

## Appeals from a division of the Supreme Court – the requirement that they lie from a “judgment or order”

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### Introduction

1. Section 101(1)(a) of the *Supreme Court Act 1970* (NSW) provides that an appeal shall lie to the Court of Appeal from a "judgment or order" of the Supreme Court of New South Wales in a Division.
2. According to the authorities, a "judgment or order" in this context means an operative judicial act, i.e. the formal judgment or order which when entered is binding upon the parties and definitive of their legal rights. Therefore, a judge's reasons for judgment are not of themselves a "judgment or order".
3. In *TriCare (Hastings) Limited v Allen*,<sup>1</sup> the appellant sought to appeal against obiter remarks of the trial judge contained in his reasons for judgment and not against the judgment or order. Accordingly, the Court of Appeal held that the appeal was misconceived and incompetent.

### Background

4. The appellant operated a holiday park which it proposed to redevelop. The respondents were owners of relocatable dwellings located at the holiday park.
5. On the appellant's application, the NSW Civil and Administrative Tribunal ("NCAT") had made orders under s 113 of the *Residential Parks Act 1998* (NSW) ("RPA") terminating residential site agreements relating to the respondents' dwellings and granting the appellant vacant possession of the premises occupied under those agreements. Pursuant to s 128(4) RPA, NCAT had fixed an amount of compensation to be paid to each of the respondents so as to entitle the appellant to obtain vacant possession of the premises.
6. The respondents had sought judicial review of NCAT's decision in the Common Law Division of the Supreme Court of New South Wales.
7. On the judicial review application, the Supreme Court judge had held that NCAT had committed jurisdictional error by assessing compensation under s 128(4) RPA in circumstances where that provision had no application to the facts of the case<sup>2</sup> and had made orders which included the following:

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<sup>1</sup> [2015] NSWCA 344.

<sup>2</sup> NCAT had purported to assess compensation for relocation of the dwellings to a new location when no relocation of the dwellings was to occur.

- Order 3: The orders made by NCAT be set aside.
  - Order 4: NCAT re-hear according to law the appellant's application seeking orders under s 113 RPA.
8. After having determined that NCAT had committed jurisdictional error, the judge had referred to s130A RPA, the object of which is to enable NCAT to assist a park owner and resident to come to an agreement as to the value of the resident's dwelling where there is a proposed sale of the dwelling from the resident to the park owner. Under the section, NCAT is empowered, by order, to determine the value of the resident's dwelling and, for that purpose, to obtain a valuation of the dwelling or to seek advice as to its valuation from one or more registered valuers.
9. The judge had then, at pars [35] and [39] of his reasons for judgment,<sup>3</sup> made certain observations as to the construction of s 130A RPA. Those observations were to the effect that the valuation of a dwelling determined under s 130A RPA could include the rights attached to the dwelling under the RPA, such as the right of quiet enjoyment, rights of alienation and the protections of defeasibility afforded by Part 12 RPA.

### Appeal

10. The appellant appealed to the Court of Appeal. The appeal was heard by Ward JA, Simpson JA and Tobias AJA.
11. In its notice of appeal, the appellant purported to appeal from the trial judge's decision "and in particular his Honour's reasoning in paragraphs [35] and [39] and Order 4..."<sup>4</sup>
12. The appellant submitted that the trial judge's reasoning in pars [35] and [39] involved a misconstruction of s 130A RPA and that the valuation of a dwelling determined under s 130A RPA, as properly construed, was limited to the physical dwelling only, without regard to its location or any occupancy rights that might be attached to it under the RPA. The appellant sought a declaration to that effect as well as the addition of a rider to Order 4 (the order that NCAT rehear the appellant's application seeking orders under s 113 RPA) to give effect to this interpretation of s 130A RPA.<sup>5</sup>
13. The Court noted that Order 4 had been made as a result of the making of Order 3 which was not the subject of challenge and that Order 3, which ordered that NCAT's orders be set aside, had been made because the trial judge had held that NCAT had committed jurisdictional error.<sup>6</sup>
14. The Court then said that it was clear that the appellant did not seek to challenge the orders made by the trial judge and, in particular, the judge's finding that NCAT had

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<sup>3</sup> See *Allen v TriCare (Hastings) Pty Ltd* [2015] NSWSC 416.

