



Civil and Administrative Tribunal
New South Wales

Case Name: Owners Corporation SP 80412 v Vickery

Medium Neutral Citation: [2018] NSWCATAP 29

Hearing Date(s): 30 August 2017, 16 October 2017

Date of Orders: 24 January 2018

Decision Date: 24 January 2018

Jurisdiction: Appeal Panel

Before: M Harrowell, Principal Member
M Anderson, Senior Member

Decision: 1 The appeal is allowed.
2 The orders made 4 May 2017 in application SCS16/18301 are set aside and the application for costs of Graham Vickery is dismissed.
3 Save as provided above, appeals AP 17/25042 and AP 17/25981 are dismissed.

Catchwords: Appeal and cross appeal from proceedings referred by adjudicator under section 164 Strata Schemes Management Act 1996 (NSW) (now repealed) to NCAT – Costs application before the Tribunal – whether jurisdiction and/or power to make a costs order in referral proceedings.

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)
Civil and Administrative Tribunal Rules 2014 (NSW)
Strata Schemes Management Act 1996 (NSW)
Strata Schemes Management Act 2015 (NSW)

Cases Cited: Allen v TriCare (Hastings) Ltd [2017] NSWCATAP 25
Beck & Anor v Owners Corporation Strata Plan No 64622 [2009] NSWSC 962
Bischoff & Ors v Rita Sahade & Anor [2015] NSWCATAP 135

Coles v Owners Corporation SP 57164 (Strata & Community Schemes) [2007] NSWCTTT 338
Collins v Urban [2014] NSWCATAP 17
David and Lyna Cannell v Stuart and Gloria Barton [2014] NSWCATCD 103
Lindsay Player, Carol Player and Benuki Pty Ltd v Themistoclis Christou and Amalia Christou [2014] NSWCATCD 60
Medical Council of New South Wales v Lee [2017] NSWCA 282
Oshlack v Richmond River Council [1998] HCA 11; 193 CLR 72
Phillips & Ors v Owners Corporation SP 3273 (Strata & Community Schemes) [2005] NSWCTTT 295
Ramid Investments Pty Ltd v The Owners Strata Plan No 45205 [2014] NSWCATCD 43
The Owners Corporation SP 32735 v Swan [2009] NSWCTTT 680
The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270
Wrigley v Owners Corporation SP 53413 [2017] NSWCATAP 100

Texts Cited: Macquarie Dictionary, Revised Third Edition
Words and Phrases Judicially Defined, Roland Burrows KC, Butterworths, 1946

Category: Principal judgment

Parties: AP 1725042
The Owners- Strata Plan SP 80412 (Appellant)
Graham John Vickery (Respondent)

AP 17/25981
Graham John Vickery (Appellant)
The Owners- Strata Plan SP 80412 (Respondent)

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Appellant)

File Number(s): AP 17/25042 and AP 17/25981

Publication Restriction: Unrestricted

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal of New South Wales

Jurisdiction: Consumer and Commercial Division

Citation: Not applicable

Date of Decision: 04 May 2017

Before: S Thode, Senior Member

File Number(s): SCS 16/18301

REASONS FOR DECISION

Introduction

- 1 The appellant is the owner of lot 74 in strata scheme SP 80412 and the respondent is the Owners' Corporation SP 80412. Both parties have appealed the decision of the Tribunal dated 4 May 2017 (cost decision). For convenience we will refer to the parties as Mr Vickery and the Owners Corporation respectively.
- 2 On 16 November 2016 consent orders were filed in proceedings, which were transferred to the Tribunal by order of an adjudicator under section 164 of the *Strata Schemes Management Act 1996 (NSW)* ("the 1996 Act") because the issues for determination were complex in law and fact. Those consent orders resolved the proceedings in the Tribunal except for the issue of costs. The Tribunal determined the costs issue on the papers pursuant to section 50 (1) (c) of the *Civil and Administrative Tribunal Act 2013 (NSW)* ("NCAT Act").
- 3 The claim which was referred by the adjudicator included a claim for rectification of water penetration from common property into lot 74. The original claim was commenced by another lot owner but that person did not remain a party to the proceedings in the Tribunal. The hearing in the Tribunal took place

on 15 and 16 November 2016. Towards the end of the second hearing day consent orders were agreed subject to any order for costs.

