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Issued July 2008

Legal Bulletin

LOVEGROVE & LORD

Commercial & Construction Lawyers
ABN 35 348 332 938

Kim Lovegrove
Managing Partner
Lovegrove & Lord

Sound Decision Making

This is a paper that Kim presented as the dinner address at the Building and Development Tribunals Seminar in Queensland on the 12th of June

Sound Decision Making

The key elements of a sound decision. The decision should be:

- Clear
- Precise
- Correct at law
- Technically correct
- Where possible, just
- Ideally, appeal proof

There is sometimes a dichotomy between that which is just and that which is legally correct. All Australian decision makers/law interpreters are subject to the rule of law. It is the role of the legislator through parliament and ultimately via the voices of the people to generate the law, it is the role of the law interpreter to apply that law. But the application of the law is a far more exact science than the application of justice, for justice is somewhat of an intangible or theoretical notion, somewhat fluent, sometimes subjective. Whereas the law once it is codified is and should be "more concrete". It is to do with the connotations of the concept of good, yet that which is considered to be good lends itself to a wide range of opinion.

There have been many instances in history where laws have been unjust yet by the same token legally enforceable by virtue of the paramouncy of the rule of law. Apartheid in South Africa, the abhorrent laws in Nazi Germany, such as the anti-Semitic laws, papal laws in the middle ages where many hundreds of thousands of innocent women were burnt at the stake because of their purported allegiances to witchcraft.

All these laws were unjust laws yet pursuant to the rule of law in the particular jurisdictions there was a compelling legal basis to apply injustice in decision making because that was the nature of the legal fabric.

Fortunately, Australia is regarded as having overwhelmingly just laws so that the application of the rule of law permits us to effect justice. Hence the comment above where ideal decision making will embody the juxtaposition of both justice and the application of the rule of law.

Decision Foundations

One of the seminal deliberations on judicial thinking is "The Nature of the Judicial Process" by Benjamin N. Cardozo, LL.D. In the paper titled "The Nature of the Judicial Process, 1921", and I quote:

Before we can determine the proportions of a blend, we must know the ingredients to be blended. Our first inquiry should therefore be: Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law

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that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute.

Cardozo's insights are consistent with the paramount rule of statutory construction, i.e. the literal rule. In applying acts of parliament as a principal means of decision making one should adhere to the literal or plain meaning approach. This sentiment is unambiguously amplified when Cardozo states the judge's duty *"is to obey… the rule… supplied by the constitution or by statute*."

There is a great temptation to dwell on legislative intent or to adopt an imaginative approach to interpretation. This is fraught with danger as failure to apply a plain meaning will result in flawed decision making. Decisions can be quashed on appeal but that is a safety net at best. My Board deals with practitioner (some 22,000 of them) livelihood and public safety – a significant responsibility and trust.

I have learnt a great deal from working with a very senior Victorian QC who has appeared before the High Court in some seminal cases. He has taught me never to deviate from the literal construction of the law or to put it another way, to lend oneself to being corralled by the literal approach straightjacket.

Not every section in every act of parliament is well thought through or when interpreted literally has the intended effect.

Case and point is first hand experience. In the early '90s, I was engaged as instructing officer to Parliamentary Counsel to develop the Building Act in Victoria. The Building Act, through section 131, generated the first ever proportionate liability provisions in Victoria. The intention of the provision was to proportion liability between multiparties responsible for building defects on the basis that each party was liable for their quotient of responsibility.

We drafted the provision so that any person responsible for a defect in multiparty proceedings was defined as a defendant. We assumed that defendant meant person responsible so that a plaintiff could join any person responsible and any person responsible could by way of joinder seek apportionment from other persons responsible in the same consolidated legal proceedings. That was clearly the intention.

Alas, the court found otherwise and in the case of Boral Resources Pty Ltd v Robak Engineering Construction Pty Ltd Anor; [1999] VSCA 66 found that a defendant did not connote a person responsible, rather it gave a highly conservative legal interpretation of the word defendant. This meant that a given defendant could not join another third party responsible. This was clearly at odds with legislative intent, but when viewed within the context of the paramount literal rule, the judges applied the literal rule and got it right.

Shakespeare comes to mind. He once said that "the law is an ass", but if a law is an ass then one must still follow this "ass of a law" because it is the law. The medium for changing an ass of a law is through legislative amendment, not misinterpretation or imaginative interpretation of a provision that does not lend itself to a sensible interpretation.

