CITATION:	*Reynolds v Chief Health Officer* [2020] NTSC 44
PARTIES:	REYNOLDS, Carolyn Jane v HEGGIE, Hugh In his capacity as Chief Health Officer
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 52 of 2019 (21852789)
DELIVERED ON:	17 July 2020
HEARING DATE:	16 and 17 March 2020
JUDGMENT OF:	Grant CJ

CATCHWORDS:

HEALTH – Administration of public health laws – Other food premises

Appeal from merits review by Local Court of refusal to grant registration as a food business – Whether Local Court took into account irrelevant considerations – Whether denial of natural justice – Whether error of law in the assessment of expert opinion – Appeal dismissed.

Food Act 2004 (NT) s 20, s 71, s 84
Local Court (Civil Procedure) Act 1989 (NT) s 19
Public and Environmental Health Act 2011 (NT) s 9, s 12, s 17 s 32 s 104 s 106
Public and Environmental Health Regulations 2014 (NT) reg 42, reg 87

Applicants A1 and A2 v Brouwer and Anor (2007) 16 VR 612, *Asciak v Samuels* (1976) 15 SASR 265, *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481, *Booth v An Assessor & Anor* [2019] NTSC 89, *Brandy v Human*

Rights and Equal Opportunity Commission (1995) 183 CLR 245, *Cottle v Cottle* [1939] 2 All ER 535, *Development Consent Authority v Phelps* (2010) 27 NTLR 174, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, *Haines v Leves* (1987) 8 NSWLR 442, *Jeray v Blue Mountains City Council (No 2)* [2010] NSWCA 367, *Kozanoglu v The Pharmacy Board of Australia* (2012) 36 VR 656, *Lindon v Commonwealth (No 2)* (1996) 70 ALJR 541, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, *Murlan Consulting Pty Ltd v Ku-Ring-Gai Municipal Council* [2008] NSWLEC 318, *Nepean Country Club Ltd v Paterson* [2009] VSC 436, *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465, *R v District Court of the Metropolitan District Holden at Sydney; Ex parte White* (1966) 116 CLR 644, *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, *Sapina v Coles Myer Ltd* [2009] NSWCA 71, *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue of the State of New South Wales* (2011) 245 CLR 446, *Trustees of Christian Brothers v Cardone* (1995) 57 FCR 327, *Wilson v Lowery* (1993) 4 NTLR 79, referred to.

REPRESENTATION:

Counsel:

Appellant:	Self-represented
Respondent:	J Nottle

Solicitors:

Appellant:	Self-represented
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Reynolds v Chief Health Officer [2020] NTSC 44
LCA 52 of 2019 (21852789)

BETWEEN:

CAROLYN JANE REYNOLDS
Appellant

AND:

HUGH HEGGIE
In his capacity as Chief Health Officer
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 17 July 2020)

[1] This appeal concerns a decision to refuse to register the restaurant at the Lake Bennett Resort (**the Resort**) as a food business. The Resort is owned and run by the appellant. The decision to refuse registration was made by the respondent in his capacity as Chief Health Officer on 19 December 2018. The appellant then made application to the Local Court for review of the merits of the decision pursuant to s 84 of the *Food Act 2004* (NT). By decision delivered on 28 October 2019 the Local Court affirmed the decision of the Chief Health Officer. The

appellant has now brought an appeal to this Court pursuant to s 19 of the *Local Court (Civil Procedure) Act 1989* (NT).

Background

[2] The essential background to the matter may be summarised as follows. Lake Bennett is approximately one hour's drive south from Darwin. The Resort has since in or about 1997 been operated as a commercial visitor accommodation business with an associated restaurant operating as a food business. In June 2015 the appellant purchased the Resort and that parcel of land on which the lake is situated, and continued operating the Resort as an accommodation and food business.

[3] On 29 November 2017, a delegate of the Chief Health Officer issued a public health order pursuant to s 32 of the *Public and Environmental Health Act 2011* (NT) in relation to both the accommodation and food businesses at the Resort. That order contained a schedule of contraventions and the recommended actions which had to be undertaken before the accommodation and food businesses could resume activity. Those contraventions related to the wastewater system and the water supply system. There ensued a series of communications and meetings between the appellant and the responsible government Agency. During the course of those dealings the registration of the food business expired on 7 May 2018 and the registration of the accommodation business expired on 11 May 2018.

[4] On 4 June 2018 the appellant made applications to register the restaurant as a food business pursuant to s 71 of the *Food Act* and to register the Resort as a commercial visitor accommodation business pursuant to the *Public and Environmental Health Act* and Regulations. By separate letters dated 28 June 2018, the Chief Health Officer declined the appellant's request to waive the application fees, sought further information in relation to the applications, and advised that in accordance with a previous arrangement the responsible Agency would have an engineer attend at the Resort to inspect and assess the water treatment and wastewater management systems. That inspection was subsequently undertaken and the results were reported in a document titled "Lake Bennett Resort Review of Wastewater Treatment Facilities" which was finalised on 30 November 2018 (**the Irwinconsult report**).

[5] By letter dated 19 December 2018, the Chief Health Officer advised the appellant that the application to register a food business had been refused. The reason given for that refusal was a failure to comply with the Food Standards Code as required by s 20 of the *Food Act*. In particular, Standard 3.2.3 required food premises to have an adequate supply of potable water and a sewerage and wastewater disposal system constructed and located to avoid the possibility of sewerage and wastewater polluting the water supply or contaminating food. The

letter advised that there was "insufficient evidence" to demonstrate compliance with those standards.

[6] By separate letter also dated 19 December 2018, the Chief Health Officer advised the appellant that the application to register a commercial visitor accommodation business had also been refused. Two reasons were given for that refusal. First, reg 42 of the *Public and Environmental Health Regulations 2014* (NT) required a proprietor to make drinking water available for visitor consumption. It was said that "insufficient evidence" had been submitted to demonstrate compliance with that requirement. Second, reg 87 of the *Public and Environmental Health Regulations* required the wastewater system to be operated in accordance with the prescribed code for on-site wastewater management. It was said that the review of the wastewater treatment facilities had found that the wastewater system was substantially undersized, that the effluent disposal area did not meet minimum site assessment criteria, that the absorption trenches were not operating efficiently, and that the system was generally not fit for purpose. The letter attached a schedule of outstanding contraventions in relation to the wastewater system and the water supply system.

[7] On 24 December 2018, the appellant made an application to the Local Court pursuant to s 84 of the *Food Act* for a merits review of the decision to refuse the registration of the restaurant as a food business. On that same day, the appellant lodged an appeal to the Local Court

pursuant to s 106 of the *Public and Environmental Health Act* for review of the decision to refuse the registration of the Resort as a commercial visitor accommodation business. That second appeal was apparently abandoned by the appellant on 28 May 2019 in the face of a contention by the legal representatives acting for the respondent that the appeal was incompetent. The basis for that contention appears to have been as follows:

(a) Only a "reviewable decision" within the meaning of s 104 and Schedule 1 of the *Public and Environmental Health Act* is amenable to appeal.

(b) Schedule 1 relevantly provides that a reviewable decision includes a refusal to register a business pursuant to s 12 of the *Public and Environmental Health Act*.

(c) The registration regime under the *Public and Environmental Health Act* applies only to a "declared activity", which is an activity declared by *Gazette* notice pursuant to s 9 as giving rise to a potential public health risk.

(d) No declaration had been made in relation to commercial visitor accommodation activity. Rather, the scheme for the registration of commercial visitor accommodation businesses was created exclusively under the *Public and Environmental Health Regulations* as a "regulated activity".

(e) Therefore, the appeal provisions in the principal legislation had no application, with the consequence that an applicant's only means of challenging a decision to refuse registration made under the Regulations was by way of judicial review in the Supreme Court, subject to the limitations which apply to reviews of that nature.

[8] There must be some real question concerning the correctness of that construction. It would effectively remove the activities subject to regulation under the subordinate legislation from those strictures and provisions of the principal legislation relating not just to the right of appeal, but also to registration and renewal, compliance, cancellation, notification of sale or disposal of a business, the declaration of standards and the maintenance of the register. The difficulty with that construction is apparent from the respondent's concession before the Local Court that the refusal of an application for the renewal of the registration of a business pursuant to s 17 of the *Public and Environmental Health Act 2011* (as opposed to the refusal of an application for registration pursuant to s 12), may be amenable to review because that provision does not make express reference to a "declared activity".

[9] On the other hand, if that construction is correct it would raise a real question about the validity of a subordinate regulation which purported to create a parallel and quite separate regulatory regime in respect of activities which, in the context of public health legislation, had not

been declared under the principal legislation to give rise to a potential public health risk, and which were not subject to the provisions of the principal legislation.

[10] However, these are matters beyond the scope of this appeal, and I express no concluded view and make no findings in that respect. The proceeding before the Local Court was confined to a merits review of the decision to refuse registration of the food business. The Local Court determined that the review was by way of rehearing on the information before the Chief Health Officer at the time he made the decision, and that it had no power to take fresh or new evidence. However, the Local Court did require the authors of expert reports which were considered by the Chief Health Officer in making his decision to attend at hearing for cross-examination on their opinions and conclusions. In addition, the appellant was permitted to give evidence on the basis of her qualifications as a biologist.

[11] The Local Court approached the review on the basis that it would need to be satisfied that the appellant would operate the food business: (a) in a "proper manner"; and (b) in accordance with its registration, the *Food Act* and Regulations. After hearing and analysing the evidence, the Local Court concluded that the appellant had failed to satisfy it of those matters on the balance of probabilities.[1]

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1 *Carolyn Reynolds v Dr Hugh Heggie* [2019] NTLC 032.

The nature of the review and appeal

[12] As stated, the application to the Local Court for review of the merits of the Chief Health Officer's decision was made pursuant to s 84 of the *Food Act*. That section relevantly provides:

> **Review of decisions relating to registration**
>
> (1) A person aggrieved by a decision of the Chief Health Officer, or a delegate of the Chief Health Officer, under this Part may apply for review of the merits of the decision in accordance with this section.
>
> (2) If the decision was made by the Chief Health Officer, the person may apply to the Local Court to review the decision.
>
> …
>
> (5) In determining the review, the Chief Health Officer or Local Court must, by notice in writing to the person who requested the review:
>
> (a) affirm the decision reviewed;
>
> (b) vary the decision reviewed;
>
> (c) revoke the decision reviewed; or
>
> (d) substitute a decision for that decision.
>
> (6) The Chief Health Officer or Local Court must specify the reasons for the determination in the notice.

[13] The term "review" has no settled or pre-determined meaning. It takes its meaning from the context in which it appears.[2] The use of the term "review" in this context conferred a species of original jurisdiction on the Local Court to determine the appellant's application for the registration of the restaurant as a food business. However, the use of that term is not determinative of the nature of the review or the duties and powers of the court in exercising the jurisdiction.[3] It was open to

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2 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261.

3 *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue of the State of New South Wales* (2011) 245 CLR 446 at [5].

the Local Court to proceed on the basis that the review would be conducted by way of rehearing of the materials which were before the Chief Health Officer, with the right to examine and cross-examine the experts, rather than by way of hearing *de novo*.[4] As is discussed below in the consideration of the grounds of appeal, it is less clear that in conducting such a review the court had no power to take fresh or new evidence.

[14] The statutory description of the review as one on "the merits of the decision" distinguishes this form of review from judicial review, which is concerned exclusively with whether the decision was made within power and whether the mode by which the power was exercised was lawful. A review on the merits will usually, but not always, entail a hearing *de novo*, and requires the review body to conduct its own independent assessment and determination of the matters necessary to be addressed.[5] In doing so, it is unnecessary for the review body to find error in the original decision, and the review is directed to the actual decision rather than the reasons for it.[6] The review body must exercise its own judgment and reach its own conclusions.

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4 See the discussion in *Sapina v Coles Myer Ltd* [2009] NSWCA 71 at [24]-[25], [58].

5 *Kozanoglu v The Pharmacy Board of Australia* (2012) 36 VR 656 at [35], [95]-[96]; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [140]-[141]; *Applicants A1 and A2 v Brouwer and Anor* (2007) 16 VR 612 at [26]

6 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 421-422, 429-430.

[15] Whatever uncertainties there may be concerning the scope of the review before the Local Court, it is plain that the appeal from the decision of the Local Court to this Court is limited to a question of law.[7] An appeal restricted to a question of law invokes the original jurisdiction of this Court rather than its appellate jurisdiction.[8] The subject matter of the appeal must be the question of law itself, rather than some mixed question of fact and law or a matter which merely "involves" a question of law.[9] The Court's function is to determine whether there has been an error of law and, if so, to describe the nature, content and effect of that error and make such order as it thinks fit. Before any intervention will be made, this Court must also be satisfied that the error of law was such as to vitiate the decision below.[10] While this Court may substitute its own decision in that event, that does not require or authorise the Court to make findings of fact or to determine questions of mixed fact and law.

[16] The appellant was self-represented during the course of the review and during the course of this appeal. Some of the difficulties which arose as the result of that representation are discussed below in the

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7 *Local Court (Civil Procedure) Act*, s 19(1).

8 *Booth v An Assessor & Anor* [2019] NTSC 89 at [33]-[34], citing *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (2001) 207 CLR 72; *Chief Executive Officer, Department for Child Protection v Hardingham* [2011] WASCA 262; *Drake v Minister for Immigration & Ethnic Affairs* (1979) 46 FLR 409; *Clements v Independent Indigenous Advisory Committee* (2003) 131 FCR 28 at [63].

9 *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481; *Nepean Country Club Ltd v Paterson* [2009] VSC 436.

10 See *Development Consent Authority v Phelps* (2010) 27 NTLR 174 at [11].

consideration of the grounds of appeal. The appellant has a litany of complaints, most of which cannot be addressed in this forum given the nature of the appeal. Some of those complaints are directed to findings of fact made by the Local Court which are not amenable to challenge in an appeal limited to questions of law. They are dealt with further below. There are also other matters the subject of complaint for which there is no evidence beyond the appellant's assertions made during the course of submissions in this appeal.

[17] The appellant says that following her purchase of the Resort and the lake, local residents objected to her attempts to establish rules and regulations for the operation and management of the lake in compliance with her legal obligations under health and safety legislation. She says that the responsible government Agency commenced investigations into the Resort in response to her complaints about health and safety issues relating to the use of the lake by local residents, and following vexatious reports by unnamed people and attempts to sabotage her business infrastructure.

[18] The appellant says that in August 2017 she was attacked and assaulted by a local resident. She says that she suffered some form of frontal lobe injury as a result of that assault, with the effect that she is "not sure if my short-term memories are real or confabricated (sic)". The appellant reported the assault to police. She says that thereafter the responsible government Agency "became more aggressive and

persistent". She seeks to attribute that attitude to a friendship between her assailant, the Chief Health Officer and a senior environmental health officer. She says that the responsible government Agency has deliberately targeted her and her business with the intention of keeping it closed. This appeal is ill-adapted to the attempted ventilation of those issues. It suffices to say for these purposes that there is no objective evidence before this Court of bad faith on the part of the responsible government Agency, or its officers or employees.

[19] Subject to those qualifications, I turn then to consider the grounds of appeal against the legislative framework. Those grounds are set out in an Amended Notice of Appeal which was filed in court on 17 March 2020.

Advertence to s 72 of the *Food Act*

[20] The first ground of appeal is that the Local Court made its decision with reference to s 72 of the *Food Act*, which was not relevant to a review of the merits of the Chief Health Officer's decision. Section 72(1) of the *Food Act* provides:

> The Chief Health Officer must register the food business if he or she is satisfied that:
>
> (a) the proprietor will conduct the food business in a proper manner; and
>
> (b) the proprietor will conduct the food business in accordance with its registration, this Act and the Regulations.

[21] As described above, the Local Court proceeded on the basis that the appellant bore the onus of establishing that she satisfied the criteria set out in that provision.[11] That determination properly recognised that in conducting a merits review of this nature it is necessary for the reviewing tribunal to exercise its own judgment and reach its own conclusions concerning the merits of the appellant's application for registration of the food business. It was necessary for that purpose for the court to consider the statutory criteria which had to be satisfied before a grant of registration could be made, and the material that was before the Chief Health Officer relevant to those criteria. In conducting that task, the court was not limited to a consideration of the reasons given by the Chief Health Officer in refusing the application.

[22] In particular, the court was not restricted to a consideration of whether the premises would have an adequate supply of potable water, and whether the sewerage and wastewater disposal system presented a risk of polluting the water supply or contaminating food. Even if the Local Court was restricted to a consideration of the reasons given for the Chief Health Officer's decision, it is plain that the court's decision was predicated primarily on a lack of satisfaction that the appellant had implemented a water management plan or that the wastewater

11 *Carolyn Reynolds v Dr Hugh Heggie* [2019] NTLC 032 at [134].

management system was sufficient to cope with the maximum occupancy of the Resort.[12]

[23] The seventh ground of appeal is that:

> The Judge failed to focus the court hearing on the two areas of declination of Renewal application.

[24] I take that ground to mean that the Local Court's consideration was limited to the two matters identified by the Chief Health Officer in his determination to refuse the application for registration. It is the obverse of the contention in the first ground of appeal that the court was not permitted to consider anything other than those two matters in determining the merits review. There was no such limitation, and the court did deal extensively with the two matters identified by the Chief Health Officer and made findings in that respect.

[25] For those reasons, these grounds of appeal must fail.

Denial of natural justice

[26] The second, third, fourth, eighth and ninth grounds of appeal all make complaints which may be categorised broadly as a denial of natural justice. The second ground contends that the Local Court did not permit the appellant to have nine witnesses give evidence as requested. The third ground contends that the Local Court did not permit the appellant to "cross-examine herself in evidence regarding biological

12 *Carolyn Reynolds v Dr Hugh Heggie* [2019] NTLC 032 at [182].

evidence provided to the environmental health department". The fourth ground contends, in part, that written evidence provided by three qualified hydraulic engineers concerning the waste management system was not allowed into evidence. The eighth ground contends that the Local Court failed to accommodate the appellant as "a self-represented litigant with a frontal lobe brain injury following an assault". The ninth ground contends that the Local Court denied the appellant the use of a whiteboard to elaborate on her written testimony.

[27] Those grounds contending that certain witnesses were not permitted to be called are referable in the first instance to the ruling made by the Local Court as to the nature of the review and the procedures to be adopted. That ruling was made orally following the receipt of submissions. The essential parts of the ruling are as follows:[13]

> The review before this court is under s 84 of the *Food Act* which requires this court to review the decision of the CHO on its merits. Considering all the evidence that was before the CHO at the time of his decision, the question is whether or not the court has the power to consider any other evidence or material that was not before the CHO at the time of his decision, whether it be because it was in existence and not provided to him, or didn't exist at all at the time.
>
> Fundamentally, this court is court of statute. It takes it powers from the statutes; that is, Acts, which create or give it jurisdiction. The court also has some implied powers to make a decision about the procedure it employs in proceedings properly before it. The decision of Hiley J in *Environment Centre Northern Territory v Minister for Land Resource Management* gives helpful guidance to the court's role in relation to such reviews.

13 Transcript of Proceedings, 29 May 2019, pp 61-64.

His Honour considered the provisions under the *Water Act* and [in reviews] by the Minister and found that a body conducting a review of an administrative decision … could take evidence which is not before the decision-maker, but that ability really does depend upon the legislation in the context of that review. His Honour was also of the view that to consider the context, the court should consider the remedies available to it.

The review referred to in s 84 of the *Food Act* specifically referred to as a review of the merits. What is not specified particularly is whether the court has power to accept fresh or new evidence. Guidance to assist this issue can be taken from other Northern Territory Acts which involved reviews of administrative decisions. Of particular assistance is that of the Northern Territory *Civil [and]Administrative Appeals Tribunal Act*. In relation to the review, administrative actions, and not the NTCAT, has been given specific power to consider fresh material, as set in s 46 of that Act, under the *Victims of Crime Assistance Act* as it then was.

In … s 49, there was a specific provision … that the court on appeal cannot take into account additional material that's not before the original decision-maker. In the *Mental Health and Related Services Act*, an appeal to the Supreme Court is specifically referred to as a re-hearing and the *Supreme Court [Rules]* say that fresh evidence can be brought before the court on a re-hearing with the leave of the court. It is important to note there is no such provision in the *Local Court (Civil Jurisdiction) Rules*, and of course, there is an argument that procedure lacking or in doubt in this, this court may then refer to the *Supreme Court Rules* and may apply and adopt those rules.

In my view, however, the application of the *Supreme Court Rules* in this circumstance cannot authorise a procedure which is not authorised by the Act which gives [the] court its jurisdiction. Section 84 (inaudible) merits reviewing the court and the court's duty is to consider the evidence, and documents, experts' opinions, et cetera, which were before the CHO when he made his decision. The respondent submits that that should be limited to the evidence, documents, experts' opinions, et cetera, which relate to the applicant's application for food business registration on 4 June and nothing more.

On review, this court has the task of considering the applicant's application for food business registration and all the relevant information she would have put before the CHO to convince him that she could fulfil the requirements under s 2 of the *Food Act*; and that is, that she, the proprietor, will conduct the food business in the proper manner and that she, the proprietor, will conduct the food business in accordance with its Registration Act and Regulations.

To stand in the decision-maker's shoes, I must have before me all that was before him when he made his decision and in light of that information I

must decide which of the options I exercise under s 84. My options are: do I affirm, vary or revoke the decision, or do I substitute a different decision.

It is not my view that s 84 envisaged or indeed empowered the court in its review of the CHO's decision to take fresh evidence. There is no specific power to do so and in my view if the legislature had intended to do so for the court to take fresh evidence it would have specifically provided that power. I therefore find that the court is not empowered by s 84 to consider additional material that was either in existence at the time of the decision and not referred to by the CHO, or came into existence since that decision.

In the present case, the CHO's refusing to register the food business and his letter explaining the reasons for the refusal refer to the applicant's continued outstanding contraventions in a schedule which were attached to his letter … advising of the refusal. Those contraventions arose from previous dealings with the applicant while she still held … a registration, … and which were disputed by the applicant.

Having taken those contraventions into account in his decision, the CHO made relevant any documents that arose out of the department's dealings with the applicant regarding those contraventions set out in the schedule attached to his letter, including any contrary expert opinions produced to the CHO which may have been the basis for the applicant's alleged failure to comply with prohibition notices. If the CHO relied on the applicant's failure to comply with the notices, which he clearly did, and the applicant has provided - previously provided explanations or justifications for an alleged failure to comply, then those explanations or justifications ought be before this court conducting a review and making the decision whether the applicant will conduct a food business in the proper way or in accordance with the business registration.

Clearly, it is relevant if the applicant has failed to comply with notices issued by the CHO in the past. It is also relevant whether or not the CHO's non-acceptance that her actions addressed the contraventions is also relevant to whether or not he should be satisfied that she will operate or conduct her business in a proper way. There can be no (inaudible) a proper manner must include requirements to protect the health and safety of patrons of the business including appropriate waste water systems and water supply systems of potable water.

…

HER HONOUR: I am going to indicate, however, Mr Nottle, that it is my view … that in their conflicting - where there are conflicting expert reports between, I believe, in Irwinconsult and … ADG that to properly assess the veracity of any conclusions that those experts have come to I will be requiring them to be available to be cross-examined on their reports, both those authors. That's one thing that I have definitely decided ought to be

> included in this appeal in relation to the documents. It's something that, you know, we're going to have to make some orders on.
>
> MS REYNOLDS: Sorry, your Honour, before we do that is it possible to qualify the veracity of the Irwinconsult report? I've been talking with the building board today and also Master Builders. The person who wrote the report would not be considered to be what was requested which is an expert in the field.
>
> HER HONOUR: Ms Reynolds, I am going to require the author of the report to be present once we hear the merits of the appeal. I will require them to be present and then as an expert they will have to be qualified and that means that Mr Nottle will be calling evidence as to their expertise or their qualifications and I will make a decision on that - - -
>
> MS REYNOLDS: Thank you, your Honour.
>
> HER HONOUR: - - - as to whether I take their evidence. And that will be the same for the author of the ADG report.

[28] The function to be performed by the Local Court was a review of the merits of the decision of the Chief Health Officer to refuse registration as a food business. As stated above, this requires the review body to conduct its own independent assessment and determination of the matter. Although the statute does not make express provision as to whether that process involves a rehearing or some narrower reconsideration of the Chief Health Officer's decision, the fact that the statute gives that task to a court would indicate that some form of rehearing is required.

[29] As the Local Court observed, the statute is silent on whether fresh or additional evidence could be received. The better view is that relevant additional evidence may be received where, as in this case, the review tribunal is required to exercise original jurisdiction and make its own

decision. That form of review is to be contrasted with one concerned only with the circumstances in existence at the particular point in time when the original decision was made. As was observed in *Shi v Migration Agents Registration Authority*:[14]

> Where the decision to be made contains no temporal element, evidence of matters occurring after the original decision may be taken into account by the tribunal in the process of informing itself. Cases which state that the tribunal is not limited to the evidence before the original decision-maker, or available to that person, are to be understood in this light. It is otherwise where the review to be conducted by the tribunal is limited to deciding the question by reference to a particular point in time.

[30] In the absence of some temporal or functional limitation in the statute, the broad scope of the review suggests the existence of a power to receive further evidence as a matter of necessary implication, rather than express provision.[15] As has been observed, albeit in the context of a Ministerial review, it would be a strange result if the decision-maker is entitled to ignore relevant material which may have a direct bearing on the decision.[16] However, this does not mean that the review body is required to conduct a hearing *de novo*, or to receive further or additional evidence which does not bear on the subject matter of the review. As the New South Wales Court of Appeal observed in relation

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14 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [143].

15 *Applicants A1 and A2 v Brouwer and Anor* (2007) 16 VR 612 at [27]

16 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at [20].

to a statutory provision allowing the review of workers compensation decisions, including the receipt of fresh or additional evidence:[17]

> This requires the Presidential member to decide for himself or herself these matters. That does not mean that there must be a *de novo* hearing in each case. … The terms of the WIM Act, ss 3 and 354 and the width of the powers in s 352(7) make clear that the Presidential member has a wide choice available as to how he or she undertakes the task of deciding for himself or herself what is the true and correct decision.

[31] Similar observations may be made in relation to s 84 of the *Food Act*. Although it does not prescribe the Local Court's procedures, the court is charged with the function of conducting a merits review expressed in broad terms, and has a broad power to substitute its own decision. In exercising that power, the court has scope and discretion to determine what form of hearing the circumstances require. In the exercise of that discretion, the Local Court in this case determined to proceed on the basis of the evidence which was before the Chief Health Officer, with the right to cross-examine on the expert evidence which formed the sole basis for the decision.

[32] That course was properly open to the court. There was nothing to suggest that circumstances had changed since the original decision was made, and nor did the appellant seek to call evidence going to any change in circumstance. Rather, the appellant sought to call the Chief Health Officer and his delegates, and certain other persons, in order to prosecute her claim that the Chief Health Officer's decision was

17 *Sapina v Coles Myer Ltd* [2009] NSWCA 71 at [57].

motivated by bias or animus, or otherwise the product of malfeasance and maladministration.

[33] Quite apart from the fact that there was nothing but the appellant's assertions which would have given rise to any concern in that respect, on even a *prima facie* basis, the purpose and effect of the review was to allow the determination to be made by the Local Court free from any apprehension of that sort. All that was required to effectuate that purpose was an opportunity for the parties to adduce their own expert evidence, to test the other party's expert evidence, and to make submissions in relation to the appropriate conclusions to be drawn from that evidence. As the Local Court correctly identified, the process under s 84 of the *Food Act* involved the court forming its own views about the merits of the application for registration rather than conducting some examination of whether the mode by which the Chief Health Officer exercised the power was lawful.

[34] In the event, and contrary to the contention in the third ground of appeal, the appellant gave evidence in the proceedings before the Local Court in relation to the water management system and the wastewater management system at the Resort. That evidence was subject to extensive analysis in the reasons for decision.[18]

18 *Carolyn Reynolds v Dr Hugh Heggie* [2019] NTLC 032 at [48]-[87].

[35] The court also heard evidence from the following witnesses, and the appellant had opportunity to cross-examine those witnesses:

(a) Mr Joshua Heath, the Environmental Health team leader from the responsible government Agency;

(b) Mr Mitchell Roberts, the plumber who undertook an assessment of the wastewater management system as part of the Irwinconsult report;

(c) Mr Southwell, the author of the geotechnical assessment concerning water action which formed part of the Irwinconsult report;

(d) Mr Maddalozzo, the principal author of the Irwinconsult report; and

(e) Mr Watkins, the hydraulic engineer who reviewed the Irwinconsult report before it was submitted to the responsible government Agency.

[36] As it transpired, the appellant did not call experts to give oral testimony in support of her case. The appellant ultimately informed the court that the experts on whom she relied were unable to attend for the purpose of giving evidence. This position was conveyed to the court after the respondent had been granted a number of adjournments to check on the availability and status of her proposed witnesses. No subpoenas had been issued for their attendance. Despite that, and contrary to the contention in the fourth ground of appeal, the court

received letters from Mr Moll, a hydraulic engineer with the firm AGD which had designed the wastewater management system, and Mr Jordan, a plumber who had inspected the wastewater management system in its present state.

[37] It may be accepted that the appellant's disadvantage as a self-represented litigant required particular care to be taken to ensure that she had a reasonable and adequate opportunity to be heard. Procedural fairness embraces the "notion that the litigant has understood the proceedings before him or her and has had an adequate opportunity given to him or her, considering his or her attributes, qualities and deficiencies which render the litigant more or less able to vindicate his or her rights in court".[19] However, it is necessary to provide only such guidance and accommodation to a self-represented litigant as is necessary to accord the reasonable opportunity to be heard.

[38] Contrary to the contention made in the eighth ground of appeal, it is apparent from the transcript that the Local Court was at pains to ensure that the appellant, as a self-represented litigant, understood the procedures which were being adopted and was in a position to make decisions in her best interests.[20] Those measures included the grant of several adjournments to allow the appellant to collect herself. In

19 *Jeray v Blue Mountains City Council (No 2)* [2010] NSWCA 367 at [6].

20 See, for example, Transcript of Proceedings, 15 May 2019, pp 13, 18, 28-29; Transcript of Proceedings, 28 May 2019, pp 7, 8, 13, 19, 22-23, 54; Transcript of Proceedings, 29 May 2019, pp 70, 72-73; Transcript of Proceedings, 24 July 2019, pp 9, 13; Transcript of Proceedings, 8 August 2019, p 378.

addition, the court required the respondent to file its submissions first so the appellant could be fully apprised of the case put in opposition to her application before making her own submissions. There was no failure to accommodate the appellant's disadvantages as a self-represented litigant.

[39] The ninth ground contends that the Local Court denied the appellant the use of a whiteboard to elaborate on her written testimony. This issue arose twice during the course of proceedings in the Local Court. During the course of submissions involving the tender of documents on 24 July 2019, the appellant handed up a plan of the round drains which formed part of the wastewater management system and offered to draw a diagram of the drains on the "board".[21] That offer was not taken up. Then, on 20 September 2019 during the course of closing submissions the appellant sought to draw a diagram of the wastewater management system on a whiteboard. That request was refused on the basis that the appellant was attempting to give further evidence rather than making submissions, and that any points she wished to make concerning the design of the system should have been put to the expert witnesses during the course of their evidence.[22] The court had received plans of the wastewater management system and evidence from expert witnesses in relation to its operation. There was in the circumstances no

21 Transcript of Proceedings, 24 July 2019, p 30.

22 Transcript of Proceedings, 20 September 2019, p 17-18.

obligation on the court to allow the appellant access to a whiteboard for the purpose requested.

[40] For these reasons, those grounds of appeal asserting various denials of natural justice must fail.

Attribution of weight to evidence

[41] The fifth and sixth grounds of appeal, and part of the fourth ground of appeal, all make complaints concerning what may be categorised broadly as the attribution of greater weight to the oral testimony of the expert witnesses called on behalf of the respondent over the written reports by those experts on whom the appellant relied. These grounds draw attention to the nature of the appeal to this Court. The principles which govern when findings of fact may be disturbed on an appeal restricted to a question of law may be summarised as follows:[23]

(a) If in evaluating the evidence of witnesses the tribunal below prefers one account to another, that decision is a question of fact and is not reviewable on appeal. Even where the reason given for preferring one witness to another is patently wrong, no appeal will lie.[24]

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23 See *Wilson v Lowery* (1993) 4 NTLR 79, citing *Tracy Village Sports & Social Club v Walker* (1992) 111 FLR 32.

24 *R v District Court of the Metropolitan District Holden at Sydney; Ex parte White* (1966) 116 CLR 644 at 654; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 156; *Haines v Leves* (1987) 8 NSWLR 442 at 469-470.

(b) When making a finding of fact, if there is evidence which would support that finding, there is no error of law. That is so regardless of the tribunal's reasons for making that finding.[25]

(c) A finding of fact cannot be disturbed on appeal on the basis that it is perverse, or against the evidence or the weight of the evidence, or contrary to the overwhelming weight of evidence.[26]

(d) There will only be an error of law if there is no evidence at all to support a finding of fact which is crucial to the ultimate determination. [27]

[42] These principles are a complete answer to the appellant's contention that the Local Court fell into error by accepting one body of expert opinion over another body of expert opinion, and in applying the evidence which was accepted to make findings of fact concerning the issues of water management and wastewater management. The Local Court's analysis of the evidence of Mr Moll and Mr Jordan, and the attribution of weight to that evidence, does not disclose any error of law.[28] These grounds of appeal incorporate a number of further assertions which do not change that conclusion, but which warrant some attention.

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25 *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465.

26 *Haines v Leves* (1987) 8 NSWLR 442; *Nicolia v Commissioner of Railways (NSW)* (1970) 45 ALJR 465.

27 *Haines v Leves* (1987) 8 NSWLR 442.

28 *Carolyn Reynolds v Dr Hugh Heggie* [2019] NTLC 032 at [124]-[133].

[43] First, the fourth ground of appeal asserts that the Local Court received "[o]pinion from people not holding lawful qualification". This would appear to be a reference to Mr Maddalozzo's qualifications. As described above, Mr Maddalozzo was the principal author of the Irwinconsult report, and had been called to speak to that report and be cross-examined by the appellant in accordance with the ruling which had been made by the Local Court. At the material times, Mr Maddalozzo held an Associate Diploma (Civil Engineering) and had been the Principal Associate Director in charge of Civil/Hydraulic at Irwinconsult for 10 years prior to the conduct of the review by the Local Court.