- 4 The owner of lot 74, Mr Vickery, sought an order for costs pursuant to section 60 of the Act and an order pursuant to section 229 of the *Strata Schemes Management Act 1996* that the legal costs of the Owners' Corporation be paid from contributions levied against all of the owners except lot 74.
- 5 The Tribunal ultimately made an order that the Owners Corporation pay Mr Vickery's costs as agreed or assessed on the ordinary basis. The reasons are dated 4 May 2017 and there were amended reasons delivered on 25 May 2017.
- 6 In short, Tribunal decided that it had jurisdiction and power to make an order for costs because the powers are cumulative and it was held to be incorrect to limit the power of the Tribunal to the powers of the adjudicator. The power to make costs orders in connection with the proceedings, in the reasons given by the Tribunal, is an ancillary order. The Tribunal also found that there were special circumstances which justified an order for costs.

Notices of Appeal and history of appeal proceedings

- 7 In its appeal, the Owners Corporation contends that the Tribunal had no power to make an order for costs after proceedings had been referred from an adjudicator to the Tribunal. The Owners Corporation also contends that special circumstances did not exist to make any costs orders at all, or of the scope made.
- 8 In his appeal, Mr Vickery contends that the Owners' Corporation should pay his costs assessed on the indemnity basis. Mr Vickery also contends that he should be excused from funding any part of the costs order to be paid to him by reason of his ownership of his lot in the strata scheme.
- 9 The *Strata Schemes Management Act 2015* (NSW) (2015 Act) came into force on 30 November 2016 after the consent orders were made on 16 November 2016. There is no dispute that the savings and transitional provisions in respect of existing proceedings contained in schedule 3, clause 7 of the 2015 Act operates so that the costs decision is governed by the 1996 Act.

- 10 The parties provided extensive written submissions prior to the first hearing date and subsequent to that date for the purposes of the second hearing date. The appeal hearing took place over two days. The appeal was originally set down for half a day and this was not sufficient time to ventilate the issues raised by this appeal.
- 11 The parties also relied upon documentary material which became exhibits in the appeal. The report dated 28 March 2016 by consulting engineers was Exhibit A. The opening outline of the position of the Owners' Corporation dated 14 November 2016 was Exhibit B. The parties also provided an agreed bundle of documents and a chronology.

Submissions

- 12 The parties' submissions can be set out briefly.
- 13 The Owners Corporation relied on a number of decisions of the Consumer Trader and Tenancy Tribunal, the predecessor to Civil and Administrative Tribunal of New South Wales, and said that the Tribunal has no power to make an order for costs. These decisions included:
 - (1) *The Owners Corporation SP 32735 v Swan* [2009] NSWCTTT 680;
 - (2) *Phillips & Ors v Owners Corporation SP 3273 (Strata & Community Schemes)* [2005] NSWCTTT 295;
 - (3) *Ramid Investments Pty Ltd v The Owners Strata Plan No 45205* [2014] NSWCATCD 43.
- 14 We note in *Swan* the Consumer Trader and Tenancy Tribunal (CTTT) determined it does not have the "*power to make a costs order when dealing with a matter that should, in the normal course of events, have been before the Adjudicator.*"
- 15 In *Phillips*, the CTTT said:

The framework for settlement of disputes within strata schemes as set out in the Act envisages that most matters, with some exceptions, will be determined by an adjudicator. The application in this matter was one that went at first instance to an adjudicator. The Act states that an adjudicator cannot make an order for the payment of costs. The Act allows for some matters to be referred to the Tribunal for hearing if the adjudicator thinks that this is appropriate using the criteria set out in the relevant section. That was the procedure followed in this matter.

The Act then states that the Tribunal has the same powers as the adjudicator where a matter has been referred. It is at least open to argument that this means that the Tribunal, when deciding a matter which has been referred does not have the power to make an order for payment of costs.