Rigour

I was appointed as chairman of the Building Practitioners Board a year ago. The board has some 12 full time members and a number of co-opted members. At present we are working on decision making rigour. The objective is to have the same rigour applied to all our decisions regardless of the composition and the mix in given disciplinary panels.

I have deliberately brought in more co-opted legal members than was traditionally the case. In contested or controversial matters the non-legal members, be they architects, engineers, builders or building surveyors, have found it useful to have a legally qualified member as part of the panel. It enables them to apply their

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paramount skills, technical analysis and technical application, to the decision. Conversely, the legal members are doing what they do best, that is, the writing up of decisions.

The legal members draft the decisions then once the draft is prepared, the decision is copied to the fellow members of the board that presided over the particular decision. They then check the decision to make sure that the technical subtleties are correct. Once this has occurred, the decision is signed off by the chairperson of the particular panel.

In recent times in Victoria there has been a significant increase in the amount of legal advocacy and as a board we have to respond. We are moving towards format templating of decisions, using uniform vernacular, terms and judicial parlance and building a reservoir of cases that contain seminal reasons for particular scenarios.

The reason we are upping the ante is because of the "trending upwards" of legal representation. As a Board we have to be exceedingly vigilant in ensuring that the way we conduct hearings and write up decisions is impeccable.

The Board has powers to fine, reprimand and suspend a building practitioner's registration. Obviously when members have to consider suspending a practitioner's registration, they must be satisfied that the conduct has been heinous and there needs to be reference to the legal tests or thresholds that have been applied to justify such serious censure. If the legal threshold for professional misconduct has not been achieved it would be a travesty to deregister a practitioner and destroy their livelihood.

Prior to my appointment as Chairman, I appeared before the Board for many years on behalf of practitioners prosecuted for misconduct.

99 times out of 100, the practitioner had a prima facie case to answer, but when I was satisfied that there was an error at law, I contested and invariably the case would be dismissed. When engaged to appeal a termination, I would only do so if convinced that the determination could be quashed. In every instance where we were successful on appeal, it was because of an error at law. Hence one of my preoccupations as Chairman is to ensure that there is a uniform judicial rigour in our decisions.

Without wishing to labour the point, rigour involves tight decision drafting based upon sound legal tenets. Because after all, if there an error in law, then that is a ground for appealing the determination and the quashing of the determination.

The Decision Maker's Disposition

"*There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs… a sense… the total push and pressure of the cosmos.*" (Page 347, Benjamin N. Cardozo, ibid)

Cardozo's observations are indeed telling and it is critical to suppress preconceptions, misconceptions, biased and ideological zealotry. This of course can be a difficult task because the thought of mental schemata or acquired and inherited "pathology", for want of a better word, influences our take on the world and our take on human behaviour.

A mix of people appear before the BPB, some of whom are gifted in antagonising decision makers. Some are legally represented and some are not. Whether defendants appear in person or with counsel some are capable advocates and some are not. Some show appropriate demeanour and some do not.

An antagonistic advocate, be he, she, lay or professional, can contaminate or jaundice the decision maker's disposition with the net effect that the decision maker becomes more pre-occupied or live to antipathy rather than objectivity. One at all times must remain detached.

We as decision makers must always maintain a constant vigil in remembering that those that appear before us are neither our friends nor our foes and we cannot be

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influenced by the seductive or conversely the antagonistic advocacy techniques deployed.

Admittedly in your tribunal, you do not have to deal with legal advocates but that does mean to say that you will not have to deal with very capable lay advocates or non-legally trained professional advocates.

Be on guard for the seductive advocate who endeavours to charm and cajole you along a certain direction. Equally, refuse to be intimidated by an overbearing belligerent style of advocacy that is designed to make you feel small with the somewhat sinister intent of thereby deferring to the antagonist's overbearing powers of persuasion.

It is thus critical that one immunises oneself against personalities and looks at the facts impartially and clearly on a detached basis. Not always easy but always the focus.

Tribunal members have tremendous power and a good deal of discretion so it could be easy to compromise objectivity. A mantra I often recite is *'no ego, no ego, no ego'.* I have found that when you approach a task devoid of any ego you see things much more clearly.

Sadly, too many legal advocates are endowed with an overdeveloped sense of ego. Frankly it is counter productive as an advocate and as a decision maker. It detracts from one's ability to analyse the facts and generate a decision with the requisite level of clarity and objectivity.

