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"The Duty to Act With Equity And Good Conscience..."

An exploration of the judicial decision making process in property related tribunals

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ABSTRACT

Adjudication of applications before the New South Wales Residential Tenancies Tribunal and the Strata Titles Board proceed in accordance with the powers expressly given under the *Residential Tenancies Act 1987* and the *Strata Titles Management Act 1996.* In determining applications, Tribunal and Board members are required to act according to "equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms." The direction to Tribunal or Board members is not a dispensation from scrupulously observing the principles of natural justice nor can the Tribunal or Board arbitrarily give to a provision of a statute a meaning other than that which a court of law would place upon it. How wide then are the powers of our property Tribunals and Boards? What can they do and not do in their limited jurisdictions? This paper looks at the development of adjudicative bodies with express powers, duties and functions and explores their ability to deliver justice which accords with contemporary ideas of equity and good conscience.

The Merits of a Good Case

In the procedural formalities of statutory tribunals and boards throughout Australia, it is quite common to discover that there is a statutory duty to "act with equity, good conscience and the substantial merits of the case" in any proceedings or investigations. The prescription is expressed in virtually identical form in the *Residential Tenancies Act 1987* [s.93(4)], the *Strata Schemes Management Act 1996* [s.186(2)], and even *the Anti-Discrimination Act 1977* [s.108(1)].

Section 93(4) of the Residential Tenancies Act 1987 provides: "In any proceedings before it, the Tribunal.

(a) is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit; and

(b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

Section 186(2) of the Strata Schemes Management Act 1996 provides: "In any such investigation, or in any proceedings before it for an order**,** the Board.

(a) is not bound by the rules of evidence and may inform itself of any matter in such manner as it thinks fit. and

(b) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms".

Legal History of the term to "act with Equity and Good Conscience".

The expression "equity and good conscience" was first used in 1606 in the Statute which established in England the Courts of Requests (3 Jac. 1, c. 15). These courts had previously been established by Order in Council during the reign of Henry VIII, when they were known as "the Courts of Conscience in the Guildhall" and had Jurisdiction to try matters of debt up to 40 shillings. The Commissioners of the Courts of Request were required to make such orders "as they shall find to stand with Equity and Good Conscience".

Howard Beale observed: "Up to the first quarter of the nineteenth century the jurisdiction of these Courts was usually expressed to be 'according to equity and good conscience' as in the Statute of 1606, but thereafter it was more usual - although by no means universal - for the Commissioners to have to decide their cases according to law or law and equity. Courts of Requests gave a sort of rough and ready local Justice to litigants in small cases. There were many complaints about the irregularities under which they were often carried on, and some of the complaints make interesting and even amusing reading. In the end public dissatisfaction led to their abolition and to the establishment in their place of the County Court system..." *[See* Beale O.H. "Equity and Good Conscience" (1937) *The Australian Law Journal 349].*

In 1842, Courts of Requests in New South Wales (which later became known as the Small Debt Court) were given power and authority to hear and determine matters "in a summary way and according to equity and good conscience " (6. Vict. No.15).

How have "Equity and Good Conscience" provisions been interpreted by the Courts?

In *Colliery Employees' Federation v Northern Colliery Proprietors' Association* (1904) AR 182 at 185, Cohen J. said. "...the words 'equity and good conscience' leave this Court, in my opinion, in the position that, whilst not infringing any positive law of the country, it may do that which it believes to be right and fair and honest between man and man...".

In the *Long Service Leave (Engine Driver) Award* case (1961) AILR, case 308, Gallagher J. sitting as the Coal Industry Tribunal, said that "equity and good conscience" required the Tribunal to have regard to "such considerations as the requirements of natural Justice, the taking of a realistic view, the necessity of doing what is right and fair and honest between man and man, conscientious observance of rules of fair play, the quality of being equal or fair, common fairness as opposed to meticulous insistence upon the formalities of the law."

In *Walkley v Dairy Vale Cooperative Ltd* (1972) SAIR 727, Olsson J. who was the President of the Commission at the time, dealt with the interpretation of Section 51 of the Industry Code which read as follows:

> S.51. Notwithstanding any thing in this Act or in any other law or any practice to the contrary -

(a) The Commission in the exercise of any Jurisdiction, duty, power function conferred or imposed by or under this Act, shall be governed in its procedure

and its judgements, awards, orders, and decisions by equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms or the practice of other courts"

(b) The Commission in the exercise of any such Jurisdiction, duty, power, or function, shall not be bound by any rules or practice as to evidence, but may inform its mind on any matter in such to evidence in manner as it thinks fit.