Neither party was prepared to make submissions on this issue, which was raised by the Tribunal. It appears to me that this section in part provides protection from an award of costs against it in a situation in which the applicant has chosen route (sic) where costs could not be awarded and has been placed in a different situation by order of the adjudicator.

I find that I do not have the power to make the orders sought with respect to costs.”

- 16 The Owners Corporation also relied on decisions of the Tribunal in *Lindsay Player, Carol Player and Benuki Pty Ltd v Themistoclis Christou and Amalia Christou* [2014] NSWCATCD 60 at [77]; *David and Lyna Cannell v Stuart and Gloria Barton* [2014] NSWCATCD 103 at [99] to like effect.
- 17 Finally, the Owners Corporation relied on the decision of *Beck & Anor v Owners Corporation Strata Plan No 64622* [2009] NSWSC 962 and said the Court found the powers of the Tribunal under 184 were limited to those of an adjudicator.
- 18 The Owners Corporation then made alternative submissions concerning what costs award should be made, a matter not presently necessary to deal with.
- 19 In reply, Mr Vickery submitted that the Tribunal, in determining an application referred by an adjudicator pursuant to s 164 of the 1996 Act, was exercising general jurisdiction under s 29 of the NCAT Act. Mr Vickery relied on s 29(2) and said the Tribunal was granted jurisdiction to make ancillary and interlocutory decisions, a matter reflected in the cost decision at [24]. This, Mr Vickery contended, included the power to make an order for costs.
- 20 Mr Vickery then said that the case of *Swan* and those cases to like effect to which the Owners Corporation referred should be distinguished. This is because those cases were decided under the former Consumer, Trader and Tenancy Tribunal Act, 2001 (CTTT Act). Having set out s 21 of the NCAT Act, Mr Vickery then said at [34] of his written submissions:

In the event the CTTT’s jurisdiction as to costs could be curtailed by empowering legislation in the past, and that is not conceded, it is no longer the case in this Tribunal.

21 Mr Vickery referred to the decision of the Appeal Panel in *Wrigley v Owners Corporation SP 53413* [2017] NSWCATAP 100 at [111]-[112]. There the Appeal Panel said:

111. A “general decision” is defined in s 29(3) of the NCAT Act as “a decision of the Tribunal determining a matter over which it has general jurisdiction”. The Tribunal relevantly has general jurisdiction over a matter if “legislation (other than [the NCAT Act] or the procedural rules) enables the Tribunal to make decisions or exercise other functions ... of a kind specified by the legislation in respect of that matter” and “the matter does not otherwise fall within the administrative review jurisdiction, appeal jurisdiction or enforcement jurisdiction of the Tribunal”, s 29(1) of the NCAT Act.

112. The adjudicator’s order against Mr Wrigley was not “a decision made in proceedings for a general decision”, within s 32(1) of the NCAT Act. It was made in proceedings before an adjudicator not proceedings in the Tribunal. Furthermore, the jurisdiction being exercised by the adjudicator was not the “general jurisdiction” of the Tribunal.

22 Mr Vickery then submitted at [36]-[37]:

36. The Owners Corporation have, quite rightly, lodged its appeal from the decision of the Senior Member as an internal appeal. That is because the decision of the Senior Member was a decision of the Tribunal in its general jurisdiction and not as the Tribunal closed only in the power of an Adjudicator.

37. The Senior Member was correct to find at [24] that the Tribunal’s powers on the costs decision were cumulative and therefore this ground of the Owners Corporation’s appeal should fail.

Consideration

23 There is no dispute in the Appeal Panel has jurisdiction to hear this appeal, the decision of the Tribunal in respect of proceedings referred under s 164 of the 1996 Act being a decision of the Tribunal under the general jurisdiction conferred by s 29 of the NCAT Act. Consequently, pursuant to s 32 of the NCAT Act, the costs decision was an internally appealable decision: see *Bischoff & Ors v Rita Sahade & Anor* [2015] NSWCATAP 135.

24 Leave to appeal is not required because the issues raised are questions of law: see s 80(2)(b) of the NCAT Act.

25 The appeal raises two issues for determination. The first issue is whether the Tribunal was correct to conclude that it had power to award costs in connection with proceedings referred by an adjudicator to the Tribunal pursuant to s 164 of the 1996 Act. The second issue is whether its discretion in connection with the award of costs miscarried.

