Civil and Administrative Tribunal

New South Wales

Case Name:	Newport v Pittman
Medium Neutral Citation:	[2022] NSWCATAP 150
Hearing Date(s):	24 March 2022
Date of Orders:	10 May 2022
Decision Date:	10 May 2022
Jurisdiction:	Appeal Panel
Before:	The Hon D A Cowdroy, AO QC, Principal Member G K Burton SC, Senior Member
Decision:	(1) The appeal is allowed. (2) The decision of the Tribunal delivered on 1 December 2021 is set aside. (3) The proceedings be reconsidered by the Tribunal either with or without further evidence.
Catchwords:	STRATA MANAGEMENT – smoking – claim of breach of Strata Schemes Management Act 2013 (NSW) s 153 – re-determination – onus of proof
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Strata Schemes Management Act 2015 (NSW)
Cases Cited:	Adams v New South Wales Housing Corporation [2016] NSWCATAP 31 Azzopardi v Tasman UEB industries Ltd (1985) 4 NSWLR 139 Bobolas v Waverley Council (2016) NSWCA 139 Bugeja v Hatgiantounio [2002) NSWCA 132 Carlson v King (1947) 64 WN (NSW) 65 Clements v Independent Indigenous Advisory Committee (2003) 131 FCR 28; [2003] FCAFC 143 Eadie v Harvey [2017] NSWCATAP 201 John Prendergast and Vanessa Prendergast v Western

	Murray Irrigation Ltd [2014] NSWCATAP 59 Mifsud v Campbell (1991) 21 NSWLR 75 New South Wales Land and Housing Corporation v Orr [2019] NSWCA 231 Pettit v Dunkley [1971] 1 NSWLR 376 Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110 Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33 Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 Temple v AMR Motors Pty Ltd [2017] NSWCATAP 221
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Desmond Bernard Newport (First Appellant) Carmen Kerry-Ann Newport (Second Appellant) Brenton Pittman (First Respondent) Lynette Robyn Cartwright (Second Respondent)
Representation:	Solicitors: First Appellant (self-represented) Second Appellant (self-represented) O'Neills Law (Respondent)
File Number(s):	2021/00353919
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	01 December 2021
Before:	K Rickards, Member
File Number(s):	SC 21/38741

REASONS FOR DECISION

1 By notice of appeal filed within time on 13 December 2021 the appellants appeal a decision of the Tribunal delivered on 1 December 2021.

2 The proceedings which were filed in the Tribunal on 13 September 2021 by the respondents to this appeal (the applicants in the primary proceedings) for an order prohibiting the appellants from smoking on the balcony of their home unit in a strata scheme in Kingscliff in NSW ("the property"). In these reasons we refer to the parties by their role in this appeal, where the respondents in the primary proceedings are the appellants.

Tribunal findings and orders

3 On 1 December 2021 the Tribunal delivered its decision.

4 The Tribunal referred to s 153 (1) (a) of the *Strata Schemes Management Act 2015* (NSW) (SSMA) and a decision of the Appeal Panel in *Adams v New South Wales Housing Corporation* [2016] NSWCATAP 31 at [64]. It acknowledged this decision dealt with an alleged nuisance under the provisions of the *Residential Tenancies Act 2010* (NSW), but said that the summary of previous decisions and what constituted a private nuisance was "both useful and applicable in the factual circumstances of the present matter which was a "not dissimilar matter".

5 The Tribunal found that the respondents' evidence supported the contention that tobacco smoke from the activity of the appellants and/or their invitees in smoking on the balcony drifted into the respondent's premises upon a not irregular basis. Accordingly, given the respective subjective circumstances of the parties, the interference caused by tobacco smoke was not insubstantial and constituted a nuisance which was reasonably avoidable.

6 The Tribunal proceeded to make orders pursuant to section 241 of the SSMA in effect prohibiting smoking on the balcony of the appellants' property at any time and requiring that all exterior windows and doors of the appellants' property should be closed during, and for at least five minutes after, any period when smoking took place inside the property.

Notice of appeal

7 Under the section in the notice of appeal entitled "Orders challenged on appeal" the appellants stated:

> "We wish to have the order to refrain from smoking on our balcony lifted. We wish to have the order to smoke inside our apartment with all doors and windows close lifted."

8 The order which the appellants seek is as follows:

> "We are free to smoke on our balcony provided there is a wind blowing at a velocity of over of 10 km/h. We have access to up-to-the-minute weather conditions on our iPhones".

9 The appellants claim the decision was not fair and equitable. Their reasons are stated as follows:

> "The decision was not fair because we suspect the decision was made on the grounds of prejudice against smokers without a thorough examination of their (applicants) evidence (proof) or our evidence that we were not harming their health or causing nuisance. Their motivation is simply control. Please see testimonials from all other unit holders in the complex." [underlining in original]

10 The appellants claim that the Tribunal should have given more weight to their submissions should have given more weight to certain evidence and state verbatim as follows:

> (1) "their lack of truth – an emotional (sic);
>
> (2) our demonstration that we could not be causing them distress but refused to pander to the absolute control they exercised in this building since it was first occupied;
>
> (3) The lack of proof the nuisance, real or imagined is attributable to us alone".

