

Supreme Court

New South Wales

Medium Neutral Citation:	Owners Corporation SP 72521 v Walsh [2016] NSWSC 1134
Hearing dates:	05 August 2016
Date of orders:	05 August 2016
Decision date:	05 August 2016
Jurisdiction:	Common Law
Before:	Fagan J
Decision:	1. The defendants' notice of motion filed 21 June 2016 is dismissed. 2. The defendants are to pay the plaintiff's costs of the notice of motion.
Catchwords:	PRACTICE AND PROCEDURE – civil law – summons for summary dismissal of appeal – appeal from member of Civil and Administrative Tribunal – whether the appeal is competent – whether Division decision was internal or external appeal decision – Civil and Administrative Tribunal Act 2013 (NSW) , s 83.
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) , Strata Schemes Management Act 1996 (NSW) , Supreme Court Act 1970 (NSW)
Category:	Procedural and other rulings
Parties:	Owners Corporation of Strata Plan No 72521 (Plaintiff/Applicant) Patrick Walsh (1st and 2nd Defendants/Respondents)
Representation:	Counsel: Mr David Lloyd (Plaintiff) Solicitors: Mr Tom Bacon (Defendants)
File Number(s):	2016/168569
Publication restriction:	Nil

Judgment

1. Before the Court is a notice of motion filed by the defendants, Patrick Walsh and Karen Best who are owners of a ground floor unit in a strata plan building at Potts Point. The plaintiff is the Owners Corporation of Strata Plan 72521 (“Owners Corporation”). By the summons with which these proceedings were commenced the plaintiff Owners Corporation seeks leave pursuant to s [83\(1\)](#) of the [Civil and Administrative Tribunal Act 2013 \(NSW\)](#) to appeal on a question of law from a decision made in the Tribunal by Member Cohen. The defendants’ notice of motion is for orders that leave be refused and the appeal be dismissed summarily; alternatively that the appeal be transferred to the Appeals Panel of the Tribunal.

The strata scheme dispute and adjudication

2. The way the proceedings came before Member Cohen in the Tribunal was as follows. The defendants at some time before February 2016 wished to construct, on an open air portion of their lot, a pergola. In order to construct this they needed to affix it to the wall of the building. The wall was part of the common property of the strata scheme.
3. To carry out this improvement and affix it to the common property the defendants required an amendment to the strata scheme by a resolution of the Owners Corporation. They put such a resolution to a meeting of the Corporation but it was defeated. According to the decision of an adjudicator who subsequently considered this decision, 69.7% of the eligible votes were against the resolution. It required 75% approval in order to pass.
4. The [Strata Schemes Management Act 1996 \(NSW\)](#) provides for an avenue of appeal from such a refusal of an owners corporation to make or amend a by-law. Under s 158(1) of that Act an adjudicator may, on an application by the proprietors of a lot such as the defendants in this case, make a determination that the Corporation has unreasonably refused to make the by-law. The adjudicator may, as he or she so finds, make an order prescribing the making of the by-law or an amendment to a by-law as the adjudicator should consider appropriate.
5. The position of adjudicator is defined in the *Strata Schemes Management Act* in ss 217 to 218. The Minister administering the Act may appoint adjudicators and they have the functions conferred by the statute. In this case the defendants appealed to an adjudicator to exercise the power to which I have referred under s 158(1). The adjudicator who dealt with the matter was a Ms K Ross. On 24 February 2016 she made a decision upholding the defendants' appeal. She directed that the Owners Corporation should do everything necessary forthwith to register the by-law which the defendant had sought and which the adjudicator had approved.

The Owners Corporation appeal from the Adjudicator to the Tribunal

6. The Owners Corporation had a right of appeal against the adjudicator's decision pursuant to ss 177 and 181 of the *Strata Schemes Management Act*. The appeal was to the Civil and Administrative Tribunal. A note to s 177(1) of the *Strata Schemes Management Act* which appears in that Act reads:

“An appeal under this section is an external appeal to the Tribunal for the purposes of the [Civil and Administrative Tribunal Act 2013](#).”
7. In the [Civil and Administrative Tribunal Act](#), Sch 4 provides for the jurisdiction and allocation of business to a division of the Tribunal which is entitled the Consumer and Commercial Division. Schedule 4 has effect by force of s 16 of the Act. Clause 3 of Sch 4 states that the functions of the Tribunal in relation to the *Strata Schemes Management Act* are allocated to the Consumer and Commercial Division.