Power to award costs

- 26 A resolution of this issue requires a consideration of the powers given to the Tribunal to resolve proceedings referred to it under s 164 of the 1996 Act and whether the provisions of s 60 of the NCAT Act and/or r 38 of the Civil and Administrative Tribunal Rules, 2014 (Rules) apply to such proceedings.
- 27 This question is a matter of statutory construction of both the 1996 Act and the NCAT Act.
- 28 Section 184 of the 1996 Act confers jurisdiction on the Tribunal to resolve an adjudication application referred under s 164. This section is found in Part 5 Orders of Tribunal. Section 184 is in the following terms:

184 Tribunal's jurisdiction to deal with applications referred by Adjudicator

(1) If an Adjudicator refers to the Tribunal an application for an order that, but for the referral, could have been made by the Adjudicator, the Tribunal has the same powers as the Adjudicator to make an order (other than an interim order) or to dismiss the application.

(2) Except in relation to a right of appeal to the Tribunal, this Act has effect in relation to an order made under subsection (1) as if the order were an order of an Adjudicator.

(3) Subsection (2) does not exclude an appeal from an order of the Tribunal made under subsection (1).

...

- 29 It is clear from s 184(1) that the powers of the Tribunal are *“the same powers as the Adjudicator to make an order (other than an interim order) or to dismiss the application”*.
- 30 There is no dispute in this appeal that Mr Vickery's adjudication application sought orders for maintenance and repairs arising from the Owners Corporation's failure to perform its obligations under s 62 of the 1996 Act. The power to make orders in connection with the failure of an owners' corporation to perform its obligations under s 62 is given to an adjudicator under s 138 of the 1996 Act: see eg *The Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270.
- 31 That section provided:

138 General power of Adjudicator to make orders to settle disputes or rectify complaints

- (1) An Adjudicator may make an order to settle a dispute or complaint about:
- (a) an exercise of, or a failure to exercise, a function conferred or imposed by or under this Act or the by-laws in relation to a strata scheme, or
 - (b) the operation, administration or management of a strata scheme under this Act.
- (2) For the purposes of subsection (1), an owners corporation or building management committee is taken to have failed to exercise a function if:
- (a) it decides not to exercise the function, or
 - (b) application is made to it to exercise the function and it fails for 2 months after the making of the application to exercise the function in accordance with the application or to inform the applicant that it has decided not to exercise the function in accordance with the application.
- (3) An Adjudicator may not make an order under subsection (1) for the settlement of a dispute or complaint:
- (a) dealt with in another section of this Chapter, or
 - (b) referred to the Tribunal or only within the jurisdiction of the Tribunal, or
 - (c) relating to the exercise, or the failure to exercise, a function conferred on an owners corporation by this Act or the by-laws if that function may be exercised only in accordance with a unanimous resolution or a special resolution (other than a special resolution under section 62 (3), 65A or 65B), or
 - (d) that includes the payment by a person to another person of damages.
- (4) If a dispute or complaint arises from or relates to the operation or application of a provision of a lease of a lot, or of the common property, in a leasehold strata scheme, the lessor of the strata scheme must not:
- (a) commence other proceedings in connection with the settlement of the dispute or complaint after having made an application under this section for the settlement of the dispute or complaint, or
 - (b) make an application under this section for the settlement of the dispute or complaint after having commenced other proceedings in connection with the settlement of the dispute or complaint.
- (5) An application for an order under this section may be made only by an interested person.

...

- 32 That section confers a general order making power. Subsection 138(3) provides limitations to the orders which can be made under that section. That section does not prevent an adjudicator from making an order for costs.
- 33 However, s 138 is contained in Part 4 Orders of Adjudicator in the 1996 Act.

34 Part 4 includes s 176 which provides:

176 Adjudicator not to make order with respect to certain matters

(1) An Adjudicator may not, in connection with an application under this Part, make an order for the payment of costs....

...

