Development Consent Authority v Denise Phelps [2010] NTCA 03

PARTIES:	DEVELOPMENT CONSENT AUTHORITY v DENISE PHELPS
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 7 of 2009 (20721279)
DELIVERED:	13 May 2010
HEARING DATE:	29 March 2010
JUDGMENT OF:	MARTIN CJ, MILDREN & REEVES JJ

CATCHWORDS:

Appeals – appeal from Supreme Court – original appeal to Supreme Court against decision of the Lands Planning and Mining Tribunal - appeal on a question of law only – error of law needs to vitiate the decision – test to be applied – consideration of level of satisfaction required that error of law vitiated the Tribunal's decision - Supreme Court properly satisfied that error of law vitiated decision – appeal dismissed.

Planning Act 1999 (NT), ss 111 and 133
Supreme Court Act 1979 (NT), s 51(1)

Tiver Constructions Pty Ltd v Clair (1992) 110 FLR 239; *Crestwood Phoenix Darwin Pty Ltd v Kamarakis* [1996] NTSC 104 (unreported, Supreme Court of the Northern Territory Court of Appeal, Martin CJ, Gallop and Angel JJ, 23 December 1996); *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409; *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 94 LGERA 330; *HWE Contracting Pty Ltd v Young* (2007) 20 NTLR 83, [2007] NTSC 42; *Portland Properties Pty Ltd v Melbourne & Metropolitan Board of Works* (1971) 38 LGRA 6; *Michaelis Bayley (Vic) Pty Ltd v Melbourne &*

Metropolitan Board of Works (1980) 44 LGRA 65; *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675; *Collins v Minister for Immigration & Ethnic Affairs* (1981) 58 FLR 407; *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 59 FLR 132; *Vocisano v Vocisano* (1974) 130 CLR 267; *The Queen v Tennant; Ex parte Woods* [1962] Qd R 241; *Barmuncol Pty Ltd v Maroochy Shire Council* [1983] 2 Qd R 639; *Commonwealth of Australia v Human Rights and Equal Opportunity Commission & Anor* (1998) 152 ALR 182; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, cited.

REPRESENTATION:

Counsel:

Applicant:	P Barr QC
Respondent:	A Wyvill SC

Solicitors:

Applicant:	C Bicheno
Respondent:	M Garraway

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Development Consent Authority v Denise Phelps [2010] NTCA 03
No. AP 7 of 2009 (20621279)

BETWEEN:

DEVELOPMENT CONSENT AUTHORITY
Applicant

AND:

DENISE PHELPS
Respondent

CORAM: MARTIN CJ, MILDREN & REEVES JJ

REASONS FOR JUDGMENT

(Delivered 13 May 2010)

THE COURT:

[1] Ms Denise Phelps, the respondent, owns a block of land in the rural area south of Darwin. The block is currently 6.93 hectares in size. Since June 2006, Ms Phelps has been attempting to obtain the consent of the Northern Territory's Development Consent Authority ("DCA") to subdivide her block into two blocks – one, 4 hectares in size and the other, 2.93 hectares in size.

[2] In this process Ms Phelps has encountered a difficulty. Her block is zoned R (for rural) under the current Northern Territory Planning Scheme ("NTPS") and the minimum lot size in zone R is 8 hectares. Moreover, the

DCA may only consent to the subdivision of land in that zone into lots of sizes smaller than 8 hectares, if it is satisfied that there are "special circumstances" that justify it giving such consent: Clause 2.5.3 of the NTPS.

[3] In her application to the DCA, Ms Phelps attempted to bring herself within this "special circumstances" exception by offering, as a condition of obtaining consent to the subdivision, to register restrictive covenants over the two subdivided lots which: limited further clearing of native bushland on the lots; limited the use to which the lots may be put to residential use; and prescribed the methods of waste disposal on the two lots.

[4] The DCA rejected Ms Phelps' application. She then appealed to the Lands Planning and Mining Tribunal ("the Tribunal") under s 111 of the *Planning Act* (NT). The Tribunal subsequently dismissed Ms Phelps' appeal.

[5] Ms Phelps then lodged an appeal to the Supreme Court of the Northern Territory under s 133 of the *Planning Act* (NT). That appeal was available "only on a question of law".

[6] It was common ground before the Supreme Court and, indeed, before this Court, that the Tribunal had committed two errors of law in its decision. They were:

6.1 in holding that the proposed restrictive covenants could only operate prospectively and they, therefore, could not amount to special circumstances

under Clause 2.5.3 of the NTPS for the purposes of Ms Phelps' application for consent to the subdivision ("the first error of law"); and

6.2 in holding that there was doubt about the enforceability of the proposed restrictive covenants ("the second error of law").

