



Précis Paper

Hastwell v Legal Services Commissioner [2021] NSWCA 20 – Administrative Law

Abstract – A judicial error complaint is raised against the Legal Services Commissioner in the Supreme Court and then in the Court of Appeal in *Hastwell v Legal Services Commissioner* [2021] NSWCA 20.

Discussion Includes

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Précis Paper

Hastwell v Legal Services Commissioner [2021] NSWCA 20 – Administrative Law

1. In this edition of BenchTV, Graham Barter, barrister, and Radhika Withana, barrister, discuss issues that arose in a judicial review proceeding against the Legal Services Commissioner in *Hastwell v Legal Services Commissioner* [2021] NSWCA 20.

Overview

2. Mr Hastwell, a legal practitioner, made a complaint to the NSW Legal Services Commissioner against a law firm and solicitor representing him in a discrimination claim he made against his employer. He retained the services of a law firm and solicitor, but he was unsatisfied with their work representing him.
3. He then lodged a complaint against the law firm and solicitor that he retained. The main complaint was against the solicitor who had given instructions to the medical legal expert and the content of the medical legal expert's report.
4. The Legal Services Commissioner ('Commissioner') decided to dismiss the complaint, and Mr Hastwell sought an internal review. However, a decision was made not to commence an internal review. Mr Hastwell then sought judicial review of the Commissioner's decision to dismiss his complaint and his decision not to conduct an internal review on the grounds that those decisions were affected by jurisdictional error and as such should be set aside and the Commissioner required to make the decisions again.

At first instance

5. At first instance, the Commissioner did not find that the claim had any validity and closed the complaint due to lack of substance under the *Legal Profession Uniform Law* (NSW) ('LPUL') s 277(1)(a).
6. Mr Hastwell then sought a review of that decision.
7. Section 313 of the LPUL states that the designated regulatory authority has the absolute discretion to perform an internal review of a decision made by the regulatory authority.
8. The Commissioner declined to conduct an internal review of the original decision to dismiss Mr Hastwell's complaint.
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Judicial Review

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11. Mr Hastwell sought relief by invoking the supervisory jurisdiction of the Supreme Court under the *Supreme Court Act 1970* (NSW) s 69.
12. He sought relief through the writ of certiorari to quash the Commissioner's decision and mandamus to compel the Commissioner to redo the decision. Mr Hastwell also sought numerous other orders, including that the matter be referred to a different Legal Services Commission team.

Why Was Mr Hastwell Not Successful?

13. Mr Hastwell had identified several grounds of jurisdictional error, which must be met to invoke the supervisory jurisdiction. He had standing to do so as he had an interest as a complainant. Standing was not an issue that the Commissioner addressed.
14. *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 establishes that to have an entitlement to the writ of certiorari or mandamus, that person must demonstrate that they have a statutory right that is affected.
15. The court determines that a person has a right through statutory construction. They view the Act in question and ascertain whether the relevant decision affects the person's right by reasons of the matter spelt out in the legislation.
16. In the current case, the court viewed the *Legal Profession Uniform Law* (NSW) and then determined whether Mr Hastwell had any rights affected by the relevant decision, which was the decision to dismiss parts of his complaint. That is the threshold question that the court had to determine before determining whether jurisdictional error exists.

Reasoning

17. In these circumstances, the Commissioner gave five reasons why Mr Hastwell did not have a right that was affected for the purposes of *Hot Holdings*.
18. Firstly, the complainant does not have a right to procedural fairness. Once the Commissioner decides to dismiss the complaint, he is not obliged to consult with the complainant and receive submissions as to why he should not close the complaint.
19. The second reason is that the Commissioner has broad powers, and all regulators subject to the uniform law have broad powers. This includes that they can summarily determine whether a solicitor is guilty of unsatisfactory professional conduct. In that type of determination, the complainant has no standing.
20. Thirdly, in circumstances that the Commissioner decides to take the case to NCAT for a complete disciplinary hearing, the complainant is also not a party to the proceedings. Thus no rights are affected.

21. Fourthly, where the Commissioner has decided summarily to determine if a lawyer is guilty of unsatisfactory professional conduct, only the subject of the complaint has a right to appeal the decision, not the complainant.
22. Finally, even if the complainant decided to withdraw the complaint, the regulator, subject to the uniform law, is entitled to continue their investigation.
23. Having made the complaint, the complainant had no rights affected by the decision to dismiss the complaint..