After reviewing a large number of decided cases, Olsson expressed the view that certain "fundamental concepts" emerged from this provision

"(1) A tribunal which is, by statute, enjoined to be governed in its procedure and judgements by equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms or the practice of other courts is not, generally speaking, bound to decide proceedings *stricti juris.* Rather it is a court of conscience different from those regulated by established principles of law and equity and not absolutely bound to adjudicate according thereto.

(2) This is not to say that the tribunal may not or should not take established principles of law and equity into consideration (and, indeed in appropriate circumstances even decide certain cases solely upon the footing thereof as being the most just approach) but it must, in the final analysis, test its conclusion solely in the light of the express statutory mandate.

(3) The wide discretionary power conferred is, in a sense, self limiting in terms of procedure. Whilst informal procedures and evidence may usually be adopted, nevertheless, everything done (or omitted) must stand the test of the established principles of natural justice.

(4) The very nature of the proceeding will have a direct bearing upon the exercise of discretion under the statute, both in procedural and substantive respects. Thus, for example, cases involving penal or quassi penal consequences may well be treated on a basis of evidence, standard of proof and principles substantially different from arbitral claims or non-penal actions.

(5) The Tribunal is not empowered to disregard an absolute statutory directive which bears upon the subject matter and manifestly is not intended to be read down in light of a general power of conscience.

Later on in his judgement His Honour suggested that the intention of the legislation was "to vest in the tribunal an express power of endeavouring to ensure that 'bad law'

does not result from hard cases. In most instances... it will operate so as to salvage claims which have much moral merit but face technical difficulties. It would even, in some circumstances, allow a claim to succeed where a contract may technically be tinged with some degree of illegality."

The discussion advanced so far would suggest that the "equity' in "equity and good conscience" is not the same as "Chancery equity" as administered by the courts. In *Earl v. Slater and Wheeler (Airlyne Limited* [1973] 1 All ER 145 at page 150, the English Court of Appeal said:

"The subsection goes on to provide that this question 'shall be determined in accordance with equity and the substantial merits of the case'. This does not, in our judgement, mean that the principles of 'equity' as contrasted with the 'common law' are applicable as such, but rather that in considering whether the employer acted reasonably or unreasonably the tribunal should adopt a broad approach of common sense and common fairness, eschewing all legal or other technicality".

How is the "Equity and Good Conscience" provision to be judged?

There are suggestions in some of the decided cases that where Parliament has clearly intended that a court or tribunal should act as a "court of conscience" rather than a court of law, there can be no appeal from a decision of such a court or tribunal. This argument has then been turned around to support the proposition that if Parliament has provided an avenue of appeal, which it has with the Residential Tenancies Tribunal and the Strata Titles Board, this must indicate some restriction on the extent to which the court or tribunal against which the appeal lies may make use of the "equity and good conscience" provision.

The case usually cited in support of these arguments is *Moses v. Parker* [886] AC 245. In that case the court in question (which was in fact constituted of the judges of the Supreme Court of Tasmania) was directed to be guided by equity and good conscience only, and by the best evidence procurable, even if not required or admissible in ordinary cases, and not to be bound by strict rules of law, equity or by any legal forms. The question arose as to whether there was a right of appeal to the privy Council. The Privy Council held that there could be no appeal, because the members of the Court were expressly exonerated from all rules of law and equity and all legal forms. The decision continued:

"How then can the propriety of their decision be tested on appeal? What are the canons by which this Board is to be guided in advising Her Majesty whether the

Supreme Court is right or wrong? It seems almost impossible that decisions can be varied except by reference to some rule; whereas the Court making them is free from rules. If appeals were allowed, the certain result would be to establish some system of rules; and that is the very thing from which the Tasmanian Legislature has decided to leave this court free and unfettered in each case. If it were clear that appeals ought to be allowed, such difficulties would doubtless be met somehow. But there are strong arguments to show that the matter is not an appealable nature".