[7] The Supreme Court upheld Ms Phelps' appeal on the ground that, while the first error of law was "cured" by the subsequent findings of the Tribunal (see [2009] NTSC 54 at [48] and [56]), the second error of law may well have formed part of the Tribunal's reasoning process in dismissing Ms Phelps' appeal: see [2009] NTSC 54 at [58] and [62].

[8] The DCA has now sought to appeal the latter conclusion in the Supreme Court's decision to this Court under s 51(1) of the *Supreme Court Act 1979* (NT). The former conclusion is not being challenged in this appeal.

[9] There is authority in this Court that, where an appeal from a tribunal to the Supreme Court is limited to a question of law, any appeal from the Supreme Court to this Court is similarly limited: see *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 at 255 per Martin and Mildren JJ and *Crestwood Phoenix Darwin Pty Ltd v Kamarakis* [1996] NTSC 104 (unreported, Supreme Court of the Northern Territory Court of Appeal, Martin CJ, Gallop and Angel JJ, 23 December 1996) [2].

[10] It is also important to bear in mind that the critical question before this Court, when it is considering an appeal from a decision of the Supreme

Court, is whether the Supreme Court (not the Tribunal) committed any error of law.

[11] It is not in dispute that, in order to succeed in an appeal, an appellant needs to identify an error of law that vitiates the decision concerned: see *Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 at 419 per Moffitt P; *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 94 LGERA 330 at 342 per Mildren J, Martin CJ agreeing at 332 and *HWE Contracting Pty Ltd v Young* (2007) 20 NTLR 83, [2007] NTSC 42 at [57] per Riley J, Martin CJ agreeing at [1].

[12] The DCA submits that the Supreme Court made an error of law in concluding that the second error of law committed by the Tribunal, vitiated the decision of the Tribunal. It follows that this is the only issue before this Court.

[13] On this aspect, we accept the submission of Mr Barr QC for the DCA that an erroneous ruling by the Supreme Court on this matter would amount to an error of law. We also note that Mr Barr QC accepted that the DCA bears the onus in this appeal of establishing that her Honour made this error of law.

[14] This sole issue essentially raises two questions: what level of satisfaction was required by her Honour that the second error of law vitiated the Tribunal's decision; and did that level of satisfaction exist?

[15] The answer to the first of these questions has been considered in a number of decisions of various courts in different contexts.

[16] In *Portland Properties Pty Ltd v Melbourne & Metropolitan Board of Works* (1971) 38 LGRA 6, Smith J (at 18), with whom Adam J agreed (at 22), in dealing with an order nisi for review of a decision of the Victorian Town Planning Appeals Tribunal, said that: "It would not be enough for the appellant to show that the Tribunal's reasons for its decision are so expressed as to suggest the possibility that the Tribunal proceeded upon a wrong view of the law." Instead, his Honour said that the Court must be: "satisfied that there was, in fact, a vitiating error of law". To similar effect is the Victorian Supreme Court decision of *Michaelis Bayley (Vic) Pty Ltd v Melbourne & Metropolitan Board of Works* (1980) 44 LGRA 65 at 67 per Fullagar J.

[17] In *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675 at 680, Barwick CJ said that an administrative tribunal's decision cannot be reviewed on an order to review: "… unless it clearly appears that there has been a material error of that kind [ie failing to take into account relevant matters]". His Honour added: "Whether or not it has occurred is a matter of fact and not of surmise."

[18] In *Collins v Minister for Immigration & Ethnic Affairs* (1981) 58 FLR 407 ("*Collins*"), a Full Court of the Federal Court (Fox, Deane and Morling JJ) set aside a decision of the Administrative Appeals Tribunal, which placed

weight upon an irrelevant consideration, ie the Minister's decision to deport the applicant, because: "… It cannot be said with confidence that the Tribunal would have come to the same conclusion if it had not placed any weight at all upon [that consideration]", at 413.

[19] In *Bisley Investment Corporation v Australian Broadcasting Tribunal* (1982) 59 FLR 132, a differently constituted Full Court of the Federal Court came to a similar conclusion about a different decision of the Administrative Appeals Tribunal. Lockhart J (at 146) and Morling J (at 164) relied upon the principle expressed in *Collins* (above). Sheppard J (at 156) referred to the decision of Barwick CJ in *Vocisano v Vocisano* (1974) 130 CLR 267 at 275 (as did Morling J at 164) where his Honour held that, before a new trial is ordered in a case where evidence has been wrongfully admitted: "… it should be seen that the inadmissible matter has been used by the judge in reaching his verdict". After considering that decision and applying it to the case before him, Sheppard J reached the conclusion that: "… this case differs from *Vocisano's* case because of the real possibility, if not the probability, that the apparent error of law pervaded the Tribunal's ultimate reasons and conclusions", at 156. Earlier in that decision, Sheppard J expressed his conclusion in these terms: "… If a misunderstanding of the law is a real possibility – in this case I think it more a probability – a danger of misdirection arises and it becomes unsafe to allow the decision to stand", at 156.

[20] In the Queensland Full Court decision of *The Queen v Tennant; Ex parte Woods* [1962] Qd R 241, Wanstall J (at 260 to 261) observed in relation to a number of English decisions on this issue that: "It seems to me, with respect, that in all of them the error was fundamental to the decision of the question at issue", and: "which show that if a Tribunal *bases its decision* on extraneous considerations which it ought not to have taken into account, or fails to take into account a *vital* consideration which it ought to have taken into account, then its decision may be quashed on certiorari. …" Conversely, Wanstall J went on to add that, where a court made an error of law which was of "slight weight", it could not vitiate the decision (at 261). These observations were applied by Shepherdson J (at 644 to 645) (with whom Campbell CJ and Kelly J agreed (at 639 to 640) in *Barmuncol Pty Ltd v Maroochy Shire Council* [1983] 2 Qd R 639.

[21] In *Commonwealth of Australia v Human Rights and Equal Opportunity Commission & Anor* (1998) 152 ALR 182, Burchett J (at 188), in commenting on the decision of the primary judge who had found an error of law in the Commissioner's reasons, but dismissed the application because it had not been shown that, on a true view of the law it, "*would* lead to any other result", said that: "In my opinion, the correct proposition is that there will be error of law in an administrative decision, requiring it to be set aside, if an error is shown '<u>that could have affected the outcome of the case</u>' …" (underlining added). His Honour then referred to a number of decisions of the Full Court of the Federal Court in support of the underlined statement.

[22] Finally, in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Mason CJ (at 353) made the following observations on this question:

> A decision does not "involve" an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different. The critical question on this aspect of the case is whether, but for the alleged error of law on which the respondents rely, the decision might have been different by reason of the possibility that the Tribunal would not have made the findings of fact relating to the settlement in the terms in which they were made.

[23] Taking into account these decisions, we consider the principle which is to be extracted from them relevant to this case is that her Honour had to be satisfied, after an examination of the Tribunal's reasons for decision and any other relevant material, that there was a real possibility (but not a mere or slight possibility) that the second error of law could (but not necessarily would) have affected the Tribunal's decision.

[24] Turning then to her Honour's decision, it is readily apparent that she carried out a detailed and careful analysis of the relevant sections of the Tribunal's reasons for decision: see [2009] NTSC 54 at [20] to [45]. In the process, her Honour noted that:

- the Tribunal's reasoning at [189] of its decision as to whether the proposed restrictive covenants would in fact amount to "special circumstances" justifying consent, if it were wrong in its view that they could not have done so, whilst curing the first error of law, was infected by the second error of law: see [2009] NTSC 54 at [31] to [32];

- the Tribunal repeated the second error of law at [215] of its reasons for decision by stating that the restrictive covenants would be of dubious effectiveness: see [2009] NTSC 54 at [37]; and

- while at [220] of its reasons for decision the Tribunal appeared to cure both errors of law, it was there considering the effect of the restrictive covenants in isolation: see [2009] NTSC 54 at [46], [49] and [57]; and

- the Tribunal appeared to take the second error of law into account when it turned to consider the collective effect of all of the relevant circumstances acting together and determined (at [225]) that: "there are no circumstances either individually or collectively that can be considered to be 'special circumstances' justifying consent to the proposed development": see [2009] NTSC 54 at [54].

[25] Based upon this analysis, her Honour concluded (at [58]) that: "It is far from clear that this error did not affect the Tribunal's final decision. It may well have formed part of the Tribunal's reasons for coming to the conclusion in paragraph [225] that there are no circumstances, either individually or collectively, that can be considered to be 'special circumstances' justifying consent to the proposed development" (underlining in original).

[26] In our view, it is clear from the analysis her Honour conducted of the Tribunal's reasons for decision and the conclusions she reached based on that analysis that her Honour was properly satisfied that there was a real

possibility that the second error of law could have affected the Tribunal's decision.

[27] We do not, therefore, consider her Honour made any error of law in concluding that the second error of law vitiated the Tribunal's decision.

[28] This appeal must be dismissed.

ORDERS

1. That this appeal be dismissed.
