Writing An Expert Determination

- The Honourable John Brownie, QC

The written determination is the means by which you communicate to the parties what you have decided, and the reasons that led you to your conclusion. The recording of the determination you have made is usually simplicity itself, calling for no particular comment, except that what is said sometimes needs to be said with considerable precision and should specifically deal with each and every question to be determined.

However, the recording of the reasons for decision is a matter for a great deal of thought. Essentially, it is similar to the task of a judge writing a judgement, and in writing these notes I have drawn on the writings of others on that topic.

People are often troubled by the question of identification of the audience: am I writing for the parties, or their lawyers, or for some wider audience who might chance to read the determination? The short answer is that whilst it is a good idea to have all these people in mind, primarily, indeed almost exclusively you should be thinking in terms of the parties. After all, they are the people whose rights you are determining, and they are the people who are paying you. Their lawyers are, or at least should be used to reading a wide variety of material, they know you are not a lawyer (almost certainly, that is why you were chosen to be the expert - if they wanted a lawyer, they would have obtained one: they or their client chose you for your other attributes). They do not expect the language of lawyers but rather a clear explanation of your reasoning in plain English.

May I suggest, however, that the person for whom you should primarily write is the losing party. If your reasoning demonstrates to the losing party that you have given careful consideration to that party's arguments and submissions, but have come to an adverse conclusion for reasons that are carefully spelt out, in terms of moderation, you will rapidly acquire a reputation as a wise and just expert. It is an ordinary quality of humanity that if we lose a case, we will feel better if we know in some detail why we lost, and if we can see that the person determining the case tried to come to the right answer. We might say something to the effect:

> *"The silly old fool got it hopelessly wrong in the end, but at least he/she tried, and I got a fair go."*

However, the primary quality to strive for in any determination is lucidity. Can someone pick it up, read it, and know what it means, without more? Of course, some cases throw up complicated issues, so that any explanation may have to be complicated, and it may be that someone coming to the problem for the first time might have to read the submission, before understanding all the complexities, but even in a case like that, a good determination is a lucid one: once the reader understands the complexities of the problem, the expert's process of reasoning should then be readily understandable.

Of course, the parties know the issues you are asked to decide, but a concise statement by you of the background facts and of the issues helps you to focus on the precise issues: and to systematically record your views in relation to each issue helps you to focus on your reasons for deciding each disputed issue in the way you do, and tells the reader just what you have done, and why. That is, starting by summarising what the parties regard as obvious is not a waste of time or energy, nor a means of boring the reader, but rather a good disciplined way of focusing your attention, and the readers' attention on the problems, the answers, and the reasons for the answers.

Some cases present a multitude of issues. For example, many a building contract leads to the parties ultimately debating the merits of dozens of different items. I do not suggest that in a case like this you need to use the above approach separately in relation to each item. Every case will be different, but it will often be enough, once you are past the preliminaries, to deal with individual issues quite briefly, for example by saying no more than something like this:

> *"Item 75, defective paintwork in kitchen: photograph number 14 shows that this work was substandard: I therefore prefer Mr Grey's submission to that of Mr Green as to the quality of this work, and I accept Mr Grey's estimate of the cost of rectification as reasonable."*

Once a reader knows the general background, notes that Messrs Grey and Green provided expert reports on behalf of the respective parties and knows that further information can be found, if necessary, from item 75 of the schedule listing the topics in dispute and in photograph

number 14, what more needs to be said. The reader, whether a party or not, knows without more what the expert has decided and why.

So far, I have spoken simply of writing a determination. May I go on to emphasise the importance of actually writing (or, if you use a typewriter or word processor, of typing - that is, of "*writing*" as distinct from speaking). It is relatively easy to pick up a dictaphone, or summon a shorthand writer and just start talking, but the product will be inferior, and discerning readers will be able to tell the difference, without much effort. Well written work is shorter, more precise, less verbose, more accurate, less fuzzy, and better thought out. The effort involved in writing, as distinct from speaking, means you are more likely to come to the correct conclusion, and to express yourself better.

Writing is hard work, requiring concentration and stamina. As one famous American judge put it: "*There is no such thing as good writing. There is only rewriting*". Sir Frank Kitto, formerly a judge of the High Court of Australia, speaking in the days before word processors, said (of judges writing judgements, although his words are just as apt for arbitrators writing awards, or experts writing determinations) that self discipline was essential: one must be prepared to be bored, getting it right, and expressing it correctly: and he criticised:

> "*the most common case of an insufficiently disciplined judgement ... which recites the facts - in a degree of pedestrian detail that scorns to discriminate between those that really bear on the problem, those that may interest a story-lover but not one possessing the lawyer's love of relevance, and those that are not even interesting but just happen to be there - which identify the question to be decided, and then, without carefully worked out steps of reasoning but 'with a blinding flash of light' (as it has been said), produces the answer with all the assurance of a divine revelation. It may sound magnificent: but it is a failure, for want in the Judge of enough self-discipline.*"

He also spoke of "*[t]he menace of prolixity, irrelevant wandering and imprecision*" as being "*terribly real*", and of it making "*for both misapprehension and non-apprehension, creating both boredom and distraction from the points that matter*". He was speaking at a conference of Supreme Court and Federal Court judges. If it was good enough to advise those judges in those terms, none of us need feel any shame in taking the same advice to heart.

In short, you should start by identifying the precise questions referred to you for determination; you should record in your determination what those issues are; you should deal with the material submitted to you by reference to those issues, recording why you prefer one submission to another, where necessary in relation to each separate issue; and you should state, as clearly as you can, why you decide each question in the way you do.

It is quite unusual for you to need to publish your determination in haste, and I must say that my own experience as a judge has persuaded me that it is almost always better, after finishing writing a judgment, to put it aside for a few days, and to then review it: almost always, I see errors in expression, matters stated ambiguously, or not as clearly as they should have been, factual details omitted that should have been stated so as to make the process of reasoning clear, facts stated that take one nowhere, or inadequacies in the statement of the process of reasoning. No doubt, others might regard some of this as not strictly necessary, or a mere striving for an inappropriately high standard of expression, satisfying only myself, but on the whole, it seems clear to me that it improves the quality of the end product. Every time you make something clearer, or more precise, you improve your work.

I do not mean to suggest that writing a determination should be drudgery, but neither is it something to be lightly tossed off, without thought or effort. Like a judge's reasons for judgment, it is the hardest, most demanding aspect of the job, but if you approach the task systematically, recognising what distinguishes a good determination from a shoddy one, writing it will become much easier, and the result will more readily please everyone who reads it.

References for further reading

Sir Frank Kitto's paper: "Why Write Judgements?", reprinted 66 ALJ 787.

Sir Harry Gibbs: "Judgement Writing", reprinted 67 ALJ 494.

Mr Justice Mahoney: "The Writing of a Judgement", (1994) 2 The Judicial Review 61. ❑