Reply

11 A Reply was been filed on 10 January 2022 which opposes the grant of leave to appeal. The submissions in reply stated that :

(a) The appeal raised no matter of law to support the appeal.

(b) There was no identification of any error of law.

(c) The mere suspicion of the appellants that the Tribunal was prejudiced against smokers was baseless and without evidence.

(d) The appellants filed and served their evidence in relation to the complaint on or about 18 October 2021 with the Tribunal directions made on 6 October 2021. There was no evidence tendered by the appellants to suggest that the Tribunal did not undertake a thorough examination of the appellants' evidence at the hearing.

(e) The appellants failed to make out one or more of the requirements in Cl 12 of Schedule 4 to the *Civil and*

Administrative Tribunal Act 2013 (NSW) (NCAT act) for a grant of leave to appeal against an alleged error of fact.

(f) In respect of the alleged decision being against the weight of evidence, the seven testimonials were from current or prior residents. However, there was no indication why the Tribunal should have given them more weight.

(g) With respect to the third claim that "significant new evidence has arisen (being evidence was not reasonably available at the time the proceedings under appeal were being dealt with)", no evidence had been tendered.

Is a question of law raised on this appeal?

12 This appeal is an internal appeal brought pursuant to s 80 (2) (b) of the *Civil and Administrative Tribunal Act 2013* (NSW)("NCAT Act"). The appellants are not legally represented, and the notice of appeal does not raise a question of law. However, early in their opening submissions, the appellants identified a inadequate question of law, namely that the Tribunal had provided reasons upon which to base the orders which the Tribunal made.

13 The notice of appeal filed by the appellants did not raise this issue. However the Appeal Panel an unrepresented litigant is not to be afforded any special treatment: see *Bobolas v Waverley Council* (2016) NSWCA 139 at [246], [247]. The New South Wales Court of Appeal stated:

> [246] There is no "special" duty of care owed to unrepresented litigants. Rather, to the extent there is an obligation, sometimes described as a "duty", but not a "duty of care, it is framed in terms of the right to a fair trial.
>
> [247] Courts have an overriding duty to ensure that a trial is fair, which entails ensuring that the trial is conducted fairly and in accordance with law. In the context of an unrepresented litigant, the duty requires that a person does not suffer a disadvantage from exercising the recognised right of a litigant to be self-represented. However, the court's duty is not solely to the unrepresented litigant. Rather, the obligation is to ensure a fair trial for all parties.
>
> …
>
> [T]he duty of a trial judge does not extend to advising the accused as to how his or her rights should be exercised, nor to giving judicial advice to, or conducting the case on behalf of, the unrepresented litigant. The judge must remain at all times the impartial adjudicator of the matter, measured against the touchstone of fairness".

14 But particular statutory provisions apply in this Tribunal. Section 38 (4) of the NCAT act provides:

> The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

15 Applying the statutory provisions the Appeal Panel considers that it would deprive the appellant of procedural fairness if it did not recognise that it had articulated a question of law, albeit orally, namely that there was an absence of reasons to support the orders under appeal. A failure to forward a party procedural fairness will in itself constitute an error of law: see *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28; [2003] FCAFC 143 at [8].

Consequences of Finding a Question of Law

16 Where a question of law arises for determination in an appeal, an appellant may bring the appeal without a grant of leave; otherwise, leave of the Appeal Panel is required.

17 What constitutes an error of law has been considered in *John Prendergast and Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 59 at [13]. See also *Temple v AMR Motors Pty Ltd* [2017] NSWCATAP 221 at [54] – [59].

18 Making findings without evidence or in the face of the evidence is an error of law: see *Azzopardi v Tasman UEB industries Ltd* (1985) 4 NSWLR 139 at 155 – 156; *Bugeja v Hatgiantounio* [2002) NSWCA 132 at [9]. Such failure may be characterised as a failure to have regard to a relevant consideration or a failure to have regard to critical evidence or a failure to give adequate reasons: see *Mifsud v Campbell* (1991) 21 NSWLR 75 at 7 to 8; *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [62] – (63]; *Eadie v Harvey* [2017] NSWCATAP 201 at [61] – [62]. See also *Pettit v Dunkley* [1971] 1 NSWLR 376 at 382 per Asprey JA.

19 It is essential to expose the reasons for resolving a point critical to the contest between the parties. Inadequate reasons which do not expose sufficiently the evidence relied upon to make a finding or do not sufficiently expose how the findings support the ultimate conclusion and decision constitute an error of law, although the manner in which that obligation is to be discharged varies according to the nature of the jurisdiction, the court or tribunal exercising it and

the subject matter being determined: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259, 270 – 272, 280 – 281; *New South Wales Land and Housing Corporation v Orr* [2019] NSWCA 231 at [65]-[77].

20 Similarly, in *Carlson v King* (1947) 64 WN (NSW) 65, Jordan CJ at page 66 said that a decision-maker must make "… a note of everything necessary to enable the case to be laid properly and sufficiently before the Appellate Court if there should be an appeal."

