

NCAT TWILIGHT SEMINAR

SECTION 36 OF THE CIVIL AND ADMINISTRATIVE TRIBUNAL ACT 2013 (NSW)

– THE GUIDING PRINCIPLE

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John Basten^{*}

I am very grateful to your President, Robertson Wright J, and his deputy, Nancy Hennessy, for the invitation to speak this afternoon. It is not the first time I have had the privilege of addressing tribunal members, though I do so with some trepidation; it requires a quick survey of recent appeals to see how much gratuitous offence we may have proffered.

The breadth of your jurisdiction is such that I would have struggled to say anything useful about most of the range of legal areas you cover. I am not sure that is not true of this evening's topic, but it seems to me that your *guiding principle* provides an important example of how context affects similar, if not identical, provisions in different statutes.

As you will be well aware, the guiding principle in the *Civil and Administrative Tribunal Act 2013* (NSW) ("CAT Act") requires the Tribunal to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 36(1)). As you will also be aware, s 56 of the *Civil Procedure Act 2005* (NSW) identifies "[t]he overriding purpose" of that Act and the rules of court as being, in identical terminology, "to facilitate the just, quick and cheap resolution of the real issues in the proceedings": s 56(1).

Do the words mean the same thing in each Act? Well, in a sense they undoubtedly do, but in another sense they do not. At least it is fair to say that their application will differ significantly as between a court and NCAT. It is also possible that they will vary in their application even when it is only the *Civil Procedure Act* which is being considered. Why? Because that Act applies to the Supreme Court, the Land and

^{*} Judge of Appeal, NSW Court of Appeal.

Environment Court, the Industrial Relations Commission, the District Court, the Dust Diseases Tribunal and the Local Court. One may readily understand how such a broad statement of overriding purpose may differ in its application in each jurisdiction.

There are further reasons why that may be so. For example, in s 36 of the CAT Act, the common terminology is identified as “[t]he **guiding principle** for this Act and the procedural rules”; in the *Civil Procedure Act*, the common terminology is said to convey “[t]he overriding purpose” of the *Civil Procedure Act* and the Uniform Civil Procedure Rules (“UCPR”). Both sections require that the court or the Tribunal must “seek to give effect to the overriding purpose [or guiding principle] when it exercises any power given to it by this Act or by [the rules] and when it interprets any provision of this Act or [the rules]”.

If there is any practical difference arising from the variation in the description (overriding purpose/guiding principle) I suspect it will be muted. On the other hand, it is interesting that the *Federal Court of Australia Act 1976* (Cth) adopted the terminology of the “overarching” purpose of the civil practice and procedure provisions. The word “overarching”, rather than “overriding”, was chosen deliberately to avoid what was seen as a danger that in New South Wales, the effect would be to “override” any other inconsistent purpose; your “guiding principle” may have been so expressed for a similar reason.

Differential application, resulting from a different institutional context, is of critical importance and I want to illustrate that proposition with examples drawing upon Tribunal decisions.

Reasons

The first example concerns the giving of reasons. There is an issue as to how the Tribunal goes about its tasks, both in writing reasons and in reviewing them in the Appeal Panel. I will say at the outset that I think there is a problem, but I am not sure there is a ready answer. Section 62 of the CAT Act draws a distinction between giving notice of a decision and providing a written statement of reasons for that decision. Section 62(2) does not envisage that reasons will necessarily be given when the decision is given, nor that they will automatically be provided thereafter.

The statutory obligation to provide a written statement of reasons only arises upon a party requesting the Tribunal to do so.

For a tribunal determining issues in a system which is, in a non-Constitutional sense, more judicial than administrative, that is problematic. Most cases which warrant a hearing demand a period of reflection and a reasoned decision; my experience tells me that I make better decisions if I prepare written reasons.

In *Collins v Urban*¹ the Appeal Panel held:

- “47 Section 62 establishes a regime under which the Tribunal is not under an express statutory obligation to provide reasons for a decision unless a party makes a request for reasons under s 62(2) but the Tribunal may and in many cases does prepare and give reasons for decision, whether oral or written, without a request to do so from the parties, consistently with s 62(4).
- 48 A provision such as s 62 of the Act does not, however, define exhaustively when there is a duty to give reasons or the extent of that duty.”