Hardiman

24. *The Queen v Australian Broadcasting Tribunal and Ors; ex parte Hardiman & Ors* (1980) 144 CLR 13; [1980] HCA 13, sets out the principle that a decision maker should participate in proceedings against it in circumstances where there is the prospect of the decision being remitted back to the original decision maker to redetermine.
25. It arises as it risks the decision maker's impartiality participating in proceedings that seek to vindicate the correctness of the relevant decision being challenged. Furthermore, the High Court has stipulated that the better stance is that the decision maker makes a submitting appearance and accepts the outcome, yet does not act as a contradictor.
26. Hardiman does not say that the Commissioner should not or cannot participate. It is a question of propriety and limits of how they can participate. So there is an exception to being able to participate, confined to submissions on the powers and procedures of the decision maker.
27. The consequence of breaching the *Hardiman* principle is that a successful decision maker would not get their costs.
28. This case was distinguished from *TXU Electrical Ltd v Office of the Regulator General* (2001) 3 VR 93; [2001] VSC 4. In the absence of another contradictor's intervention, the decision maker should typically assist the court regarding the question of power. In doing so, the decision maker should adopt a minor partisan role.
29. The Commissioner wrote to Mr Lorraine, the solicitor against whom Mr Hastwell's complaints were primarily directed, and the Attorney General to ascertain whether they wished to participate in the proceedings as an active contradictor. Both declined.

The Commissioner's Powers

30. For a judicial review, certain provisions must be met, which go to procedure. The way that Mr Hastwell framed the jurisdictional error as actual and apprehended bias relates to questions about irregularity, and the traditional jurisdictional error grounds, unreasonableness, or irrationality, relevant or irrelevant considerations. All of which require viewing the Act and the scope of the Commissioner's power, having regard to the language, the text, the structure and the purpose of the Act.

31. Similar issues were still brought up in the Court of Appeal. However, while the case was before the Supreme Court, there was potential conflict regarding addressing powers and procedures instead of the law associated with judicial review.
32. It was viewed as the same and not contradictory. What would have been problematic would have been to delve into the merits of the complaint and the decision.
33. Mr Hastwell then sought leave to appeal under the *Supreme Court Act 1970* (NSW) s 101.
34. Judicial review is all about the limits of power and whether the power exercised has gone beyond the scope of what is permitted. So Mr Hastwell is in the same position as any other plaintiff who seeks to commence judicial review proceedings, evoking the court's supervisory jurisdiction.

Grounds of Appeal

35. In Mr Hastwell's leave to appeal summons, he had his draft grounds of appeal, and the Commissioner addressed his submissions to the questions of whether the appeal and the leave to appeal questions should be dealt with concurrently or separately.
36. Under the *Uniform Civil Procedure Rules 2005* (NSW) ('UCPR'), a respondent should address the question as to whether the appeal and the leave application should be heard concurrently.
37. If the appeal grounds were meritorious with a reasonable prospect of success or raised an important question of law, one would seek to have the matters heard concurrently. However, in the current circumstances, it would have been a waste of the court's time.

Obligation To Review the Original Decision

38. Mr Hastwell sought an internal review under LPUL s 313, and the Commissioner, in their absolute discretion, determined not to conduct a review. Under the principles in *Hot Holdings*, his rights were not affected, and thus the remedy he sought did not apply.
39. There was no error in the Commissioner's decision not to conduct a review, as it is an absolute discretion.

Final Points

40. The final point was the question in *Hardiman* and the role of the contradictor. *Hardiman* permits a decision maker to make submissions in respect of their powers and procedures. Given that the issues raised in the supervisory jurisdiction are questions of law and procedure, that exception to the principle will commonly apply.
41. When offering the person who is the subject of the complaint the opportunity to contraindicate, one should stay on the side of caution. However, there is now the benefit

of a judgment stating the general rule that it is not necessary to go through all the motions. However, to be prudent, it is recommended to do so.

BIOGRAPHY

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Mr Barter practices in the following areas of law - alternative dispute resolution, appellate, common law, commercial law, inquests, inquiries, personal injury, public/administrative law and workers compensation.

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Ms Withana is currently briefed in a number of matters, including several regulatory matters in which she acts for the NSW Legal Services Commissioner, the New South Wales Environment Protection Authority, and the Australian Competition and Consumer Commission (ACCC). She practices in a number of legal areas such as administrative law, commercial law, equity and criminal law.

BIBLIOGRAPHY

Focus Case

Hastwell v Legal Services Commissioner [2021] NSWCA 20

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_03-03-2021_insurance_banking_construction_government.pdf

Judgment Link

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2021/20.html>

Cases

Hastwell v Health Care Complaints Commission [2021] NSWCA 22

Hot Holdings Pty Ltd v Creasy [1996] HCA 44; (1996) 185 CLR 149

The Queen v Australian Broadcasting Tribunal and Ors; ex parte Hardiman & Ors (1980) 144 CLR 13; [1980] HCA 13

TXU Electrical Ltd v Office of the Regulator General (2001) 3 VR 93; [2001] VSC 4

Legislation

Legal Profession Uniform Law (NSW)

Supreme Court Act 1970 (NSW)

Uniform Civil Procedure Rules 2005 (NSW)