To put it another way, the rigour and the decision maker's disposition need to be as pure as possible.

Decorum

There is an old Italian saying *"The fish rots from the head down".* Leaders, be they tribunal presidents, deputy presidents, board chairpersons always set the tone for their tribunals. In jurisdictions where the leaders conduct themselves with a high level of professionalism, decorum, respect and politeness they set the tone and the culture.

Where the tone is adversarial and sometimes ill-tempered then that tone becomes the culture.

I have experienced cultures in some jurisdictions where lawyers are arrogant and adversarial and such conduct is tolerated. Such an environment is not conducive to cost effective and timely dispute resolution.

As Chairman, I do my utmost to ensure that people are treated with decorum and dignity. As a Board we will not tolerate inappropriate conduct on the part of advocates be they lay or professional.

The most impressive senior judicial officer I have encountered, who happens to head up a tribunal, has obvious humanity, sensitivity and objectivity. These qualities also seem to set the tone for his tribunal and make it a pleasure to appear in that jurisdiction.

I would be very satisfied if such observations were made about me or my fellow Board members in Victoria.

Culture

The tribunal's culture will be determined by the level of decorum and respect. I reiterate that tribunals should provide a sound environment for both the decision makers and the users of the system. Even a person being prosecuted for professional misconduct, like the aggrieved complainant, is a user of the system and as a member of society and a taxpayer is entitled to assume that there is an appropriate rigour and application of dignity to his or her predicament.

Hence, for fear of labouring the point, the culture of the environment within which the decision maker operates is an important backdrop.

Natural Justice

Tribunals are required to afford natural justice and procedural fairness to the participants within the system. In the case of Annetts v McCann it was held that "*It can now be taken as settled that, when a statute confers power upon a public official to destroy or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by the plain words of*

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necessary intendment" (1990, 170 CLR 596 at 596).

In similar vein, Mason J stated in Kioa v West that "*what is appropriate in terms of natural justice depends upon the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting."* (1985, 159 CLR 550 at 584-5)

It is paramount that tribunal members apply natural justice. Failure to do so can make the decision susceptible to appeal and quashable. In order to apply natural justice one has to ensure that parties are permitted to present their case and make submissions on all relevant considerations. That does not mean to say that the parties have license to meander down side alleys and arterials that go nowhere. A member is entitled to insist that parties limit themselves to germane considerations, i.e. the facts and evidence that directly correlate with the matter under consideration. Hence some rigour is required on the part of the tribunal to ensure that matters that are not apposite to the hearing are not canvassed.

Of course, this can be a threshold issue and requires a degree of acumen on the part of the decision maker lest the applicant harbours a view that he or she has been denied the opportunity to present his or her case to the most poignant effect.

I have laboured this issue a little bit because recently our Board has experienced an escalation in submissions being made to do with natural justice considerations. When Board members take issue with submissions that are not on point, a frequent retort from counsel is that natural justice is being denied. This can be at times be a little bit extravagant because an advocate does not have licence under the guise of natural justice to engage in spurious submissions on the basis of natural justice.

Dealing with Advocacy Bullies

A common complaint aired by members of my Board is advocacy filibustering, sometimes arrogance and sadly on occasion total disrespect. There are those that seek to belittle tribunal members and by the same token inflate their own sense of significance in proceedings.

As an advocate who appears in jurisdictions other than the Building Practitioners Board in Victoria, I consider some of the seminal virtues of advocacy to be as follows:

- Treat the decision maker with respect
- Be on top of the facts and the law
- Present one's case politely and succinctly
- Avoid confusion, don't try to be confusing

Always remember who has the power over the destiny of one's client: to state the obvious that will always be the decision maker.

The decision maker, be it judge or tribunal member, must set the tone for the proceedings by being candid and assertive from the outset.

We at the BPB do not tolerate disrespect or lack of decorum. We are not well disposed to advocacy one-upmanship as between opposing barristers, one-upmanship in the sense that is involves disparagement of another advocate. Terse conduct is discouraged. If one allows such attitudes or conduct to take hold, then that becomes the culture of the proceeding and it can become toxic.

Always remember that you are in charge, you are the person in authority and never let anybody corrupt that disposition, after all, any tribunal member has been carefully chosen on account of a view being formed that they have the ability constitutionally and by way of background to take charge and make the best possible decisions.

For more information, please contact Kim Lovegrove
Phone: (03) 9600 3522 | Fax: (03) 9600 3544 | Email: kiml@llcc.com.au