The first proposition is undoubtedly correct; the latter is contestable. The conclusion that the Tribunal has a general law obligation was derived from the fact that the right of appeal would be rendered nugatory if the appellate body did not have a written statement of reasons in accordance with s 62(3). In reaching that conclusion, the Appeal Panel said that it was following the decision of the earlier ADT Appeal Panel in *Sydney Supermarkets Pty Ltd v Xu*.² However, *Xu* strictly stood for the proposition that *if* the Tribunal gives reasons, it must comply with the statutory requirements. Because lengthy reasons had been given, the source of the obligation was not fully explored.

Returning to the justification of facilitating appeal rights, I accept the pragmatic force of that proposition; I also accept that there are many authorities linking the obligation of a judge to give reasons with the effectuation of rights of appeal.³ However, to derive a universal principle from that connection would be to raise more questions than can readily be answered. (For example, did judges have no obligation to give

¹ [2014] NSWCATAP 17.

² [2009] NSWADTAP 28.

³ See, eg, *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 387 (Moffitt JA, Manning JA agreeing), relied on in *Collins* at [50].

reasons before statutory rights of appeal were created?) Further, where the right of appeal is limited to errors of law, appeals are not so different from the exercise of judicial review. Nevertheless, the fact that an administrative decision may be subject to judicial review has never been considered a sufficient ground for imposing a duty on the administrative officer to give reasons.

Collins did not consider that the general law obligation to give reasons which it identified had a uniform operation. Acknowledging the operation of the guiding principle, the Appeal Panel concluded “that in uncontested residential tenancy matters involving relatively small amounts of unpaid rent or other similarly small claims... that duty may be discharged by ... written statements, circling options or ticking responses...”.⁴

There is a difficulty in implying such an uncertain general law obligation in a statutory context where Parliament has prescribed a limited obligation to give reasons. The preferable course, in my view, is not to imply a general law obligation of uncertain content, but to supplement s 62 with rules made pursuant to s 25(2). Indeed, the President’s powers to give procedural directions under s 26 may provide a sufficient basis to prescribe appropriately modulated requirements.

If s 62 does not provide a complete statement as to the legal obligations of the Tribunal, does it go so far as the general law obligation? If not, what is its purpose? If it goes further than the general law would require, why refer to the general law? Nor is there any necessary inconsistency between the value of a statement of reasons in determining an appeal and the requirement that a party which wants reasons should ask for them. If the unsuccessful party wants to appeal, or consider appealing, it can ask for reasons, if none have been provided. In dealing with a leave application from orders for which no reasons had been given, the Court of Appeal has had to consider why leave should be granted, the applicant not having sought reasons from the trial judge.

One question arising from the terms of s 62 is the scope of the term “any decision”. It could include any interlocutory decision, for example the grant or refusal of an adjournment, the agreement to accept material as evidence and any range of similar

⁴ *Collins* at [62].

determinations. It could also include administrative decisions, such as the setting of a date for hearing. Alternatively, it could be limited to what may be described as an “operative decision”, a term which is intended to cover final decisions disposing of the proceedings, but also necessary decisions in the course of proceedings, which may include the grant of leave to appeal or take some other step which is not available as of right. It would not further the “just, quick and cheap resolution of the real issues” if every administrative or interlocutory decision were required to be the subject of written reasons. Such a conclusion would place greater burdens on Tribunal members than are generally understood to exist with respect to judges of the Supreme Court.

Section 62(3) provides what a statement of reasons must include, namely:

- (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
- (b) the Tribunal’s understanding of the applicable law, and
- (c) the reasoning processes that led the Tribunal to the conclusions it made.

That, it may be said, would appear to impose an all-encompassing obligation. In fact, it is almost too discursive: by requiring that written reasons refer to the evidence on which any findings of fact are based, it ignores an important purpose of reasons, which is to explain why evidence which did *not* form the basis of a finding was rejected. My reading of the paragraphs is that they operate sequentially – thus, findings, law, application of law to findings to reach conclusions.

In 2015 in *McPherson v Mace*⁵ the Appeal Panel accepted that a failure to provide adequate reasons for a decision constituted an error of law. Significantly, the claims of legal error (not restricted to inadequate reasons) related to two items only in the claims in a building dispute, which were determined by the Tribunal; 10 out of 12 original claims had been disposed of by agreement. To remit two matters for a rehearing in those circumstances was seen as a challenge to the utility of the dispute

⁵ [2015] NSWCATAP 203.

resolution processes provided by s 37 of the CAT Act. It was also said to be inconsistent with the guiding principle.⁶

The Appeal Panel relied upon the guiding principle to reject a claim by the appellant that the Tribunal member had failed to determine the issues presented by the pleadings. The Panel noted that things had moved well beyond the pleadings by the time the remaining issues came before the Tribunal for determination.⁷ The Appeal Panel held that the critical issue for it was whether the Tribunal's reasons were adequate.⁸ The Appeal Panel upheld the challenge with respect to one item, but not the other.

Having determined that the Tribunal member erred in respect of one item, the Appeal Panel noted that it did not have the material before it which would allow it to determine the issue (assuming that course was otherwise open) and the matter had therefore to be remitted to the Tribunal. The award was varied by removing the amount of the disputed item. The Tribunal was reminded of the scope of its discretion to give directions in accordance with the guiding principle. The Appeal Panel then made further provision for submissions by the parties as to the costs of the appeal.

Without knowing how costs are assessed in the Tribunal, one might think that the combined costs of the parties would be roughly equal to the amount in dispute in that case. Reading the reasons of the Appeal Panel, one might also think that there was an excellent case for making an order that neither party obtain its costs of the appeal.

This case was interesting for another reason. One obviously has sympathy for the view that the outstanding issue could not be resolved by the Appeal Panel. Nevertheless, there was undoubtedly merit in the proposition that remittal for a further hearing was not likely to give effect to the guiding principle.

I raise this question because reference to the general law principles appears to have overwhelmed consideration of what is required by s 62(3). None of that is to cast

⁶ *McPherson* at [17].

⁷ *McPherson* at [31]-[32].

⁸ *McPherson* at [35].

doubt on the uncontestable policy of requiring coherent reasons for all decisions which affect the substantive rights and interests of the parties. The discipline of giving reasons improves the standard of decision-making.

You all know your own cases better than I do, but I associate the start of the upward curve of demand with respect to reasons with *Commissioner of Police v Barrett*,⁹ which picked up the judgment of the Court of Appeal in *Keith v Gal*, noting that “bald conclusionary statements should be eschewed.”¹⁰ *Keith* in turn quoted a statement by Ipp JA in *Goodrich Aerospace Pty Ltd v Arsic*¹¹ stating:

“It is not appropriate for a trial judge merely to set out the evidence adduced by one side, then the evidence adduced by another, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: ‘I believe Mr X but not Mr Y and judgment follows accordingly’. That is not the way in which our legal system operates.”

The reasoning then developed that theme:

"Often important issues of credibility involve sub-issues. Often, objective facts, or facts that are probable, are capable of having significant bearing on the sub-issues. In cases of this kind, it is incumbent upon trial judges to resolve the sub-issues and to explain, by reference to the relevant facts, the conclusions to which they have come. This having been done, they should then turn to the ultimate facts in issue and explain how their decisions on the sub-issues have assisted them in forming a conclusion on the ultimate issue. It is only when adequate reasons of this kind are given that an unsuccessful party will be able to understand why the judge has believed his or her successful opponent."

In *Resource Pacific Pty Ltd v Wilkinson*,¹² I expressed some concern as to what was meant by that last passage. I thought the hyperbole tended to obscure the message. I also expressed the view that there was no reason to think that Justice Ipp was intending to raise the standard of legal adequacy above that which had been articulated in earlier judgments.

The further point, which appears from the first words of *Goodrich* itself, is that Ipp JA was speaking of the obligations of a court, in that case the District Court. Even if the

⁹ [2015] NSWCATAP 68.

¹⁰ [2013] NSWCA 339 at [116], quoted in *Barrett* at [98].

¹¹ (2006) 66 NSWLR 186; [2006] NSWCA 187 at [28].

¹² [2013] NSWCA 33 at [55]-[58].

description given identifies a standard to be applied in the District Court, it does not follow that the same standard is required in the Tribunal. It is also intriguing that the example given by Justice Ipp does not fall within the scope of the obligation expressly articulated in s 62(3)(a). As appellate bodies, we can sometimes become fixated upon our appellate function; what may seem obscure to us, not having been present during the conduct of the proceedings in the tribunal below, may be quite clear to the parties. In other words, reasons which are opaque to the appellate court may be meaningful to the primary audience, namely the parties.

I note that the Tribunal¹³ has also picked up reference to the adequacy of reasons in *Zahed v IAG Ltd t/a NRMA Insurance*,¹⁴ a case dealing with the reasons given by a motor accidents compensation assessor. As Leeming JA noted in *Zahed*, the guideline pursuant to which the assessor acted required that claims and disputes be assessed “fairly and according to the substantial merits of the application with as little formality and technicality as is practicable and minimising the cost to the parties”. He stated that the obligation to set out the reasoning process was to be construed accordingly and was therefore “less than that imposed on courts”. He also accepted a suggestion of mine in *Allianz v Kerr*¹⁵ that “the nature of the Assessor’s task may mean that aspects are unsusceptible of any detailed articulation of reasons.”¹⁶ Justice Leeming described the threshold thus set as “low”. He continued:¹⁷

“Although it is undesirable for the statement of reasons to leave important matters to inference, doing so does not necessarily breach the obligation to set out the Assessor’s reasons. The question is whether the reasoning process can be discerned, reading the reasons as a whole and applying a ‘beneficial construction’ to which the High Court referred in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*.¹⁸ At least where a gap may be filled as a matter of necessary inference on a fair reading of the reasons, I would consider that the obligation to set out the reasons has been discharged.”

¹³ *Head Mod Nominees Pty Ltd v Macken* [2016] NSWCATAP 106 at [31]; *O’Brien v Twyman* [2016] NSWCATAP 125.

¹⁴ [2016] NSWCA 55; 75 MVR 1.

¹⁵ *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302; [2012] NSWCA 13 at [53]-[59].

¹⁶ *Zahed* at [4].

¹⁷ *Zahed* at [6].

¹⁸ (1996) 185 CLR 259 at 271-272; [1996] HCA 6.

The Appeal Panel further explained in *Collins v Urban* that this approach is consistent with the guiding principle.¹⁹ Indeed, the Appeal Panel expressly identified the broader point I am seeking to make, namely that the application of the guiding principle may have widely different consequences, dependent upon the nature of the case and the institutional context in which it is being applied. Thus, accepting the role of the Tribunal as an independent check on the unfettered power of landlords to terminate residential tenancies, it must also be accepted that uncontested residential tenancy cases can appropriately be resolved by giving brief, almost formalistic reasons. Indeed, the value of having a simple established format for such reasons is that necessary elements of the decision will not readily be overlooked. The countervailing risk is that the exercise becomes overly mechanical and the actual material in the particular case is not properly considered. These are tensions which will always be present.

In any event, some caution is advisable before assuming that statements made in cases in our Court necessarily operate as statements of universal legal principle. A scathing critique of a set of reasons does not necessarily reveal an intention to raise the standard required of adequate reasons. Indeed, the underlying intention may be quite the opposite: that is, to justify intervention the court may be anxious to emphasise how far short of expectations the reasons in question fell. There is no bright line standard and an appellate body should not be over-willing to find breach.

Some discussions refer to the requirement for adequate reasons forming an element of procedural fairness. There is a tendency in parts of the case law of judicial review to recharacterise any error as involving procedural unfairness. Often the purpose is to engage the unconstrainable jurisdiction of the Supreme Court to undertake judicial review for jurisdictional error. A similar underlying motive may arise in this Tribunal. That is because, while s 38 permits the Tribunal to determine its own procedures, relieves it of the rules of evidence (which only apply in a court in any event) and permits it to inquire into and inform itself on any matter in such manner as it thinks fit,

¹⁹ *Collins v Urban* at [61].

it nevertheless prescribes that the Tribunal is “subject to the rules of natural justice.”²⁰ It is to be resisted; the obligations are separate.²¹

Natural justice

The term “natural justice” is not commonly found in judgments in this century. It is often thought to be equivalent to “procedural fairness” and thus invoke the principles which have operated in this area for roughly 30 years, since the decision in *Kioa v West*.²² However, as usual, terminology found in a statute must be read in its statutory context. Section 38(2) does not self-evidently have anything to say about reasons for decision; rather, it is addressed to the pre-decision process. On the other hand, the requirement of s 38(4) that the Tribunal “act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms” may engage with any act undertaken by the Tribunal. It is largely consistent with the tenor of the guiding principle. These procedural obligations are themselves further articulated in s 38(5) and (6) and, indeed, Divs 3, 4 and 5 of Pt 4, dealing with practice and procedure.

In discussing *McPherson v Mace*, I noted that the Appeal Panel found that a failure to provide adequate reasons for a decision was characterised as an error of law and not specifically a breach of procedural fairness.