35 That is, there is an express prohibition on an adjudicator making an order for the payment of costs.

36 In our view the power of an adjudicator to make an ancillary order under s 169 does not otherwise enable an adjudicator to make an order for costs. That section provides:

169 Ancillary orders

(1) An order of an Adjudicator under this Part may include such ancillary or consequential provisions as the Adjudicator thinks fit.

(2) For the purposes of this Part, an Adjudicator may order any person who is the subject of an application for an order to do, or to refrain from doing, a specified act with respect to a strata scheme.

37 The expression "*ancillary orders*" is not defined in the 1996 Act. It does not, by its terms, expressly grant to an adjudicator the power to make an order for costs. Rather, the expression "ancillary" suggests a power to make orders to aid or support the primary orders made. An order for costs would not ordinarily fall within such a definition. Subsection 169(2) suggests that the nature of the orders which may be made include orders in the nature of mandatory or restraining injunctions. Again, this inclusion does not support the grant of a power to make a costs order under this section.

38 In any event, the express exclusion of costs makes clear that "ancillary orders" do not include an order for costs.

39 It follows that in so far as the Tribunal's order making power is confined to that of an adjudicator there is no power to award costs.

40 The next question is whether Part 5 Orders of the Tribunal, being the part where s 184 is found, otherwise permits the Tribunal to make an order for costs when determining a matter under s 184 of the 1996 Act.

41 While there is a power to award costs found in Part 5 of the 1996 Act, that power only arises in limited circumstances. Firstly, where the Tribunal imposes

a pecuniary penalty, a matter not presently relevant to this appeal. In this regard s 204 provides:

204 Order as to costs

(1) The Tribunal may also make an order for the payment of costs when making an order requiring the payment of a pecuniary penalty under this Part.

(2) Any costs awarded against a person on an application for an order under section 202 include the amount of the fee paid when the application for the original order was made.

42 Secondly, costs may be awarded in limited circumstances against a developer in connection with an order to reallocate unit entitlements under s 183 of the 1996 Act: see s 183(6)(a).

43 The Tribunal does have power to make ancillary orders under s 188 of the 1996 Act. This power is in similar terms to that given to an adjudicator under s 169. Section 188 provides:

188 Ancillary orders

(1) An order made by the Tribunal may include such ancillary or consequential provisions as the Tribunal thinks fit.

(2) For the purpose of securing compliance with an order of the Tribunal, the Tribunal may order any person who was the subject of the application for the order to do or refrain from doing a specified act with respect to a strata scheme.

44 Again, the expression “ancillary orders” is not defined in the 1996 Act.

45 However, in our view this expression does not include a power to award costs. Our reasons are as follows.

46 First, there is no reason why the word "ancillary order" found in s 188 of the 1996 Act should be given a different meaning to the meaning in s 169.

47 In this regard, prior to the commencement of the NCAT Act, the 1996 Act contained the following provision in respect of costs which has now been repealed:

192 Orders relating to costs

The Tribunal may not make any order for the payment of costs except as specifically authorised by this Act or in relation to an order dismissing an application or appeal because:

(a) the application or appeal is frivolous, vexatious, misconceived or lacking in substance, or

(b) a decision in favour of the applicant or appellant is not within the jurisdiction of the Tribunal.

48 That is, until repeal of s 192, costs could only be awarded as "specifically provided" or in the circumstances set in in subs 192(a) and (b). As we indicated above, there were limited provisions specifically dealing with costs. However, the power to make ancillary orders did not "specifically" allow for a costs order by the Tribunal.

49 Secondly, as with s 169(2), s 188(2) provides some assistance in determining what is meant by the expression "*ancillary orders*". As stated above, the Tribunal is expressly authorised to make an order in the nature of an injunction to require a person to do or refrain from doing a specific act with respect to the strata scheme.

50 Thirdly, in the absence of a definition of ancillary, its ordinary English meaning is "subsidiary" or "supplementary or incidental relief sought in addition to the main relief": *Macquarie Dictionary, Revised Third Edition*. In *Words and Phrases Judicially defined, Roland Burrows KC, Butterworths, 1946*, ancillary is defined in the following terms:

It is an additional remedy, the making more effective a remedy for the one cause of action.