<sup>4</sup> Above, n 1, at [1].

<sup>5</sup> Above, n 1, at [8].

<sup>6</sup> Above, n 1, at [2]-[4].

committed jurisdictional error which had required the orders that NCAT had made be set aside and the matter remitted to NCAT for determination in accordance with law. Rather, what the appellant sought to challenge was obiter remarks of the trial judge contained in his reasons for judgment relating to the construction of s 130A RPA in circumstances where NCAT had not purported to determine the value of the respondents' dwellings pursuant to s 130A RPA but had instead assessed compensation pursuant to s 128(4) RPA, a provision which had no application to the facts of the case.<sup>7</sup>

15. After noting that the challenge could only proceed in an appeal from "a judgment or order of the Court in a Division" as required by s 101(1)(a) of the *Supreme Court Act 1970* (NSW),<sup>8</sup> the Court said:

*"It is well established that a "judgment or order" in the context of s 101(1)(a) of the Supreme Court Act refers to an operative judicial act, i.e., the formal judgment or order which when entered is binding on the parties and definitive of legal rights: Driclad Pty Limited v Federal Commissioner of Taxation [1968] HCA 91; (1968) 121 CLR 45 at 64; and see the other authorities referred to by Campbell JA, with whom Handley AJA agreed, in Wang & Liu v State of New South Wales [2011] NSWCA 321 at [23] noting his Honour's observation that while error in a judgment or order might be demonstrated on an appeal by showing error in a judge's reasons for judgment, the appeal is against the judgment or order, not the reasons for judgment."*<sup>9</sup>

16. The Court then said that the obiter remarks of the trial judge had not led to an operative judicial act because they were irrelevant to the findings which the trial judge had made which had founded his Orders 3 and 4 and had not arisen on the judicial review application to be determined by him.<sup>10</sup>
17. Accordingly, the Court concluded that the appeal was "misconceived and incompetent".<sup>11</sup>
18. Neither party had raised the issue of competency of the appeal in their written submissions. Rather, it was raised by the Court itself at the commencement of the hearing. Although the appellant conceded the issue, it nevertheless sought to persuade the Court that it should address the construction of s 130A RPA by way of clarification of the orders made by the trial judge.<sup>12</sup> The Court however refused to do this on the basis that it would be:

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<sup>7</sup> Above, n 1, [9].

<sup>8</sup> Above, n 1, at [9].

<sup>9</sup> Above, n 1, at [10].

<sup>10</sup> Above, n 1, at [11].

<sup>11</sup> Above, n 1, at [11].

<sup>12</sup> Above, n 1, at [12].

*“inappropriate and probably beyond this Court’s remit, in circumstances where the appeal is incompetent, to add obiter upon obiter in a factual vacuum.”*<sup>13</sup>

19. The Court noted that the true ambit of s 130A RPA might ultimately be determined by NCAT on the remitter and said that, in that event, it needed to be clearly understood that the Court neither agreed nor disagreed with the trial judge’s obiter remarks.<sup>14</sup>

20. The respondents sought an order that the appellant pay their costs of the appeal but the Court refused to make this order for a number of reasons including that:

- the issue of the competency of the appeal was first raised by the Court; and
- as acknowledged by the respondents, the respondents themselves had been in a sense the authors of the course that had led to the appeal because their legal representative had submitted to NCAT, when the matter had been remitted to NCAT, that the trial judge had determined how s 130A should be applied in the matter when no such binding determination had been made.<sup>15</sup>

21. Accordingly, the Court dismissed the appeal as incompetent and ordered that each party pay its or their own costs of the appeal.

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<sup>13</sup> Above, n 1, at [13].

<sup>14</sup> Above, n 1, at [13]-[14].

<sup>15</sup> Above, n 1, at [15].