

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : THE OWNERS OF QUEENS RIVERSIDE STRATA
PLAN 55728 -v- ENGWIRDA [2021] WASC 392

CORAM : TOTTLE J

HEARD : 19 OCTOBER 2021

DELIVERED : 11 NOVEMBER 2021

FILE NO/S : GDA 10 of 2021

BETWEEN : THE OWNERS OF QUEENS RIVERSIDE STRATA
PLAN 55728
Appellant

AND

JENNIFER ENGWIRDA
Respondent

Catchwords:

Appeal from decision of State Administrative Tribunal - Legal professional privilege - Senior member erred when determining legal professional privilege claim by failing to consider whether third party had a claim for legal professional privilege over documents - Leave to appeal granted - Appeal allowed

Legislation:

State Administrative Tribunal Act 2004 (WA), s 105
Strata Titles Act 1985 (WA), s 43(1)(b), s 90

Result:

Leave to appeal granted
Appeal allowed
Orders made by the State Administrative Tribunal on 6 July 2021 set aside
Matter remitted to the State Administrative Tribunal

Category: B

Representation:

Counsel:

Appellant : C P K Russell
Respondent : No Appearance

Solicitors:

Appellant : Wotton + Kearney Lawyers (Perth)
Respondent : In Person

Case(s) referred to in decision(s):

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147
Commissioner for Consumer Protection v Carey [2014] WASCA 7
Craig v South Australia [1995] HCA 58; (1995) 184 CLR 163
Engwirda and The Owners of Queens Riverside Strata Plan 55728 [2021] WASAT 17
Hossain v Minister for Immigration and Border Protection [2018] HCA 34; (2018) 264 CLR 123
Kirk v Industrial Relations Commission (NSW) [2010] HCA 1; (2010) 239 CLR 531
Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Ziverts v City of Albany [2016] WASC 94

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TOTTLE J:

1 The appellant is the strata company for the scheme comprised in
strata plan 55728 (Scheme). The respondent is the proprietor of a lot
within the Scheme. The strata development comprised by the Scheme is
large. It consists of 526 units within an apartment complex in East
Perth.

2 On 6 November 2017 the State Administrative Tribunal (Tribunal)
made an order that the appellant provide the respondent with electronic
copies of documents she had requested other than documents subject to
legal professional privilege. The respondent's request for documents
had been made under s 43(1)(b) of the *Strata Titles Act 1985* (WA) and
the Tribunal's order was made under s 90 of the *Strata Titles Act*.

3 On 6 July 2021, a senior member of the Tribunal ordered that
eight documents that the appellant had asserted were subject to legal
professional privilege should be provided to the respondent and written
reasons for the making of the order were published.¹

4 On 9 July 2021, the appellant filed an application for leave to
appeal under s 105 of the *State Administrative Tribunal Act 2004* (WA)
(the Act) and filed an application pursuant to s 106 of the Act for a stay
of the orders of 6 July 2021 until the determination of the appeal.

5 On 20 August 2021 I made an order staying the Tribunal's order of
6 July 2021 pending the determination of the appeal.

6 The respondent did not participate in this application for leave to
appeal. She appeared at the hearing of the appellant's application for a
stay and informed the court that she did not wish to participate in the
appeal if doing so exposed her to the risk of an adverse costs order. The
respondent was present in court when the appeal was heard but did not
seek to make any submissions or otherwise oppose the application. I do
not, though, interpret this as an indication that she consented to the
application.

7 The gravamen of the appellant's argument is that the senior
member did not ask the correct question and as a result made an error
of law. The appellant contends that the senior member confined himself
to a consideration of whether the documents were the subject of legal
professional privilege held by the appellant. The appellant contends that

¹ *Engwirda and The Owners of Queens Riverside Strata Plan 55728* [2021] WASAT 17 (S) (Tribunal's Reasons).

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the senior member should have considered whether the documents were the subject of legal professional privilege held by the appellant or its strata manager or agent, Colliers.

The documents

8 On 12 June 2020 the appellant filed with the Tribunal a document listing 15 documents over which legal professional privilege was claimed. The basis on which that privilege was claimed was as follows:

1. Privilege was claimed over these documents as they were documents containing or related to legal advice obtained by the [appellant] and/or its strata manager(s)/agents.
2. Since the USB was prepared and provided to the [respondent] documents 1 - 7 have been provided to the [respondent] (or the [respondent] has been given the opportunity to inspect them) and copies have again been provided to the [respondent] at the time of giving her this written statement - the [appellant]'s claim for legal professional privilege has therefore been waived over these documents.
3. The [appellant] maintains its claim for legal professional privilege over documents 8 - 15. These documents contain legal advice obtained by the strata manager in relation to matters concerning the [respondent].²

9 The senior member determined that the preliminary issue for the Tribunal to determine is whether the appellant has improperly claimed legal professional privilege for all or any of documents 8 - 15 (the disputed documents).³ The disputed documents are email chains between a firm of solicitors and Colliers, a company said to act as the appellant's strata manager and agent.