In *Qantas Airlines Limited v Gubbins,* (1992) 28 NSWLR 26, the New South Wales Court of Appeal had to consider s.108(1) (b) and s.118 of the *Anti-Discrimination Act 1977*. The former provision provided that the Tribunal in question "shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms". The latter provision provided for an appeal to the Supreme Court on questions of law. Gleeson C.J. and Handley J., in a joint judgement, described these provisions as "apparently conflicting". Their Honours held that the conflict could be resolved only by holding that the "equity and good conscience" provision did not release the Tribunal from the obligation to apply rules of law in arriving at its decisions. Their Honours pointed out that in some cases, the words equity, good conscience and the substantial merits of the case" may indicate that "the decision maker is free from any obligation to apply rules of law so that any decision will be executive rather than judicial and not subject to appeal even if that is otherwise available". In other contexts, those words have been construed as requiring the Tribunal to apply the ordinary law. Their Honours referred to the decision of Kinsella J. in *Ex parta Herman re Mathieson* [1961] NSWR 1139 which His Honour said (at page 9).

"The words 'according to equity and good conscience'... as used in s.7 of the Small Debts Recovery Act... do not give the court power to depart from established principles of law nor do they give it power to dispense justice otherwise than according to law".

To the Judgements of Gleeson and Handley JJ should be added the judgement of Kirby P [the critical elements of the judgement are reproduced].

"Two curiosities concerning the proceedings before the Tribunal should be noted. The first is the way in which the proceedings were conducted as if the answer to the claim of the respondent was to be determined in precisely the same way as it would be solved in an equivalent suit in the Equity Division of the Supreme Court...

In this way, the pleadings invited the tribunal to approach the matter on the footing that it was resolving the pleas based upon the deed of release and the reply in exactly the same way as such issues would be resolved in a court of law.

The tribunal is not a court of law. It is a statutory body created by s.69(b) of the Act. It comprises " judicial members" and other members as appointed from time to time....

Two provisions of the Act modify the common law rules of evidence. They are s. 107 and 108:

> 107 (1). In the course of an inquiry, the Tribunal may, in its discretion –
>
> (a) receive in evidence the transcript of evidence in any proceedings before a court or tribunal and draw any conclusions of fact therefrom that it considers proper....
>
> 108(1). For the purposes of any inquiry, the Tribunal –
>
> (a) shall not be bound by the rules of evidence and may inform itself on any matter it thinks fit,,
>
> (b) shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms...."

This range of powers demonstrates what the special constitution of the tribunal under the Act and special provisions relating to evidence before it foreshadow in any case. The relief to be provided by the tribunal is to be fashioned to achieve the purposes of the Act.

Being a statutory body with defined jurisdiction, the tribunal must adhere strictly to its statutory function. It has no inherent power to dispose of other disputes that may subsist between the parties to a complaint before it. Its powers are those expressly stated in its governing statute, necessarily implied in the powers conferred or inescapably imported from the very fact that it is an independent tribunal structured as the Act provides.

One of the problems of the creation of specialist courts and tribunals is that frequently, a point will be reached in the resolution of differences between parties before such courts and tribunals where they run out of jurisdiction. This may be extremely frustrating for the parties. It may occasion delay, expense and inconvenience. But it is simply the consequence of the law which obliges a body of limited jurisdiction to

remain within its jurisdiction, properly interpreted. *see National Parks and Wildlife, Service v. Stables Perisher Pty Lld* (1990) 20 NSWLR 573.

In that case this court held that the Land and Environment Court, although a superior court of record, was a Court of limited jurisdiction. It has no jurisdiction to deal with a claim in court for general damages. Nor did it have any pendant or accrued jurisdiction akin to that enjoyed, by statute, by the Federal Court of Australia. Therefore, if parties to proceedings before that Court wished to claim damages they were obliged to resort for that purpose to the Supreme Court. The Supreme Court retained its residual power to award or deny damages as the general law provided.

In this sense, the tribunal enjoys a larger power than, it was found, the Land and Environment Court enjoyed. But it does so only because Parliament has expressly so provided in its case. The principle still remains the same. The tribunal must conform to the powers conferred upon it. There is nothing in the Act expressly providing for exemption by a deed of release from the consequences of conduct otherwise unlawful under the Act....

Provisions enjoining tribunals, and even some courts, to perform their functions "according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms" are quite common in legislation of this State, of other States of Australia, of the Commonwealth and indeed of other jurisdictions of the common law....