8. Within Sch 4, the expression “Division decision” is used. This is defined to mean a decision of the Tribunal in exercise of a function of the Consumer and Commercial Division which includes the business which is allocated to that Division under the *Strata Schemes Management Act*, Schedule 4, also uses the expression “Division function” which means a function of the Tribunal allocated to the Consumer and Commercial Division.

9. Mr Cohen, a member of the Tribunal, apparently sits within the Consumer and Commercial Division. The Owners Corporation appealed from Ms Ross’s decision, as adjudicator, pursuant to s 177 of the *Strata Schemes Management Act* to the Tribunal and that appeal came before Mr Cohen. The defendants, who were respondents to that appeal, applied to Mr Cohen to dismiss it upon a number of bases, each of the various grounds being raised in a preliminary manner.

10. One of the grounds raised involved s 80D *Strata Schemes Management Act*. That section provides as follows:

“80D Legal action to be approved by general meeting

 - (1) An owners corporation or executive committee of an owners corporation must not seek legal advice or the provision of any other legal services, or initiate legal action, for which any payment may be required unless a resolution is passed at a general meeting of the owners corporation approving the seeking of the advice or services or the taking of that action.
 - (2) The regulations may make provision for or with respect to exempting any type of legal service or legal action from the operation of this section.”

11. The effect of this section appears to me to be that it creates a statutory and necessary pre-requisite to a legal action such as the appeal from the adjudicator to Mr Cohen. Namely that the Owners Corporation should first have passed at a general meeting a resolution approving the taking of the action. That was not done. Even when this objection to their appeal to the Tribunal was raised by the defendants, the Owners Corporation did not attempt to reconvene and pass a resolution which would satisfy s 80D of the *Strata Schemes Management Act*.

12. Mr Cohen’s reasons of 4 May 2016 for his decision on the strike out application before him record that the reason the Owners Corporation did not attempt to rectify the default with respect to s 80D were (a) the Secretary of the Corporation had formed a view that the costs would be no more than \$12,500 and that this fell within an exception to the requirements of s 80D, prescribed by a regulation and (b) that in any event the Owners Corporation had insurance against liability for legal fees.

13. These matters did not satisfy Mr Cohen as to there being an exemption from the requirements of s 80D. He held at [51] of his reasons of 4 May 2016:

“[51] The consequence is that the Tribunal finds that even though it was open to the [Owners Corporation] to conduct an extraordinary general meeting ratifying the incurring

of legal expenses and the commencement of the proceeding before the date on which the application was lodged with the Tribunal, this has not occurred by reason of the intentional conduct of the Executive Committee of the Applicant.”

14. Mr Cohen further found at [57] that:

“...it was never open to the [Owners Corporation] to avoid confronting and satisfying the requirements of s. 80D of the Act.”

15. The Tribunal member concluded that it would not be proper for him simply to exercise his discretion to stay the proceedings to permit the obtaining of such a resolution retrospectively at an extraordinary general meeting of the Owners Corporation. Rather he determined that by reason of the intentional non-compliance with s 80D, as he found it, “the statutory appeal brought from the Adjudication proceeding thereby is incompetent” (see [59]).

16. However at [60] Mr Cohen said:

“It follows necessarily that the statutory proceeding must be dismissed, and the stay of the order made in the Adjudication proceeding made by the Tribunal on 21 March 2016 be dissolved.”

17. Mr Cohen went on to say at [64]: that it had been “demonstrated that the proceeding was otherwise misconceived.” The word “misconceived” was in my opinion, with respect, inappropriate having regard to the ground upon which Mr Cohen had determined the matter. The term “incompetent” as used at [59] was more apposite to describe his finding regarding the proceedings. According to the familiar usage of legal terminology “misconceived” would describe a case where a cause of action unknown to the law had been pleaded, for example, or where relief claimed could not be granted upon the basis of the allegations pleaded or would be futile in the known circumstances.

18. The relevant order made by Mr Cohen on 4 May 2016 picked up the word “misconceived”. It was as follows:

“1. The application is dismissed because the Tribunal is satisfied that the proceedings are:

– misconceived

– The proceedings should not be entertained upon the basis on the reasons for decision.”

19.

This determination of Mr Cohen was a decision on the Owners Corporation’s appeal against the order of the adjudicator. The decision was made pursuant to the jurisdiction conferred on the Tribunal by ss 177 and 181 of the *Strata Schemes Management Act*. In the course of his reasons Mr Cohen referred to the defendants’ application to have the Corporation’s appeal dismissed as an

interlocutory application. However the orders disposing of the appeal to the Tribunal were not interlocutory, they were final. The appeal by the Owners Corporation was dismissed. There could not have been anything more final than that which was ordered on 4 May 2016.

20. Section 181 of the *Strata Schemes Management Act* includes subs (3) as follows:

“Unless the order [of an Adjudicator] appealed against is an interim order, the Tribunal may determine an appeal by an order affirming, amending or revoking the order appealed against or substituting its own order for the order appealed against.”

21. This subsection is facultative. It states ways in which the Tribunal “may determine” appeals. It does not provide that an appeal from an adjudication may only be disposed of by an order which precisely answers one of the alternative descriptions in s 181(3). I consider that it is part of the necessary intendment of Parliament in the enactment of s 181 that the Tribunal might also determine an appeal by dismissing it. That is what occurred here. A dismissal has the indirect effect of affirming the order appealed.
22. Having regard to the wording of ss 177 and 181 and the scope of the Tribunal’s powers in dealing with an appeal from a decision of an adjudicator, I see no reason for concluding that the order which the Tribunal member made disposing of the Owners Corporation’s appeal to him was other than an order made under the powers conferred by those two sections.

External and internal appeals in the Tribunal

23. The [Civil and Administrative Tribunal Act](#) recognises a distinction between external and internal appeals. The distinction is made clear by ss 31 and 32 respectively. An external appeal is an appeal to the Tribunal against an appealable external decision. An appealable external decision is defined in subs (3) of s 31 as a “decision of an external decision maker over which the Tribunal has external appeal jurisdiction”.
24. “External decision maker” is defined in s 4(1) to mean “a decision-maker who is external to the Tribunal”. That definition encompasses the adjudicator. The adjudicator in exercising her function was not part of the Tribunal. She was external to it. She gave her decision as a statutory appointee under s 217 of the *Strata Schemes Management Act* not under the [Civil and Administrative Appeals Tribunal Act](#).
25. Under s 32 of the [Civil and Administrative Tribunal Act](#), an internal appeal is an appeal to the Tribunal against an internal appealable decision. An internal appealable decision is one that has been made by the Tribunal itself or by a registrar over which the Tribunal has internal appeal jurisdiction. This includes by subs (1) of s 32 any decision made by the Tribunal in proceedings for a general decision or an administrative review decision and any decision made by a registrar of certain kinds defined in the Act.

26. The effect of all these provisions is that before Mr Cohen the Owners Corporation was a party to an external appeal. That is, it was a party to an appeal which had been made to a member of the Tribunal to exercise that member's external appeal jurisdiction with respect to a decision of an external decision maker, namely a *Strata Schemes Management Act* adjudicator.
27. Section [83\(1\)](#) of the [Civil and Administrative Tribunal Act](#) provides that a party, such as the Owners Corporation, to an external appeal in the Tribunal "may, with the leave of the Supreme Court, appeal on a question of law to the Court against any decision made by the Tribunal in the proceedings." Accordingly I consider that the current appeal in which the Owners Corporation seeks by its summons the leave of this Court to raise a question of law by way of appeal from the decision of Member Cohen is competent.

Defendants' denial that this was an external appeal to the Tribunal

28. Against the above conclusions, for which the Owners Corporation contended, the defendants have sought to characterise the decision made by Mr Cohen as not having been made under s 171 and/or s 181 of the *Strata Schemes Management Act* but under s 185. That section provides by subs (4) as follows (so far as relevant):

"(4) Without limiting the generality of subsection (3), the Tribunal may, by order, dismiss an application for an order under this Part if:

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

29. The defendants in this Court contend that because Mr Cohen said that his basis for dealing with the Owners Corporation's appeal from the adjudicator was that it was misconceived, therefore it must have been an order and a decision that was made under s 185 and is not a decision made in an external appeal to the Tribunal from the adjudicator under ss 177 and 181 of the *Strata Schemes Management Act*. I reject that submission.
30. The use of the word "misconceived" in s 185(4) is in a context which would attract its usual legal meaning as referred to at [17]. The fact that Mr Cohen may have characterised the basis of his decision, in my respectful opinion erroneously, as being that the Owners Corporation appeal to him was "misconceived", does not bring it within the statutory meaning of that term in s 185(4)(a). Mr Cohen's usage of the word "misconceived" cannot affect the substantive statutory nature of his decision. It cannot change it from having been a decision made under ss 177 and 181 on appeal from an adjudicator to a decision made under s 185. Section 185 is concerned with proceedings in the Tribunal in relation to Strata schemes of a nature entirely different from appeals from adjudicators' decisions.

Two types of strata scheme proceedings in the Tribunal

31. Part 4 of Chapter 5 of the *Strata Schemes Management Act* comprises ss 138 – 181 and is entitled "Orders of Adjudicator". These sections prescribe the power of an adjudicator appointed under s

217 to make orders to settle disputes relating to strata schemes. Sections 138 and 139 contain general statements regarding adjudicators' powers and sections 140 – 162 set out in great detail particular types of orders which adjudicators may make and the subject matters with which they may deal. Section 158, referred to at [4], is within Pt 4. It prescribes the power of an adjudicator to resolve disputes between an owners Corporation and the proprietors of one or more individual lots regarding the making or amending by-laws.

32. Sections 162A – 176 are concerned with procedural matters relating to the making of orders by adjudicators: how an application to adjudicator must be made, whether the adjudicator may refer a question to the Tribunal without deciding it, the power to make interim orders and so on. Sections 177 and 181 are the final two sections in Pt 4 and provide for appeals from adjudicators' decisions to the Tribunal.
33. Part 5 of Chapter 5 comprises sections 182 – 199 and is entitled "Orders of Tribunal". Sections 182 – 184 prescribe matters upon which the Tribunal may make orders upon direct application to it, not by way of appeal from an adjudicator's decision. These matters are different in character from those in respect of which adjudicators have the jurisdiction prescribed by Pt 4. For example the Tribunal's jurisdiction under Pt 5 includes making orders to reallocate unit entitlements amongst lots if it finds an existing allocation unreasonable (s 183) and appointing a strata managing agent to exercise the functions of an owners corporation (s 183B). Generally, the subject matters upon which the Tribunal has original jurisdiction under Pt 5 are of greater moment than the matters upon which adjudicators have original jurisdiction under Pt 4, with a right of appeal to the Tribunal under ss 177 and 188.
34. The defendants sought to characterise Mr Cohen's decision of 4 May 2016 as having been made under s 185 *Strata Schemes Management Act* in order to deny that it was a decision in either "an external or internal appeal" from which the owners Corporation might appeal to this Court on a point of law pursuant to s [83 *Civil and Administrative Tribunal Act*](#). This attempted characterisation, in my view, fails. There is a stark distinction between appeals from adjudicators' decisions to the Tribunal pursuant to Pt 4 (ss 171 and 181) and, on the other hand, direct applications to the Tribunal under Pt 5 (including s 185) of the *Strata Schemes Management Act*. Mr Cohen's decision was very clearly made in the former type of proceeding and was "an external appeal" within the meaning of s [83 *Civil and Administrative Tribunal Act*](#).

The proceeding before Mr Cohen was necessarily an external appeal

35. The proceeding which was before Mr Cohen must fall into one or other of the two comprehensive and mutually exclusive categories of Tribunal appeals which are recognised in the [Civil and Administrative Tribunal Act](#). Namely it must have been either an external appeal or an internal appeal. It was clearly not an internal appeal because the statute describes that as a form of appeal whereby decisions of individual members are taken to a panel of three members. See the discussion above of ss 31 and 32.

36. When the solicitor representing the defendants on the hearing of their notice of motion was asked in argument how he would classify Mr Cohen's decision, external or internal, he sought to argue that it was neither but that it was a "Division decision", picking up the language from Sch 4 of the Civil and Administrative Tribunal Act quoted at [8]. But to say that this was a "Division decision" is not to answer the question. Division decisions are those made by the Consumer and Commercial Division exercising the functions of the Tribunal with respect to the various Acts listed in cl 3 of Sch 4.
37. A Division decision is necessarily an external appeal decision because internal appeals, being the work of the Tribunal when constituted by an Appeal Panel, are not allocated to any particular Division: s 16(4). I consider it quite clear that what Mr Cohen decided constituted an external appeal so that the right to apply to this Court for leave to appeal under s 83 is available as stated earlier.

Referral of an appeal on a question of law back to an Appeal Panel

38. The defendants' solicitor, in support of the notice of motion to strike out the Owners Corporation's summons in this Court, referred me to cl 6 of Sch 4 of the Civil and Administrative Tribunal Act. This provides that where proceedings have been instituted in a court, the court may of its own motion order that the proceedings be referred to the Tribunal if the matter to which they relate is a matter for which the Tribunal has jurisdiction to exercise a function of the Consumer and Commercial Division.
39. The Civil and Administrative Tribunal Act provides that questions of law may be appealed as of right from a single member to an Appeal Panel. The question of law which the Owners Corporation wishes to raise may arguably be within the Tribunal's jurisdiction "to exercise a Division function" so that it would be open to this Court of its own motion to transfer the proceedings back to the Tribunal to be dealt with by an Appeal Panel. But I consider that it would be a wrong exercise of the discretion reposed in this Court by cl 6 to transfer the case back to the Tribunal at this point. The Owners Corporation's application for leave to appeal has not been embarked upon. The point of law which it wishes to raise has not been examined. The merits or otherwise of that point of law have not been ventilated. It has not yet become possible for this Court to form any view as to whether it would be better that the point of law be decided by the Appeal Panel rather than by a judge of this Court.
40. Section 83, on my reading of it, is intended to provide an avenue by which a party may bring to the Supreme Court a point of law without ever going to an Appeal Panel or before taking a matter on its factual and discretionary merits to an Appeal Panel. The section appears designed to enable this Court to exercise a supervisory jurisdiction with respect to legal questions, which may be invoked subject to leave at any stage of the decision making process within the hierarchy internal to the Tribunal. I would not accede to the defendants' application that I exercise the power under cl 6.

41. The defendants also invoke cl 5(3) of Sch 4 of the Act. This provides as follows:

“If, at a time when an application was made to the Tribunal for the exercise of a Division function, no issue arising under the application was the subject of a dispute in proceedings pending before a court, a court has no jurisdiction to hear or determine such an issue.”

42. In its application to the facts of this case that subclause merely has the effect that when the Owners Corporation appealed to Mr Cohen to reconsider the adjudicator's decision, as there was then no proceeding before a court with respect to the same subject matter no court had jurisdiction to hear or determine the issues which would arise in the appeal to Mr Cohen. That provision is of no assistance in resolving the issues before the Court on the defendants' notice of motion. Because the subclause has nothing to say about the bringing of an application for leave to appeal on a point of law to this Court after an external appeal has been brought before a Tribunal member and heard and determined, there is no contradiction between cl 5(3) of Sch 4 and s 83(1).

43. The defendants' solicitor cited cl 5(10) of Sch 4 which says that the clause has an effect despite Pt 3 of the Act or any other Act or law to the contrary.

44. My attention was drawn to a second reading speech in relation to the bill by which the Civil and Administrative Tribunal Act was brought before Parliament. The Parliamentary Secretary explained, on behalf of the responsible Minister, that the schedules to what has now become the Act contained special procedures. He said that the amending bill had been drafted “to ensure that the schedules override the general provisions of the bill to the extent of any inconsistency”.

45. Assuming that the intent has been carried into effect, given that there is in fact no inconsistency between cl 5(10) of Sch 4 and s 83, there is no reason not to give s 83 full effect.

Judicial review under s 69 Supreme Court Act

46. By the summons through which these proceedings have been commenced in the Common Law Division, the Owners Corporation relies, in the alternative, to invoke the judicial review power of this Court under s 69 of the Supreme Court Act 1970 (NSW). I do not need to consider whether or not the Owners Corporation has under that section a viable avenue of judicial review pursuant to which it could litigate this summons because I am satisfied that it does have an avenue of appeal, subject to leave, under s 83(1) of the Act. The summons can go forward for the determination of the plaintiff's claims in that respect.

Orders

47. For these reasons I order:

1. The defendants' notice of motion filed 21 June 2016 is dismissed.
2. The defendants are to pay the plaintiff's costs of the notice of motion.

Decision last updated: 16 August 2016