The Tribunal's decision

10 The senior member framed the issue for determination initially in the following terms: 'whether the disputed documents, which the strata company has not allowed Ms Engwirda to inspect on the ground that

² *Engwirda and The Owners of Queens Riverside Strata Plan 55728* [2021] WASAT 17 [16].

³ *Engwirda and The Owners of Queens Riverside Strata Plan 55728* [38].

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they are legally professionally privileged, are actually privileged.⁴ Shortly thereafter, however, the senior member referred to the issue in more limited terms as follows:⁵

Therefore, if I decide that the strata company *has not proved its claim for legal professional privilege* in respect of all or any of the disputed documents, I will order the strata company to provide inspection of those documents to Ms Engwirda by giving her an electronic copy of those documents within the period of seven days. (emphasis supplied)

11 The senior member set out the relevant legal principles governing legal profession privilege by reference to well-known authorities in terms that are uncontroversial.

12 The senior member summarised the appellant's arguments as follows:⁶

The strata company has filed written submissions and an affidavit dated 10 March 2021 of Amy Cooper, senior strata manager of Colliers International (Colliers), which is the strata manager of the strata company.

The strata company submits that in the months prior to the commencement of this proceeding Colliers engaged Jackson McDonald Lawyers (Jackson McDonald) for advice in relation to matters the subject of disputes with Ms Engwirda and advice was sought from Jackson McDonald by Colliers, both in its own right and in its capacity as the strata manager for the strata company.

The strata company submits that each of the disputed documents contains advice given by Jackson McDonald to the strata company about disputes with Ms Engwirda and matters that became the subject matter of this and other proceedings.

The strata company submits that the disputed documents were created for the dominant purpose of giving advice in direct response to communications from Ms Engwirda and in relation to anticipated legal proceedings and Ms Engwirda is identified in each of those documents.

The strata company says that documents 11 to 15 of the disputed documents also contain legal advice in relation to other disputes between Ms Engwirda and Colliers / the strata company.

In her affidavit Ms Cooper identifies the disputed documents and states that each of them contains legal advice provided by Jackson McDonald to Colliers in relation to matters the subject of disputes with

⁴ Tribunal's Reasons [5].

⁵ Tribunal's Reasons [6].

⁶ Tribunal's Reasons [11] - [16].

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Ms Engwirda and in anticipation of legal proceedings. Ms Cooper says that each of the disputed documents contains legal advice given by Jackson McDonald to Colliers on matters, the subject of this proceeding, and that documents 11 to 15 of the disputed documents also contain legal advice which relates to other disputes between Ms Engwirda and Colliers or the strata company. I will examine the statements made by Ms Cooper in her affidavit in more detail later in these reasons.

13 The senior member summarised the respondent's relevant submissions and evidence as follows:⁷

Ms Engwirda has filed written submissions, her affidavit dated 8 April 2021 and an affidavit of Susan Mary Evans dated 15 March 2021.

Ms Engwirda submits that the disputed documents do not qualify as privileged because the strata company was not a client of Jackson McDonald when the documents were created and the legal advice was provided for the benefit of Colliers, which waived the privilege it held in respect of the documents by sharing the advice it received with the strata company.

Ms Engwirda submits that the strata company was not a client of Jackson McDonald until after 18 April 2017 and neither directly nor indirectly sought advice from Jackson McDonald regarding requests by owners of lots in the strata scheme to inspect the records of the strata company until this proceeding was commenced.

In her affidavit Ms Evans states that she served as the chairperson of the council of the strata company from 8 September 2015 until 6 September 2017. Ms Evans says that on 1 November 2016 a strata management agreement between the strata company and Colliers came into effect. Ms Evans has incorporated into her affidavit copies of various emails sent by Daniel Crotty (an employee of Colliers) to Ms Evans (and other persons who seem to be members of the council of the strata company at the time) and various emails sent by Ms Evans to Mr Crotty, all between 30 March 2017 and 4 April 2017. I will examine those emails in more detail later in these reasons.

Ms Evans has also incorporated into her affidavit a copy of an invoice from Jackson McDonald dated 28 April 2017 addressed to the strata company of care of Colliers, for professional services from 31 March 2017 until 21 April 2017. Ms Evans says that the council of the strata company disputed that the strata company was liable to pay for those services, which were obtained by Colliers voluntarily. Ms Evans says that the strata company did not become a client of Jackson McDonald

⁷ Tribunal's Reasons [17] - [23].

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until the council of the strata company signed a retainer agreement with Jackson McDonald on 19 April 2017.