I note that the application of the guiding principle survived review in one of those difficult cases arising in the Guardianship Division, where there are disputes within the family as to the proper protective regime for an aging parent. In the course of a lengthy analysis of legal principles (not relevant for present purposes) Lindsay J rejected an appeal from the refusal of the Tribunal to allow investigation of the management of the aged mother’s finances. This was held not to involve a denial of procedural fairness.²³

²⁰ CAT Act, s 38(2).

²¹ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212; [2003] HCA 56 at [39]-[42] (Gleeson CJ, Gummow and Heydon JJ); [55] (McHugh J).

²² (1985) 159 CLR 550; [1985] HCA 81.

²³ *C v W* [2015] NSWSC 1774 at [71]-[81] and [101]-[123].

Returning to procedural issues, when I spoke about the overriding purpose in the *Civil Procedure Act*, almost two years ago, at the 10th birthday party for the Act,²⁴ I wished to emphasise that the language of “just, quick and cheap” was not to be dismissed as insubstantial because it identified conflicting purposes, nor as merely aspirational. Rather, it invited courts (and litigants and legal representatives) to re-evaluate the way they manage litigation. Courts can never know what instructions the parties give their lawyers, nor what advice the lawyers give their clients. If one party appears to be dilatory, it may be because that suits the interests of the party, or the interests of the lawyers, or, legitimately, it may be because there are real difficulties in preparing the case for trial, which have not been disclosed to the court. Nevertheless, active management can often reduce delay without necessarily uncovering its cause. For our Court, the message of the High Court in the aptly named *Expense Reduction Case*,²⁵ a case involving the inadvertent discovery and disclosure of privileged documents, made it clear that the problem should have been resolved by expeditious procedural steps, rather than three days of evidence going to the cause of the disclosure and responses of the parties once the error had been identified.

This message is, I think, less important in the Tribunal. You are, I suspect, more adept than many judges at keeping disputes moving and demanding the active involvement of the parties in dispute resolution. But I am sure you are subject to similar concerns and tensions. There is always the worry that the self-represented litigant, who, from a legal point of view, is unfocused and continually pursuing irrelevant rabbits down endless burrows, may in fact have a legitimate interest which he or she cannot properly articulate. On the other hand, we are all conscious of the fact that extended attempts to have the same person focus on identifying the real issues in dispute is, at each unsatisfactory step, running up costs for the represented respondent.

I should also address one further note of caution to my own approach. Whereas I have sought to emphasise that the operation of the guiding principle will be variable,

²⁴ Miiko Kumar and Michael Legg (eds), *Ten Years of the Civil Procedure Act 2005 (NSW) – A Decade of Insights and Guide to Future Litigation* (LawBook Co, 2015), ch 5.

²⁵ *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303; [2013] HCA 46.

depending on the circumstances of its engagement, I realise that those circumstances themselves may not be subject to ready characterisation. We are all conscious that litigation involves cost to the parties; as a rule, we would like to ensure that the costs are not disproportionate to the amount in dispute. However, this consideration does not give rise to any simple equation. Small amounts may mean more to some parties than large amounts to others. On the other hand, if the issue in dispute can be simply resolved, the fact that there is a large amount at stake does not justify expenses which are disproportionate to the cost of an appropriate resolution. One valuable purpose of a statement of the guiding principle is to ensure that we actively address these issues.

In *ALZ v Lismore City Council (No 2)*,²⁶ careful attention was given to the guiding principle in determining the steps to be taken in the Administrative and Equal Opportunity Division on directions where there was to be a further hearing, after disposal of a preliminary issue. The applicant invoked the guiding principle in opposition to further delay and cost which would be incurred were the respondent permitted to file further evidence. The decision involved a careful weighing of the respective positions; my only question is whether, if the Tribunal were concerned about the additional costs involved in permitting the respondent to file further evidence (which was done) there could have been a protective costs order, either requiring any additional costs to be paid by the respondent in any event, or depriving the respondent of any right to recover costs even if it were ultimately successful. The answer to my question will, of course, depend upon the usual orders as to costs in the Division and the way the discretion is exercised in practice.

Conclusions

There can be no doubt that the application of the guiding principle will vary according to the institution in which it operates, the subject-matter of the particular proceeding and by reference to the procedural step in question. However, it is not to be disregarded as a statement of high-level exhortation; it should have practical application on a day-to-day basis.

²⁶ [2016] NSWCATAD 250.