51 In this context, a costs order is not ancillary to the primary orders which an adjudicator or the Tribunal is authorised to make.

52 Lastly, in consequence of the repeal of s 192, in so far as the Tribunal has power to award costs, that power is now to be found in the NCAT Act.

53 It follows that the 1996 Act does not authorise the Tribunal to make an order for costs when deciding an application referred by an adjudicator to the Tribunal pursuant to s 164 of the 1996 Act.

54 Having considered the various cases in the CTTT and Tribunal set out above, to which the parties referred, the Tribunal concluded that the NCAT Act was a source of power to award costs in a matter referred to the Tribunal by an adjudicator. At [24] the Tribunal said:

I am satisfied that the Tribunal, upon being invested with the power to hear and determine the proceedings, has powers to make ancillary orders in connection with the proceedings, including an order for costs. Having regard to

the wording at section 184, I find that the powers to make orders are limited to those that the adjudicator can make in the disposal and finalisation of the proceedings. However, the Tribunal, upon being invested with jurisdiction to hear and determine the issues, is also imbued with jurisdiction to make ancillary orders, such as directions for the exchange of evidence, the order for the exchange of points of claim and points of defence. In my view, once constituted, the Tribunal has the requisite jurisdiction to make orders as to costs. I accept and adopt the applicant's submissions that the power is cumulative, and that the Tribunal, once constituted, has the power to make an order under s 60, and it is not a correct interpretation of s 184 to limit the order making power of the Tribunal to that only of the Adjudicator. S184 simply states that the Tribunal has jurisdiction is to make orders as the adjudicator was able to, but does not state that the Tribunal is otherwise replete of other order making powers available to it. I accordingly find that the Tribunal does have the power to make orders as to costs, once a matter is transferred pursuant to s 164 (now repealed).

- 55 That is, the Tribunal concluded the power to award costs arose from the power given under s 60 of the NCAT Act, which was cumulative to the powers given under s 184 of the 1996 Act.
- 56 As is apparent, in supporting its construction of the relevant legislation, the Tribunal made reference to the other powers of the Tribunal to make interlocutory and other orders found in the NCAT Act for the purpose of the management and disposition of the proceedings. The effect of what was said is that these powers, not found in the 1996 Act, were a necessary part of the Tribunal discharging its functions in the disposition of the application on referral and there was no reason to exclude a power to award costs.
- 57 For the following reasons, in our view the Tribunal was in error in reaching this conclusion.
- 58 Firstly, the power to award costs is not a necessary power incidental to the disposition of legal proceedings. As the High Court has made clear, there is no general power of a court, including a superior court, to award costs. Rather, there must be an express power granted by enabling legislation: *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72 per McHugh J at [63].
- 59 In the present case, as the Tribunal concluded the source of power to award costs was the NCAT Act. The Tribunal did not suggest the 1996 Act was a source of power. The power to award costs on which the Tribunal relied is found in s 60 of the NCAT Act. That section is found in Part 4 Practice and procedure of the NCAT Act.

60 As the Tribunal correctly points out, an order for costs is an ancillary order within the meaning of the NCAT Act. In this regard, s 3 of the NCAT Act defines “*ancillary decision*” to include:

(b) a decision concerning the awarding of costs in proceedings.

61 Section 5 of the NCAT Act defines “*decision*” to include the making of an order for determination. That is, an order for costs is an “*ancillary decision*”.

62 In submissions in the appeal, the appellant relied on the fact that the Tribunal was exercising its general jurisdiction and submitted that s 29(2) of the NCAT Act enabled the Tribunal to make ancillary orders, in this case an order for costs under s 60.

63 Section 29(2) provides:

(2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its general jurisdiction:

(a) the jurisdiction to make ancillary and interlocutory decisions of the Tribunal in the proceedings,

(b) the jurisdiction to exercise such other functions as are conferred or imposed on the Tribunal by or under this Act or enabling legislation in connection with the conduct or resolution of such proceedings.

64 The problem with this submission is that the operation of the cost provisions in s 60 is subject to the enabling legislation, in this case the 1996 Act. In this regard, s 35 in Part 4 of the NCAT Act provides:

35 Application of Part

Each of the provisions of this Part is subject to enabling legislation and the procedural rules.

65 The Court of Appeal of the Supreme Court of New South Wales recently considered this section in *Medical Council of New South Wales v Lee* [2017] NSWCA 282. This consideration was in the context of whether or not the Tribunal had power to make a stay an order suspending a medical practitioner under s 43(3) of the NCAT Act pending hearing of an appeal, in circumstances where s 150(2) of the Medical Practitioner Regulation National Law (NSW) (National Law [NSW]) required the Medical Council to suspend a medical practitioner if satisfied it was appropriate in the prescribed circumstances. Section 150(2) provided:

(2) A suspension of a registered health practitioner's or student's registration under subsection (1) has effect until the first of the following happens—

- (a) the complaint about the practitioner or student is disposed of;
- (b) the suspension is ended by the Council.

66 At [86]-[87], Sackville JA, with whom Beazley P and Basten JA relevantly agreed, said (footnotes omitted):

86 First, each provision in Part 4 of the NCAT Act, including s 43(3), is expressly made “subject to enabling legislation”. This expression includes the National Law [NSW]. The words “subject to”, like most common expressions found in legislation, has no fixed meaning but must be construed having regard to the context in which it appears. In some contexts, for example, the expression may mean that two pieces of legislation are to operate concurrently. In others it may mean that one statute applies to the exclusion of another. #endnotes #endnotes

87 When used to defined the relationship between two statutes or provisions, “subject to” is a standard means of establishing which provisions are dominant and which are subservient. The subservient provisions therefore operate only to the extent that they are not inconsistent with or repugnant to the dominant provisions. In *C & J Clark Ltd v Inland Revenue Commissioners*, #endnotes #endnotes for example, the relevant subsection commenced with the words “subject to the provisions of this section”. Megarry J said that: #endnotes #endnotes

“the phrase ‘subject to’ is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision.”

88 In my view, this is the meaning that should be given to s 35 of the NCAT Act. Thus to the extent that there is an inconsistency or repugnancy between a provision of Part 4 of the NCAT Act and the National Law [NSW] (or any other “enabling legislation), the National Law [NSW] governs. Whether there is an inconsistency or repugnancy depends on the proper interpretation of the relevant provisions of the National Law [NSW]. For present purposes it is necessary to consider whether there is any inconsistency or repugnancy between s 43(3) of the NCAT Act and the relevant provisions of the National Law [NSW]. The inconsistency might take the form of a direct conflict between two provisions (for example, where both cannot be obeyed simultaneously). There will also be an inconsistency in the relevant sense if, as a matter of construction, the National Law [NSW] is intended to operate in relation to a particular matter to the exclusion of s 43(3) of the NCAT Act. #endnotes #endnotes

67 In the present case, in our view there is an inconsistency between the enabling legislation, namely the 1996 Act and the NCAT Act in respect of costs.

- 68 First, as provided by s 184(1), the Tribunal is only authorised to make orders which an adjudicator can make. The order making powers of the adjudicator expressly excludes the power to make an order for costs.
- 69 There is no general entitlement to costs under the common law. There is no provision in the 1996 or the NCAT Act that says that the limits of an adjudicator's order making power do not apply to the Tribunal. There is no reason to imply such a term. Any such inference would be inconsistent with the express statement of the extent of power granted to the Tribunal under the enabling legislation.
- 70 Secondly, a contrary interpretation is also inconsistent with subs 184(2) of the 1996 Act. This subsection provides that, except in relation to any rights of appeal from an order made by the Tribunal under s184, the orders of the Tribunal take effect "*as if an order were an order of an Adjudicator*": see s 184(2). An order for costs could not have effect as an order of an adjudicator because an adjudicator cannot make such an order. Consequently, the legislature could not have intended to grant such a power in circumstances where any order made could have no effect.
- 71 Thirdly, the Tribunal suggested in its reasons that the fact the Tribunal can make procedural directions and make orders by consent to give effect to any settlement reached are indicators that there is no general limitation that would exclude the power to make an order for costs. However, the matters which the Tribunal identified are not matters expressly excluded from the powers given to an adjudicator.
- 72 Further, in connection with procedural directions and orders to facilitate the hearing of an application, the 1996 Act does not prevent an adjudicator from making orders including in relation to the provision of points of claim, the filing and service of evidence and conducting a hearing. In this regard s 167(1) of the 1996 Act provides:

An Adjudicator may investigate an application for an order in any way the Adjudicator thinks fit and may refuse to proceed with an application until any further information required by the Adjudicator has been provided.

- 73 Consequently, there is no inconsistency of the type identified in *Lee* between this provision and the provisions which permits the Tribunal to conduct proceedings and make procedural directions under its general jurisdiction.
- 74 As to the settlement of disputes by agreement, there is nothing which prevents an adjudicator from making an order by consent. Again, no inconsistency of the type referred to in *Lee* arises in this case.
- 75 Finally, our view is consistent with the decision in *Beck*. There, the Court was considering the power of the Tribunal to make an award for damages in proceedings referred by an adjudicator in circumstances where the adjudicator was expressly prohibited by s 138(3)(d) from doing so. In that case Forster J said at [21]-[22]:

21 Secondly, he submitted that contrary to the submissions made by Mr Hicks, the provisions of Chapter 5 of the Act do not confer on the Tribunal any power to award damages.

22 As I have already noted, by reason of section 138(3)(d), an Adjudicator has no such power. Insofar as any matter is referred by an Adjudicator to the Tribunal, pursuant to section 164(1) of the Act, Mr Sirtes points out that as is provided by section 184(1), the Tribunal has the same powers as does an Adjudicator. In other words, the restrictions imposed on the powers of an Adjudicator by section 138(3)(d) carry over to limit the powers of the Tribunal where the Tribunal is exercising the functions of an Adjudicator.

- 76 In short, the provisions of the enabling legislation, namely the 1996 Act, do not permit the Tribunal to make an order for costs under the cost provisions in the NCAT Act and Rules in connection with an application referred to the Tribunal under s 164 for determination by the Tribunal pursuant to s 184 of the 1996 Act.
- 77 Therefore, the appeal should be allowed, the orders made on 4 May 2017 should be set aside and the application for costs by Mr Vickery should be dismissed.

Miscarriage of discretion

- 78 Having reached the conclusion above, it is unnecessary to determine the issues raised by the parties on this matter

Costs of appeal

- 79 Rule 38A of the Rules provides:

38A Costs in internal appeals

(1) This rule applies to an internal appeal lodged on or after 1 January 2016 if the provisions that applied to the determination of costs in the proceedings of the Tribunal at first instance (the first instance costs provisions) differed from those set out in section 60 of the Act because of the operation of:

- (a) enabling legislation, or
- (b) the Division Schedule for the Division of the Tribunal concerned, or
- (c) the procedural rules.

(2) Despite section 60 of the Act, the Appeal Panel for an internal appeal to which this rule applies must apply the first instance costs provisions when deciding whether to award costs in relation to the internal appeal.

80 As we have found in the present case, the cost rules of the proceedings of the Tribunal at first instance differ from those set out in s 60 of the NCAT Act because of the operation of the enabling legislation. It would seem to follow from this conclusion that the cost provisions of the proceedings at first instance apply in determining costs issues in relation to the internal appeal. Consequently, as there is no power to award costs in the proceedings at first instance, there is no power to award costs in the appeal.

81 Accordingly, we should not make any order in respect of costs.

82 If either party contends that an order can and should be made, an application for costs should be filed and served within 7 days from the date of these orders. As necessary, the Appeal Panel will make directions to facilitate the hearing of such an application and/or consider whether an order should be made dispensing with a hearing pursuant to s 50(2) of the NCAT Act.

Orders

83 The Appeal Panel makes the following orders:

- (1) The appeal is allowed.
- (2) The orders made 4 May 2017 in application SCS16/18301 are set aside and the application for costs of Graham Vickery is dismissed.
- (3) Save as provided above, appeals AP 17/25042 and AP 17/25981 are dismissed.

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.



Principal Registrar

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

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