21 A Tribunal must state clearly the reasons relied upon to justify its findings. In *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [46], Basten JA said that a "*pragmatic and functional approach"* is to be applied in determining whether the obligation to give reasons has been satisfied. At [48] His Honour stated that the function of the appellate court is "to determine whether the reasons provided have reached a minimum acceptable level to constitute a proper exercise of judicial power."

Consideration

22 It was essential for the decision-maker first to establish that the Tribunal had jurisdiction to determine the dispute. This was readily achievable by referring to the relevant provisions of the SSMA including specifically: s 232 which empowers a lot owner (defined as an "interested person" in s 226(1)(d)) to apply to the Tribunal to resolve a dispute such as the present; s 153 which requires an owner, tenant or occupier not to create a nuisance, and s 241 which invests power in the Tribunal to prohibit specific action as follows:

> *"The Tribunal may order any person the subject of an application for an order to do or refrain from doing a specified act in relation to a strata scheme".*

23 The foundation for the jurisdiction of the Tribunal was not referred to anywhere in the decision. However, s241 of the SSMA empowers the Tribunal to make an order of the kind sought by the respondent.

24 Turning to the evidence, the Appeal Panel finds it impossible to identify the evidence which was relied as the basis of the Tribunal's findings and orders. The appellants had provided seven statements, a letter from another unit holder, their own statement and transcripts from a conciliation conference. The

respondents had provided correspondence and minutes of meetings, together with a diary record of affectation allegedly caused by the appellants.

25 The reference in s 153 of the SSMA to "a nuisance or hazard" to another lot occupier and to unreasonable interference with another lot occupier's use or enjoyment imports an objective assessment of the circumstances of respective use and enjoyment by the competing parties.

26 The evidence before us from both parties consisted of hearsay statements from other lot owners which were largely irrelevant (being related to other alleged conduct) and the assertions of each party about smoke drift. Such assertions included claims that there were other smokers in other lots; there was an absence of complaint from other lot owners or occupants; and the smoke could be from other buildings or other sources such as cane field burnoffs.

27 There was no specific identification in the material before us of wind direction or other attempt at scientific assessment of the origin of the smoke said to constitute an unreasonable interference. Nor was there any evidence of winds and climate conditions which could have contributed to the nuisance. Further, there was no objective evidence that assessed the impact of the smoke on the applicants.

28 It was common ground that there were no scheme by-laws regulating or preventing smoking by lot owners, tenants or occupiers. Significantly, the Second Reading Speech of the Honourable Niall Blair in relation to the Strata Schemes Management Bill 2015 and Strata Schemes Development Bill 2015 expressly envisaged the introduction of by-laws to deal with issues of importance to strata residents. The Second Reading Speech includes the following:

> *The by-laws will also address the issue of smoke drift. To support this, the bill notes that smoke drift can be considered to be a nuisance or hazard if it interferes with the rights of a resident to use or enjoy their lot.*

Since the Owners Corporation had not adopted any such by-law, the respondent is unable to point to any by-law that has been allegedly breached by the appellant. But, provided there is adequate evidence to support the making of an order, and the reasons of the Tribunal articulate that evidence to

found the orders sought, there is no jurisdictional basis why such an order should not be made.

29 In this instance, the decision under appeal failed to state the specific evidence which was critical to contested issues that led to the ultimate findings. Rather, the Tribunal's decision offered a series of assertions that "the evidence" had been reviewed and supported the particular finding. Further, a finding was made:

> 5. There can also be no real dispute to the contention that the inhalation of second-hand smoke is a health hazard.

The Appeal Panel is unable to locate any material which could have justified such conclusion.

30 The reasons accordingly are inadequate. The Appeal Panel is accordingly satisfied that a question of law as referred to in section 80 (2) (b) of the NCAT act is shown to exist. Accordingly leave is not required and accordingly leave of the Appeal Panel to institute the appeal is not required.

31 Further, the Appeal Panel is satisfied that this the appeal should succeed and that the original decision should be set aside.

Form of relief

32 The Appeal Panel is empowered, pursuant to s 81(1)(d) and (2) of the NCAT Act, to substitute another decision for the decision it sets aside, exercising all relevant powers of the Tribunal including on grounds other than those relied upon at first instance. The parties, when asked, indicated that their preference was for the Appeal Panel to re-determine the case on the evidence before it, and that the parties wanted to put on no further evidence.

33 The Appeal Panel has reflected upon the parties' request that it determine the proceedings. However, the Appeal Panel is not satisfied that it can do justice to the proceedings on the papers alone and without the benefit of oral submissions.

34 The Appeal Panel notes that reliance was placed by the Tribunal upon the decision of *Adams v New South Wales Land & Housing Corporation* [2016] NSWCATAP 31. Apart from the discussion of the general law of nuisance

which appears at [60] – [64], the Appeal Panel is unable to obtain any assistance from that authority in relation to the issues arising in this appeal.

Orders

35 The Appeal Panel orders that:

(1) The appeal is allowed.

(2) The decision of the Tribunal delivered on 1 December 2021 is set aside.

(3) The proceedings be reconsidered by the Tribunal either with or without further evidence.

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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