Upon such provisions there is a multitude of authority...

Such cases illustrate the way in which such provisions have sometimes been read down, even to the point of being deprived of meaning. In part, it is doubtless because of the fact that the provisions are construed by courts of lawyers who may be less sympathetic to the Parliamentary purpose and more conscious than legislators of the injustices which an uncontrolled procedure can sometimes occasion. In part, it is doubtless because many of the principles of the common law and of equity (including the rules of evidence) have developed precisely to achieve the objective of "equity, good conscience and the substantial merits of the case.....

Not only is this a principle upheld ill the courts of equity. It is clearly a principle which the statutory injunction in s. 108(1)(b) makes applicable to the suggested operation of the deeds of release executed by the respondents here...

The injunction by the Act that the tribunal here should have regard to equity, good conscience and the substantial merits of the case" would quite readily take the tribunal to such a principle. It has obvious good sense".

Summary of procedural approach

In an attempt to summarise the way in which tribunals should approach the question of equity and good conscience, Noblet J in *Russito Pty Ltd v Rosso* (1993) 173 LSJS 14 has this to say: "It is not appropriate to attempt an exhaustive definition of what is meant by 'equity and good conscience'. Each case must be examined on its merits. However, in view of the difficulty in reconciling some recent decisions, and having regard to my responsibility as Chairman to determine any question of law or procedure, it may be useful for me to attempt to extract from the authorities some general principles which I consider should guide the tribunal in the future.

(1) The Tribunal must always ensure that principles of natural justice are scrupulously observed.

(2) The Tribunal must comply with any express statutory directive that is clearly not intended to be ignored or departed from, *even if the result may not seem to accord with equity and good conscience.*

(3) In matters of statutory interpretation, the Tribunal must not give a statute a meaning other than that which a court of law would place upon it.

(4) Subject to the above, the Tribunal may determine a matter before it by the application of conscience, fairness and common sense, rather than according to strict law, if it is satisfied that this is an appropriate approach in all the circumstances of the particular case.

(5) In deciding whether this alternative approach is appropriate, the Tribunal should have regard to all relevant factors and, in particular, the following:

   (a) the nature of the proceedings (the alternative approach may not be appropriate if the proceedings involve penal or quasi-penal consequences),

   (b) the nature of any dispute involved in the proceedings (the alternative approach may not be appropriate if it would remove the degree of certainty which the law attempts to bring to commercial transactions),

(c) the conduct of the parties (the alternative approach may not be appropriate if it would remove the degree of certainty which the law attempts to bring to commercial transactions),

(d) in cases involving contracts or agreements, the relative bargaining power of the parties and the extent to which they have had legal or other appropriate advice (the alternative approach may be appropriate if one party is in an inferior position relative to the other and has acted to his or her disadvantage without advice)."

Arguable conclusions or an on-going discussion?

It is possible to extract from the authorities cited so far the general principles which guide the exercise of the power to act with "equity, good conscience and the substantial merits of the case". The provision in S. 186 of the *Strata Schemes Management Act 1996* and S.93(4) of the *Residential Tenancies Act 1987* does not give the adjudicative bodies the power to depart from established principles of law and confirms the considered view that tribunals must conform to the powers conferred upon them particularly to their statutory functions.

Principles of the common law (including equity) have developed specifically to achieve the objectives of "equity, good conscience and the substantial merits of the case". The principle behind the imperative to act with "equity and good conscience" is a principle upheld in the courts of equity. However tribunals are bound to interpret the statute in accordance with accepted principles of law and must not give a statute a meaning other than that which a court of law would place upon it.

There is evident in s. 187 of the *Strata Schemes Management Act* an express power to make orders other than those orders sought by an appellant or complainant provided such orders are made by the Strata Titles Board under another provision of the Act and are specifically made for the reason that an order sought under a particular provision is inappropriate to determine the application. To the express powers of the Board to make orders in accordance with the provisions *generally* is added a discretionary power to make "Ancillary Orders," arising from the provisions of s.188, for the purpose of securing compliance with an order of the Board. Similarly powers to make ancillary orders (considered to be "appropriate") are given to the Residential Tenancies Tribunal under s.85 (1)(d) of the *Residential Tenancies Act 1987.*

In the final analysis adjudicative tribunals or boards will determine an application guided by the wisdom of accepted legal principles but *must act* according to "equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms."