Civil and Administrative Tribunal

New South Wales

Case Name:	The Owners - Strata Plan No 6097 v Placanica
Medium Neutral Citation:	[2019] NSWCATAP 85
Hearing Date(s):	25 March 2019
Date of Orders:	12 April 2019
Decision Date:	12 April 2019
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President A Boxall, Senior Member
Decision:	(1) The appeal is dismissed; (2) The lot owners (the Respondents) are to file and serve submissions with respect to costs of the appeal within 14 days of today's date; (3) The Owners Corporation (the Appellant) is to file and serve its submissions with respect to costs within 14 days thereafter; (4) The lot owners are to file and serve any submissions in reply within 7 days thereafter; and (5) Submissions should include a submission as to whether the Tribunal may decide the question of costs on the papers and dispense with a hearing (see s 50 of the Act)
Catchwords:	Appeals - jurisdictional error – proceedings for the imposition of a civil penalty – appeals to the Tribunal or to a Court
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Civil and Administrative Tribunal Rules 2014 Strata Schemes Management Act 1996 (NSW)
Cases Cited:	Ex Parte Hebburn Limited; re Kearsley Shire Council. Ex Parte J & A Brown and Abermain Seaham Collieries

	Ltd; re Kearlsey Shire Council 1947 SR NSW 416 EXU17 v Minister for Immigration and Border Protection [2018] FCA 1675 Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 Plaintiff S157/2002 v Commonwealth of Australia [2003] 211 CLR 476
Texts Cited:	Nil
Category:	Principal judgment
Parties:	The Owners - Strata Plan No 6097 (Appellant) Francesco Placanica and Maria Placanica (Respondents)
Representation:	Counsel: Mr D Knoll AM (Appellant) Mr A Byrne (Respondents) Solicitors: Grace Lawyers (Appellant) Adelsteins (Respondents)
File Number(s):	AP 18/41373
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	28 August 2018
Before:	D Robertson, Senior Member
File Number(s):	SC 17/50263

REASONS FOR DECISION

Background

1 This is an appeal from a decision made the in the Consumer and Commercial Division of the Tribunal (which we will refer to as "the Decision") published on 28 August 2018. The Notice of Appeal was lodged on 24 September 2018 within the time required by the *Civil and Administrative Tribunal Rules 2014* (the Rules). In the proceedings in the Consumer and Commercial Division, the appellant (which we will refer to as the "Owners Corporation") sought the imposition of a civil penalty against the respondents (who we shall refer to as the "lot owners"). The application for a civil penalty order was dismissed. The Owners Corporation appeals that order.

The Decision

2 The Decision may be summarised as follows:

(1) The Owners Corporation sought a penalty order pursuant to s 202 of the *Strata Schemes Management Act 1996 (NSW)* (the SSM Act) by reason of the alleged failure of the lot owners to comply with orders made by the Tribunal on 8 August 2016;

(2) The Decision set out the orders of the Tribunal made on 8 August 2016. Those orders required the Owners Corporation to give to the lot owners notice of the need to obtain access to the lot owners' unit to enable the Owners Corporation to have work carried out. The orders record that the lot owners agreed to give access. The contention of the Owners Corporation was that the orders included an order that the lot owners give access (as opposed to merely agree to provide access);

(3) The Decision dealt with the fact that the parties had signed consent orders and that there was a difference in the wording in the signed proposed consent orders, compared with the consent orders published by the Tribunal;

(4) In paragraph 10 of the Decision, the Tribunal stated that regardless of the principles relating to the capacity of the Tribunal to look at background circumstances in order to determine what the orders actually require, it seemed to the Tribunal that it was "impossible to construe the order that the respondents "agree to give access" to their unit by the end of the notice period as a direction to the respondents that they must give that access"; and

(5) The Decision stated that in circumstances where there is no command directed to the respondents requiring them to give access, it seems "impossible to find that the respondents have failed to comply with the order of the Tribunal. That... is sufficient to dispose of the application".

Jurisdiction to appeal the Decision

3 The submissions exchanged between the parties in preparation of this appeal did not deal with s 32 of the *Civil and Administrative Tribunal Act 2013* (the Act) and in particular s 32(3)(d). The full text of s 32 is set out below:

> **32 Internal appeal jurisdiction of Tribunal**
>
> (1) The Tribunal has internal appeal jurisdiction over:
>
> > (a) any decision made by the Tribunal in proceedings for a general decision or administrative review decision, and
> >
> > (b) any decision made by a registrar of a kind that is declared by this Act or the procedural rules to be internally appealable for the purposes of this section.
>
> (2) The Tribunal also has the following jurisdiction in proceedings for the exercise of its internal appeal 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.
>
> (3) However, the internal appeal jurisdiction of the Tribunal does not extend to:
>
> > (a) any decision of an Appeal Panel, or
> >
> > (b) any decision of the Tribunal in an external appeal, or
> >
> > (c) any decision of the Tribunal in proceedings for the exercise of its enforcement jurisdiction, or
> >
> > (d) any decision of the Tribunal in proceedings for the imposition of a civil penalty in exercise of its general jurisdiction.
> >
> > Note. The decisions above may be appealable to the Supreme Court and, in some cases in relation to civil penalty decisions made by the Tribunal (whether under this Act or enabling legislation), the District Court. See section 73 and Part 6.
>
> (4) An internally appealable decision is a decision of the Tribunal or a registrar over which the Tribunal has internal appeal jurisdiction.
>
> (5) An internal appeal is an appeal to the Tribunal against an internally appealable decision.
>
> (6) Subject to the procedural rules, if a decision of a registrar is an internally appealable decision, the provisions of this Act relating to the making and determination of an internal appeal are taken to apply as if:
>
> > (a) any reference to the Tribunal at first instance (however expressed) included a reference to a registrar, and
> >
> > (b) any requirement concerning the granting of leave to appeal against particular kinds of decisions of the Tribunal or on particular grounds

> extended to decisions of the same kind made by a registrar or grounds of the same kind.

4 At the hearing of the appeal, we raised with counsel representing the parties the question of whether the Appeal Panel had jurisdiction to entertain the appeal in the light of s 32(3)(d).

5 Counsel had considered the question of the Appeal Panel's jurisdiction and what follows is a summary of the submissions of the Owners Corporation and of the lot owners in respect of the jurisdictional issue.

6 The submissions of the Owners Corporation may be summarised as follows:

(1) Where a Tribunal has engaged in jurisdictional error in coming to a decision, there is in fact no decision of the Tribunal: see *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 211 CLR 476. In that case, the Court stated that an administrative decision which involved jurisdictional error is regarded in law as no decision at all;

(2) In *Ex Parte Hebburn Limited; re Kearsley Shire Council. Ex Parte J & A Brown and Abermain Seaham Collieries Ltd; re Kearlsey Shire Council* 1947 SR NSW 416, the Court of Appeal stated the following at page 420:

> But there are mistakes and mistakes ; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply "a wrong and inadmissible test " : Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust (2) ; or to " misconceive its duty," or "not to apply itself to the question which the law prescribes " : The King v. War Pensions Entitlement Appeal Tribunal (3) ; or "to misunderstand the nature of the opinion which it is to form" : The King v. Connell (4), in giving a decision in exercise of its jurisdiction or authority, a decision so given will be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law : R. v. Board of Education.(5) This is, I think, the predicament of the learned magistrate in the present case.

(3) The Decision reveals that the Tribunal did not decide what was before the Tribunal. In paragraph 10 of the Decision the Tribunal stated that it is impossible to construe the order. Similarly, in paragraph 11 the Tribunal stated that it is impossible to find that the respondents have failed to comply with an order of the Tribunal; and

(4) Given the way the Tribunal approached the decision making process, the Appeal Panel should decide that there was in fact no decision at all.

7 In contrast, counsel for the lot owners submitted that the Appeal Panel had no jurisdiction by reason of the operation of s 32(3)(d) of the SSM Act. Here, an

application was made under s 202 of the SSM Act and the Member construed the effect of the order said to have been breached by the lot owners.

Consideration

8 In our view, the Appeal Panel has no jurisdiction to consider this appeal. The effect of s 32(3)(d) is clear in stating that the Appeal Panel does not have jurisdiction with respect to an appeal concerning any decision for the imposition of a civil penalty.

9 The Decision concerned whether a civil penalty should be imposed and the Member decided it should not. In the course of coming to that view, the Tribunal considered the effect of the order made on 8 August 2016 which was said to have been breached by the lot owners. The process of reasoning may be summarised as follows:

(1) The order of 8 August 2016 did not contain a direction that the lot owners give access. The orders merely contained a notation that the lot owners had agreed to give access ([8]);

(2) It is impossible to construe the order of 8 August 2016 as a direction to the lot owners that they must give access ([10]); and

(3) The orders of 8 August 2016 do not constitute a command directed to the lot owners requiring them to give access ([11]) and it is therefore impossible to find that the respondents have failed to comply with an order of the Tribunal.

10 Whether or not one agrees with the construction adopted by the Tribunal, the position is, in our view, that the Member has undertaken the task of construing, and has expressed an opinion as to the effect of the 8 August 2016 orders. The question to be addressed is whether the Decision displays jurisdictional error.

11 We have considered the submissions of the Owners Corporation and in particular, the reliance placed upon the two cases cited. The first is *Plaintiff S157/2002 v Commonwealth of Australia*. There, the High Court considered a case involving an alleged denial of procedural fairness by reason of failure to provide to the plaintiff material adverse to the plaintiff's claim of refugee status, and an opportunity to address that material. Gleeson CJ said the following:

> Subject to any such statutory provision, denial of natural justice or procedural fairness will ordinarily involve failure to comply with a condition of the exercise of decision-making power, and jurisdictional error (page 490).

12 In addition, the following appears in the joint judgments of Gaudron, McHugh, Gummow, Kirby and Hayne JJ:

> This Court has clearly held that an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all" (page 506).

13 The above extract cites the High Court decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597. In that case, the High Court was also required to consider a submission that a hearing had occurred and a decision made, contrary to the requirement to provide procedural fairness. The Tribunal had made a second decision after being alerted to the unfairness associated with the first decision. The question was whether the Tribunal had power to make the second decision. Some statements made by the High Court that are relevant to our determination of this case are the following:

> (1) However, the Court held that the principle of functus officio should not be strictly applied if the tribunal has failed to discharge its statutory function and "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation."
>
> The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration. And the statutory scheme, including the conferring and limitation of rights of review on appeal, may evince an intention inconsistent with a capacity for self-correction. Even so, as the facts of the present case show, circumstances can arise where a rigid approach to the principle of functus officio is inconsistent with good administration and fairness (Gleeson CJ at 603).
>
> (2) The failure of the Tribunal to give Mr Bhardwaj a reasonable opportunity to present evidence and argument had the consequence that it did not reach a decision after considering evidence and argument against the cancellation of his visa. That being so, it follows that the Tribunal did not conduct a review as required by the Act and the September decision was, thus, not a "decision on review" for the purposes of ss 367 and 368 of the Act (Gaudron and Gummow JJ at 612)
>
> (3) There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all (Guadron and Gummow JJ at page 614).

14 Here, the Decision does not fall into the kind of decision considered in *Plaintiff S157/2002 v Commonwealth of Australia* or *Minister for Immigration and Multicultural Affairs v Bhardwaj* and does not involve jurisdictional error. This is because the task of the Tribunal at first instance in the present case was to

determine whether the lot owners had breached an order of the Tribunal to provide access to their lot. That involved a consideration of the terms of the prior order by which it was said that access was ordered to be provided. The Tribunal considered the terms of that prior order and decided that its terms did not involve any direction or command being imposed upon the lot owners to give access. Therefore, there was no failure to comply with the Tribunal order and no possibility of determining that the lot owners had failed to comply with the Tribunal's order. In our view, the Tribunal purported to exercise its jurisdiction. Here, there was no failure to provide procedural fairness as in *Plaintiff S157/2002 v Commonwealth of Australia* or a failure to perform a statutory function as in *Minister for Immigration and Multicultural Affairs v Bhardwaj*. If the Tribunal was in error in its construction of the terms of the order, that error does not, in our view, constitute jurisdictional error. As a consequence, the Tribunal has no power to consider an appeal in this case by reason of s 32 of the Act. Rather, rights of appeal in such circumstances are determined by ss 82, 83 and 84 of the Act.

15 Accordingly, the only order available to us is to dismiss the appeal. The Tribunal will thus order that the appeal be dismissed.

Costs

16 The question arises as to whether the Owners Corporation should be ordered to pay the lot owners' costs of the appeal. We will make directions for the parties to make submissions on costs.

Orders

17 The Appeal Panel makes the following order:

(1) The appeal is dismissed;

(2) The lot owners are to file and serve submissions with respect to costs of the appeal within 14 days of today's date;

(3) The Owners Corporation is to file and serve its submissions with respect to costs within 14 days thereafter;

(4) The lot owners are to file and serve any submissions in reply within 7 days thereafter; and

(5) Submissions should include a submission as to whether the Tribunal may decide the question of costs on the papers and dispense with a hearing (see s 50 of the Act).

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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