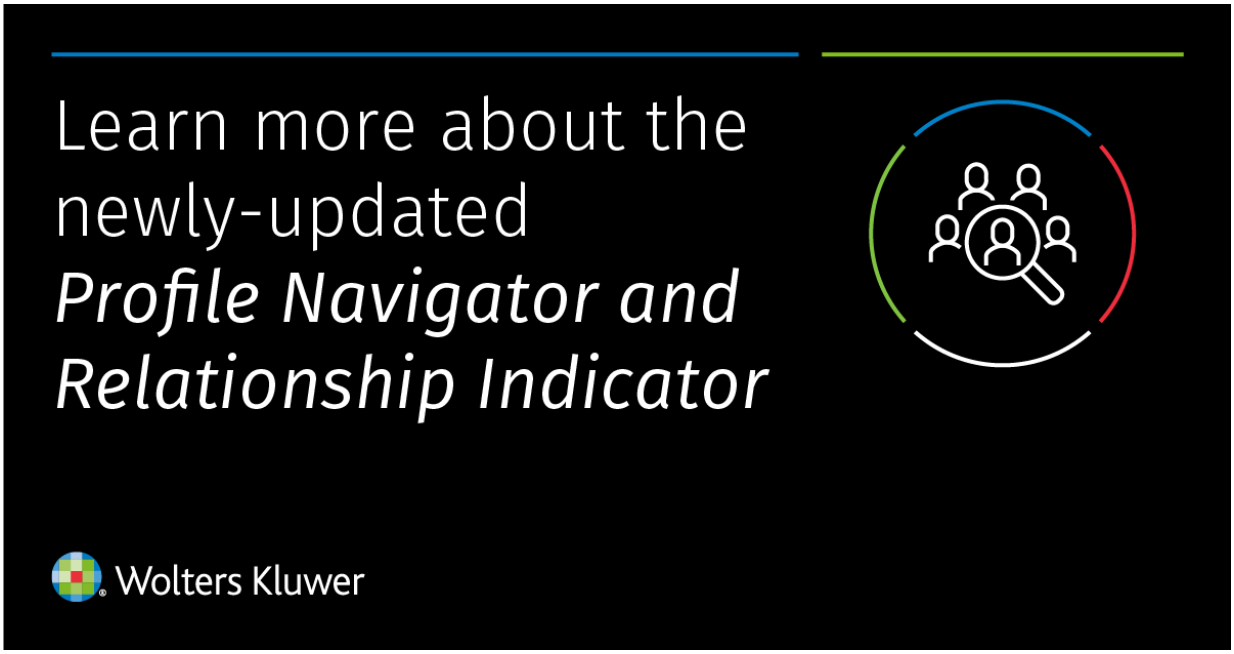
> "Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the Court should not construe his reasons in an overly critical way. However, it is necessary that the arbitrator deal with the issues raised…and make all necessary findings of fact…. The reasons must not be so economical that a party is deprived of having an issue of law dealt with by the Court."

The Court noted that the modern approach is in favour of sustaining awards where that can be done fairly. An arbitrator's reasoning should not be scrutinised critically and should be read fairly and as a whole.

The Court accepted that the panel's findings in relation to the key evidence were "undeniably sparse". Having heard extensive evidence from a range of sources, the panel's ultimate reasoning was to be found in just five paragraphs. This, the Court said, was "regrettable".

The Court nevertheless found that by a "fine margin" the panel had met its duty. It had stated findings of fact which led to its conclusion that the two groups' interests in the land were equal. The panel determined the case on the facts and not according to a broad concept of fairness. The Judge said: *"I am bolstered in this conclusion by the importance the Courts have customarily attached to the principle of arbitral finality both in New Zealand and in foreign jurisdictions."*

Courts have long recognised that the extent of the duty to give reasons is case-specific. What is noteworthy here is that even with a major arbitration, and a panel chaired by a retired Judge, the Court was unwilling to require more than very limited reasoning. Parties should not, the Court said, expect judicial intervention on procedural grounds unless *"minimum standards of competence or fairness have been breached."* The low bar reflects the policy goal of finality and is important to bear in mind before challenging an award on this basis.



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