14 The senior member analysed the evidence in some detail. In the course of that analysis the senior member focused on whether Jackson McDonald provided legal advice to Colliers in its own right or to Colliers in its capacity as the representative or agent of the appellant. This analysis led the senior member to make the following factual findings:⁸

I find that Colliers became the strata manager of the strata company on 1 November 2016.

I find that Jackson McDonald was engaged by the strata company on 19 April 2017 to provide legal services to it, when a retainer agreement with Jackson McDonald was signed by the council of the strata company on that date.

I find that the legal advice sought and obtained by Colliers from Jackson McDonald between 30 March 2017 and 6 April 2017 in the disputed documents was advice for Colliers in its own right and not for the strata company.

15 The senior member expressed his conclusion as follows:⁹

I, therefore, find that the strata company has not proved, on the balance of probabilities, that any of the disputed documents (which are dated from 30 March 2017 to 6 April 2017) fall within either legal advice privilege or litigation privilege which can be invoked by the strata company against Ms Engwirda, in light of the fact that Jackson McDonald was not engaged to provide legal services to the strata company prior to 19 April 2017.

16 I interpolate that the senior member did not examine any of the documents, as he was entitled to do. In *Ziverts v City of Albany*,¹⁰ Beech J (as his Honour then was) observed that a court should not be hesitant to examine documents where there is a disputed claim to privilege.¹¹

Appeal from decisions of the Tribunal

17 An appeal from the Tribunal's decision requires leave to appeal.¹²

⁸ Tribunal's Reasons [40] - [42].

⁹ Tribunal's Reasons [43].

¹⁰ *Ziverts v City of Albany* [2016] WASC 94.

¹¹ *Ziverts v City of Albany* [9].

¹² *State Administrative Tribunal Act 2004* (WA) s 105(1).

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18 The appeal can only be brought on a question of law.¹³ As Buss JA observed in *Paridis v Settlement Agents Supervisory Board*:¹⁴

An appeal 'on a question of law' is narrower than an appeal that merely 'involves a question of law'. Where an appeal lies 'on a question of law' the subject matter of the appeal is the question or questions of law. If a question raised by a litigant, properly analysed, is not a question of law, linguistic gymnastics in the formulation of the grounds of appeal cannot convert it into a question of law. A question of mixed law and fact is not a question of law within s 105(2).

19 The questions of law on which an appeal may be brought are not, however, confined to jurisdictional errors of law.¹⁵

20 Where the Tribunal fails to deal with an issue before it (by identifying the wrong issue or asking the wrong question) there will be an error of law.¹⁶

Grounds of appeal

21 The grounds of appeal are as follows:

1. The Senior member erred in law by failing to consider whether the documents were subject to legal professional privilege and instead considered only whether the strata company had a claim to legal professional privilege over the documents when he ought to have considered whether Colliers (the strata manager) had a claim for legal professional privilege over the documents.
2. The senior member erred in law by failing to consider whether the strata manager's claim for legal professional privilege over the documents was maintained after it had provided the documents to the Council of Owners of the strata company when he ought to have actually looked at the documents and the circumstances in which they were provided to the Council of Owners of the strata company to determine whether any waiver of privilege had occurred.

¹³ *State Administrative Tribunal Act 2004* (WA) s 105(2).

¹⁴ *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361 [53].

¹⁵ *Commissioner for Consumer Protection v Carey* [2014] WASCA 7 [65] - [73] (McLure P).

¹⁶ *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 264 CLR 123 [40] (Nettle J), [70] (Edelman J); *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; (2010) 239 CLR 531 [72] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 176 - 178 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 (Lord Reid).

*TOTTLE J***Disposition**

22 The question of law raised by this appeal is whether the senior member asked himself the wrong question.

23 I consider that ground 1 is made out. The senior member was required to consider whether the disputed documents (or any of them) were the subject of a claim for legal professional privilege. The senior member directed his consideration to the confined question of whether the disputed documents were the subject of a claim for privilege by the appellant. With respect, he should have asked the further question of whether the disputed documents were the subject of a claim for privilege by Colliers, it being the only other person who could have had a claim for legal professional privilege over the documents. By misdirecting himself the senior member made an error of law. Parenthetically, I observe the senior member may have been assisted in his task if he had inspected the disputed documents as he was entitled to do.

24 Unless and until the senior member determined whether the disputed documents were the subject of a claim by Colliers for legal professional privilege the requirement to consider the questions embraced by ground 2 do not arise. On that basis, ground 2 is not made out. The matter will be remitted to the senior member for reconsideration in accordance with these reasons. If the senior member considers that the disputed documents are the subject of a claim for legal professional privilege by Colliers then he may well be required to consider the issue of whether there has been a waiver of privilege.

25 I will grant leave to appeal, allow the appeal, set aside the orders made by the Tribunal on 6 July 2021 and remit the matter for reconsideration to the Tribunal in accordance with these reasons.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

RC

Associate to the Honourable Justice Tottle

10 NOVEMBER 2021