Federal Court of Australia

Daly v Australian Securities and Investments Commission [2021] FCA 1521

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| File number(s): | VID 752 of 2020 |
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| Judgment of: | **DAVIES J** |
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| Date of judgment: |  29 November 2021 |
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| Date of publication of reasons: | 6 December 2021 |
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| Catchwords: | **ADMINISTRATIVE LAW** – whether decision of the Administrative Appeals Tribunal refusing to stay an application for review is an appealable “decision” under s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) – notice of objection to competency – decision interlocutory in nature and not “final determination” of the application for review – application not competent – application for extension of time to file a review under *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) – application for review not a reviewable decision under s 5 of the ADJR Act – application refused. |
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| Legislation: |  *Administrative Appeals Tribunal Act 1975* (Cth) ss 43, 44*Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(a), 5(1)(e), 5(1)(f)*Corporations Act 2001* (Cth) ss 920A, 920B, 1317G, ss 601FV(1), (3)  |
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| Cases cited: |  *Daly and Australian Securities and Investments Commission* [2020] AATA 4589*Director-General of Social Services v Chaney* [1980] FCA 87; (1980) 3 ALD 161*Federal Commissioner of Taxation v Beddoe* (1996) FCR 446*Geographical Indications Committee v The Honourable Justice O’Connor* [200] FCA 1877; (2000) 64 ALD 325 *MDXJ v Secretary, Department of Social Services* [2019] FCA 2163; (2019) 168 ALD 454*Productivity Partners Pty Ltd and Australian Skills Quality Authority* [2018] AATA 4878  |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Economic Regulator, Competition and Access |
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| Number of paragraphs: | 12 |
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| Date of hearing: | 29 November 2021  |
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| Counsel for the Applicant: | Ms L Keily |
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| Solicitor for the Applicant: | Assembly Law |
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| Counsel for the Respondent: | Mr M Brady QC with Mr K Clark |
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| Solicitor for the Respondent: | Australian Securities and Investments Commission |

ORDERS

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|  | VID 752 of 2020 |
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| BETWEEN: | PETER EUGENE DALYApplicant |
| AND: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONRespondent |

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| order made by: | DAVIES J |
| DATE OF ORDER: | 29 NOVEMBER 2021 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The application for an extension of time in which to file an application under the *Administrative Decisions (Judicial Review) Act* *1977* (Cth) be refused.
3. The applicant pay the costs of the respondent, such costs to be taxed in default of agreement.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

DAVIES J:

1. By these proceedings, the applicant, Mr Daly, seeks to challenge the decision of the Administrative Appeals Tribunal (**Tribunal**) refusing an application by Mr Daly to stay his application in the Tribunal for a review of the decision of the respondent, the Australian Securities Investments Commission (**ASIC**), to impose a banning order on Mr Daly. Ms Keily of counsel, who represents Mr Daly, has sought to appeal that decision pursuant to s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), alternatively seeks review of that decision under ss 5(1)(a), 5(1)(e) and 5(1)(f) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). Mr Daly requires an extension of time to bring his application under the ADJR Act because it was filed out of time. ASIC has filed a notice of objection to competency to the appeal pursuant to s 44(1) of the AAT Act and opposes an extension of time to bring the ADJR Act application on the basis that this Court does not have jurisdiction under either s 44(1) of the AAT Act or s 5 of the ADJR Act to hear the challenge.
2. The review proceeding before the Tribunal is of a decision of ASIC under s 920A of the *Corporations Act 2001* (Cth) (**Corporations Act**) that Mr Daly be banned for a period of five years from providing any financial services. Subsequent to the institution of those review proceedings by Mr Daly, ASIC advised Mr Daly that it was considering commencing civil penalty proceedings against him and, in the Tribunal proceeding, would seek expanded banning orders against Mr Daly under s 920B of the Corporations Act. ASIC later commenced a civil penalty proceeding against Mr Daly in the Federal Court of Australia (**Federal Court**) and, by that proceeding, pursues relief against Mr Daly seeking, amongst other things, pecuniary penalties pursuant to s 1317G of the Corporations Act in respect of contraventions of ss 601FD(1) and (3) of the Corporations Act. Shortly after the civil penalty proceeding was instituted, Mr Daly applied to the Tribunal for an order that the Tribunal proceeding be stayed until such time as the civil penalty proceeding is resolved. One of the arguments advanced for Mr Daly in support of that application was that he has the right to claim penalty privilege in the civil penalty proceeding, but claiming that privilege would prejudice the conduct of his case in the Tribunal because it would limit the evidence to be relied on. In its reasons for refusing the stay, the Tribunal identified that the concern was whether requiring Mr Daly to proceed in the Tribunal would limit his legitimate, forensic choices in the civil penalty proceeding. The Tribunal concluded that it was ultimately for Mr Daly to make his forensic choices in the Federal Court proceeding and act accordingly in the Tribunal: *Daly and Australian Securities and Investments Commission* [2020] AATA 4589 at [24] and [26].
3. It was not disputed by Ms Keily in this proceeding that the decision of the Tribunal was interlocutory in nature. There is a wealth of appellate authority that the word “decision” in s 44(1) of the AAT Act has a restrictive meaning and is confined to a final decision or determination (*Geographical Indications Committee v The Honourable Justice O’Connor* [200] FCA 1877; (2000) 64 ALD 325, 332 [19] (***Geographical Indications Committee***); *Director-General of Social Services v Chaney* [1980] FCA 87; (1980) 3 ALD 161, 178, 180 (***Chaney***); *Federal Commissioner of Taxation v Beddoe* (1996) FCR 446, 447 (***Beddoe***)). Those and other authorities were recently helpfully considered in *MDXJ v Secretary, Department of Social Services* [2019] FCA 2163; (2019) 168 ALD 454 by Besanko J as follows at [15]‑[26]:

15 Section 44(1) of the AAT Act is in the following terms:

**44 Appeals to Federal Court of Australia from decisions of the Tribunal**

*Appeal on question of law*

(1) A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

16 A leading authority on the meaning of decision in s 44(1) of the AAT Act is *Director-General of Social Services v Chaney* [1980] FCA 87;(1980) 31 ALR 571 (*Chaney*). Justice Deane (with whom Fisher J agreed in concurring remarks at 597) said (at 593):

The conclusion which I have reached is that, subject to the qualifications mentioned below, an appeal under s 44(1) of the Act lies only from a decision of the Tribunal which constitutes the effective decision or determination of the application for review. Ordinarily, such a decision will be the final decision formulated in accordance with the provisions of s 43 of the Act. The qualifications referred to are an appeal pursuant to s 44(2) from a decision that the interests of a person are not affected by a particular decision and the case where the proceeding before the Tribunal can properly be divided into two or more separate parts in respect of which independent “decisions” may properly be given.

17 In *Commissioner of Taxation v Cancer and Bowel Research Association Inc* *(as trustee for the Cancer and Bowel Research Trust)* [2013] FCAFC 140; (2013) 305 ALR 534 (Cancer and Bowel Research Association), the Full Court of this Court said (at [8]):

An appeal under s 44(1) requires that the disposition by the Tribunal be “the effective decision or determination of the application for review”. In the usual case an effective decision by the Tribunal will be reflected in the orders made under s 43, but, as was explained by Deane J in *Chaney*, a decision may come within s 44 where it is (a) that the interests of a person are not affected by a particular decision (see AAT Act s 44(2)) and (b) where it is of a part of a proceeding which can properly be divided into separate parts. In such cases the disposition by the Tribunal can be seen as deciding finally some aspect of a party’s entitlements and, therefore, as having the effect of finally deciding or determining an aspect of a proceeding. Its quality as a decision within the meaning of s 44 is that it ends the whole or a properly separable part of the matter before the Tribunal.

18 In *Kishore v Tax Practitioners Board* [2016] FCA 1328; (2016) 244 FCR 320 (*Kishore*), Robertson J considered an objection to the competency of an appeal from a decision of the Tribunal in which the Tribunal answered “yes” to the “threshold question” of whether certain conduct of the applicant was capable of contravening s 30-10(1) of the *Tax Agent Services Act 2009* (Cth) and listed the matter for directions “at the earliest opportunity”. His Honour concluded (at [20]):

In the present case, it is plain that the Tribunal has not yet completed its review of the decision of the Tax Practitioners Board to terminate the appellant’s registration as a tax agent: see [17] and [18] above. The Tribunal has not affirmed, varied or set aside the decision under review: see s 43 of the *Administrative Appeals Tribunal Act*. Applying the decision of the Full Court in *Chaney*, an appeal under s 44 of the *Administrative Appeals Tribunal Act* is incompetent.

19 His Honour also said (at [19]):

In my opinion, the point of the decision in *Chaney*is to avoid judicial review by way of an appeal to this Court *instanter* and as of right from non-determinative steps, determinations or decisions of the Tribunal. This reflects the undesirability of fragmenting proceedings in the Tribunal by the making of applications to the Federal Court seeking to challenge intermediate directions, determinations or decisions of the Tribunal: see the judgment of the Full Court in *Geographical Indications Committee v The Honourable Justice O’Connor* [2000] FCA 1877; 64 ALD 325 at [26]-[28]

20 In *Geographical Indications Committee v The Honourable Justice O’Connor* [2000] FCA 1877; (2000) 64 ALD 325 (*Geographical Indications Committee*), the applicant sought judicial review of directions contained in an interlocutory decision made by the Tribunal which had the effect of confining the role which the applicant would have as a party at a future hearing before the Tribunal. Although the application was not brought as an appeal from the Tribunal’s decision under s 44 of the AAT Act, the following statement of von Doussa, O’Loughlin and Mansfield JJ is relevant (at [26] and [28]):

26. In the context of curial proceedings, the courts have been at pains to emphasise the undesirability of allowing appeals against interlocutory decisions involving matters of practice and procedure to fragment and delay the trial of proceedings. The most frequently cited authority for this proposition comes from the joint judgment of Gibbs CJ, Aickin, Wilson and Brennan JJ in *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176-7; 35 ALR 625 at 628‑9. Their Honours repeated with approval the following statement of Sir Frederick Jordan in *Re the Will of F B Gilbert (dec’d)* (1946) 46 SR (NSW) 318 at 323:

 … I am of the opinion that … there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a Court of Appeal.

Their Honours added that it is safe to say that the question of injustice flowing from the order appealed from will generally be a relevant and necessary consideration. At this stage, as we have just observed, it is not possible to know if there is any real issue in the [*Geographical Indications Committee*]’s complaint about the directions. Until that is possible the [*Geographical Indications Committee*] is unable to demonstrate that any injustice could flow from the directions.

…

28. In *Federal Commissioner of Taxation v Beddoe* (1996) 68 FCR 446, which concerned an application under the [ADJR Act] to review directions made by the tribunal under s 33 of the AAT Act for the filing and exchanging of answers to questions prior to a hearing Spender J, said at FCR 453; ALD 568; ALR 390:

It is in my opinion wholly undesirable that the process contemplated by the AAT Act should be fragmented by applications seeking to challenge intermediate directions or determinations made along the way to reaching an ultimate determination of the issue before the tribunal, in the same way that this court should be reluctant to fragment the criminal process by entertaining applications under the [ADJR Act] in relation to committal proceedings and, in particular, intermediate rulings or determinations made in the course of committal proceedings rather than the ultimate decision to commit.

21 In *Kumar v Secretary, Department of Social Services* [2019] FCA 202, the applicant sought to appeal from an order of the Tribunal that stayed “the implementation of the decision under review” (at [1]). The respondent filed an objection to competency alleging that the stay order was not a decision within s 44 of the AAT Act. Justice Logan held that the appeal was incompetent on the basis that the stay order did not have the quality of finality required by *Chaney* (at [6]).

22 In *Hutchison v Australian Securities and Investments Commission* [2018] FCA 1002, Banks‑Smith J considered the competency of an appeal from a decision of the Tribunal to refuse to order the production of certain documents. Her Honour concluded that the appeal was incompetent because the decision was not “an effective decision or determination of the application for review” (at [5]).

23 In *Cremona v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2013] FCA 1003, North J considered the competency of an appeal against orders made by the Tribunal refusing the applicant leave to issue a summons to produce documents based on relevance. His Honour concluded that the appeal was incompetent because the decision was an interlocutory decision which did not determine the underlying application for review (which concerned the entitlement of the applicant to an allowance under the *Social Security Act 1991* (Cth)).

24 In *Ibarcena v Cole* [2003] FCA 417, Finn J considered whether an intimation by a Senior Member of the Tribunal in the course of hearing two applications (prior to reserving his decision) as to the likely outcome of those applications constituted a “decision”. His Honour said (at [5]):

In the present matter, the evidence before me satisfies me that the Tribunal has not reached a determination in this matter at all.  The decision is reserved.  Equally, I am satisfied, given the requirement of finality, that the term “decision” does not apply to intimations of likely success in a proceeding, let alone as to comments on relevance.  For these reasons I am satisfied that the appeal, so called, in this matter is destined to inevitable failure for the reason that the jurisdiction to entertain the matter has not properly been enlivened.  There is simply no decision against which the alleged appeal is said to lie.

25 In *Minister for Immigration and Citizenship v Hassani* [2007] FCA 436; (2007) 219 FCR 144, I considered the competency of a purported appeal under s 44 of the AAT Act from orders of the Tribunal that were in the following terms:

(a) The matter be adjourned until 1 May 2006 for a further telephone directions hearing;

(b) Either party is at liberty to apply for an earlier telephone directions hearing in the event that the criminal proceedings in the Magistrates Court involving the applicant are finalised before 1 May 2006.

I concluded that these orders did not constitute a decision under s 44 because they did not amount to a final decision or determination (at [29]). The orders merely deferred or adjourned consideration of the underlying application for review.

26 The above are the authorities to which I was referred. There are no doubt a number of other authorities. However, there is no suggestion that the test is other than as stated by Deane J in *Chaney* and set out above with the addition, it seems, of a third exception involving rulings under ss 36(3), 36A(2)(b) or 36B(3). In any event, what was argued in this case was that the s 35C issue was a separate part of the proceeding before the Tribunal in respect of which an independent decision may properly be given.

The “third exception” referred to in [26] is not relevant to the present case.

1. This Court, of course, is bound by the appellate decisions on the meaning of “decision” in s 44(1) of the AAT Act. Ms Keily correctly did not seek to argue differently to the established and settled law, but sought to characterise the decision made by the Tribunal as having the quality of finality. It was argued that the refusal of the stay was an exercise of discretion which determined substantive rights in the proceeding because, in effect, Mr Daly will not be able to continue the review proceeding and also preserve his penalty privilege in the Federal Court proceedings, thus, the argument went, the Tribunal decision has effectively finally determined Mr Daly’s review application. In support of that submission, Ms Keily placed reliance on the passage in *Chaney* at 593, where Deane J, in the seminal passage on the meaning of “decision” in s 44(1) of the AAT Act, stated that:

…an appeal under s 44(1) of the Act lies only from a decision of the Tribunal which constitutes the effective decision or determination of the application for review. Ordinarily, such a decision will be the final decision formulated in accordance with the provisions of s 43 of the Act.

1. Ms Keily argued that his Honour, in that passage, countenanced the “effective” determination of an application being a “decision” within the meaning of s 44, albeit that the decision is not one that is final as formulated in accordance with the provisions of s 43 of the AAT Act. Ms Keily argued that it can be said that the refusal of Mr Daly’s stay application is a decision that has the quality of finality, in that it has effectively determined Mr Daly’s review application because of the impact that a claim of penalty privilege in the civil penalty proceeding will have on the case that Mr Daly can present in his review proceeding, and, it was said, in consequence of the refusal of the stay, Mr Daly will effectively be forced to abandon the review proceeding. It was submitted that the refusal of the stay has put Mr Daly in the invidious position identified in *Productivity Partners Pty Ltd and Australian Skills Quality Authority* [2018] AATA 4878, namely the interests of justice are so compromised by the refusal of the stay that the refusal constitutes the effective determination of the review proceedings. I reject those submissions.
2. The Tribunal’s refusal to stay Mr Daly’s application for review was not a “decision” within the meaning of that word as used in s 44 of the AAT Act, as it lacked the quality of a final or effective determination of the application for review of the decision to impose a banning order on him. It is a matter for Mr Daly as to how he will present his case in the Tribunal and for that matter, whether he will discontinue that application, in light of whether or not he determines to claim the penalty provision in the Federal Court, but that is a forensic decision for him. It does not bring about the outcome that the refusal to stay the Tribunal application amounts to an effective determination of that application. That application remains on foot for determination on its substantive merits.
3. A second argument put by Ms Keily in support of her contention that the decision is a final decision within the meaning of s 44(1) of the AAT Act relies upon a covering letter from the registrar of the Tribunal, attaching the decision on the stay application. In that letter, the registrar wrote:

We have made a decision in this application under section 43 of the [AAT Act]. We have sent you a copy of our decision with this letter.

1. The letter also advised that “if [the applicant] thinks the decision is wrong”, the applicant “might be able to appeal to the Federal Court of Australia”.
2. It was argued that the form of the decision was thus a decision within the meaning of s 44 because it was a decision made under s 43 of the AAT Act and served on Mr Daly as required by that section.
3. The letter from the registrar does not, of itself, have the effect of characterising the nature of the decision that was made. It is no more than a covering letter from a registrar, and whether or not the registrar referred to it as a decision under s 43 does not, of itself, give that decision such a character. It is necessary to look at the decision itself and by reference to the decision, not to any covering letter, determine whether or not it is a decision within the meaning of s 43.
4. For those reasons, the appeal under s 44 is not competent. It follows also that the proposed application under the ADJR Act is also not competent. Ms Keily correctly also did not dispute that a reviewable decision under the ADJR Act must also have the element or characteristic of finality before a decision can be a “decision under an enactment” (*Beddoe* at 452-3; *Geographical Indications Committee* at [20]) and for the same reasons, the decision of the Tribunal was not determinative of the review application before the Tribunal in a final sense.
5. Accordingly, the orders that I will make are:

(1) The appeal be dismissed.

(2) The application for an extension of time in which to file an application under the *Administrative Decisions (Judicial Review) Act* *1977* (Cth) be refused.

(3) The applicant pay the costs of the respondent, such costs to be taxed in default of agreement.

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| I certify that the preceding eleven (12) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Davies. |

Associate:

Dated: 6 December 2021