[44] Mr Maddalozzo was not an engineer, and nor was it suggested otherwise in the Irwinconsult report or during the course of his evidence. In preparing the report he relied on assessments which were conducted by experts in those areas in which he was not qualified, being those areas addressed by Mr Southwell and Mr Roberts as described above. Once the report has been prepared in draft, it was subsequently reviewed by Mr Watkins and Mr Clarke, who were qualified engineers in the employ of Irwinconsult. Mr Maddalozzo was subjected to extensive cross-examination by the appellant during the course of his evidence, during which the extent of his qualifications and his reliance on other experts was fully ventilated. Having regard

to those matters, the assertion that Mr Maddalozzo did not hold "lawful qualification" has neither substance nor relevance.

[45] The second assertion which appears to be incorporated into these grounds, and which was certainly pressed during the course of submissions in the conduct of this appeal, was that the Local Court judge held a bias towards Mr Maddalozzo due to personal association. That association was squarely raised early in the proceedings before the Local Court:[29]

> MR NOTTLE: One of these witnesses in this matter, and it probably won't be apparent to your Honour yet, that he – this witnesses prepared one of the reports in the Appeal Book and his name is Mario Maddalozzo.
>
> HER HONOUR: Yes.
>
> MR NOTTLE: I conferred with him yesterday and discussed with him the process of court proceedings and so forth and indicated to him that your Honour is going to be presiding over this matter.
>
> HER HONOUR: Yes. And I know Mario Maddalozzo.
>
> MR NOTTLE: Yes. So, I have raised that with Ms Reynolds this morning. She has indicated to me that she has no concern about it. But –
>
> HER HONOUR: I don't have a difficulty, Mr Nottle.

[46] At the time Mr Maddalozzo was sworn, the Local Court judge made the following further disclosure:[30]

> MARIO MADALOZZO, sworn:
>
> HER HONOUR: We just need to confirm that I do know Mr Madalozzo. I went to school with his brother. He is the younger brother of the person I

29 Transcript of Proceedings, 24 July 2019, p 30.

30 Transcript of Proceedings, 8 August 2019, p 310.

> went to school with, but I have no difficulties in dealing with his evidence. And you don't have any objection, Mr - thank you.

[47] The fact that the decision-maker may know a witness in the proceedings does not ground a reasonable perception that the decision may be influenced by that association or acquaintance.[31] That depends in every case on the closeness of the association, the time for which it has subsisted, and the incidents of that connection.[32] The appellant did not raise objection at the time of the review, and in this appeal brought no evidence contrary to the judge's indication that there was no personal or social relationship of a degree which disqualified her from hearing the matter.

[48] The third assertion incorporated into these grounds is that persons provided reports (presumably Irwinconsult), "who are normally excluded from the NT's lawful Procurement and Tendering process". The precise nature of this allegation is unclear. It was subject to some attention in the cross-examination of Mr Watkins, and appears to be based on the fact that Irwinconsult was the building certifier for the Resort when it was first constructed.[33] There also seems to be some assertion of malfeasance in the procurement process which was never

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31 *Cottle v Cottle* [1939] 2 All ER 535 at 539; *Lindon v Commonwealth (No 2)* (1996) 70 ALJR 541; *Asciak v Samuels* (1976) 15 SASR 265.

32 *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 369; *Lindon v Commonwealth (No 2)* (1996) 70 ALJR 541; *Murlan Consulting Pty Ltd v Ku-Ring-Gai Municipal Council* [2008] NSWLEC 318 at [68]; *Trustees of Christian Brothers v Cardone* (1995) 57 FCR 327.

33 Transcript of Proceedings, 8 August 2019, pp 258-304.

particularised. It suffices to say that there is no evidence that Irwinconsult was engaged contrary to procurement rules, and there was no relevant conflict of interest for the reasons given by Mr Watkins during cross-examination.

Refusal to undertake a site visit

[49] The tenth and final ground of appeal contends that the Local Court refused to permit a site visit to "visibly assess the systems". The only reference to a possible view of the site was made on 29 May 2019 following the Local Court's ruling on the procedures to be adopted for the conduct of the review. The relevant exchange was as follows:[34]

> HER HONOUR: Ms Reynolds, I am going to make an order that you identify the materials that you want included in the Appeal Book. Now - -
>
> MS REYNOLDS: I will send the review again.
>
> HER HONOUR: - - - the timetable is very tight because if you wanted to keep those dates - 24 July, I think - sorry, 24 July - if you wanted to keep the date of 24 July, then we need to ensure that the Appeal Books are settled.
>
> MS REYNOLDS: Your Honour, in that time, could I also ask please that there be a site visit, so that you can actually have an understanding of what we're talking about.
>
> HER HONOUR: I am not doing a site visit at this point in time. If I decide, after hearing from the experts, I might need a site visit I will make a decision then.
>
> MS REYNOLDS: Your Honour - - -
>
> HER HONOUR: But I am not going to commit to doing a site visit now.

34 Transcript of Proceedings, 29 May 2019, p 72.

[50] The application that the court conduct a site visit was not thereafter renewed, and it may be inferred that the court determined a site visit was unnecessary after hearing the expert evidence. That was a matter within the province of the court to determine, the appellant was not entitled to have the court conduct a site visit, and there was no denial of procedural fairness or other error of law involved.

Disposition

[51] The appeal is dismissed. I will hear the parties in relation to costs if need be.
