ACT CIVIL & ADMINISTRATIVE TRIBUNAL

ILLAWARRA RETIREMENT TRUST ACN 000 726 536 v COMMISSIONER FOR ACT REVENUE (Administrative Review) [2020] ACAT 103

AT 52/2020

Catchwords: **ADMINISTRATIVE REVIEW –** subpoenas – application for subpoenas to be set aside – whether documents required to be produced under subpoenas lack a legitimate forensic purpose – whether subpoenas are a 'fishing expedition' – whether subpoenas are oppressive in the circumstances – scope of subpoenas in the Tribunal – test of relevance – documents which "on the cards" will materially assist – where subpoenas in the Tribunal can act as a *de facto* discovery process pursuant to objects of the ACAT Act

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 6, 7, 23, 56

Rates Act 2004 s 8
Taxation Administration Act 1999 s 99

Subordinate Legislation cited: ACT Civil and Administrative Tribunal Procedures Rules 2020 r 130

Cases cited: *Alister v R ("Hilton Bombing case")* [1984] HCA 85
Canberra Cleaners Pty Limited & Ors v Commissioner for ACT Revenue [2017] ACTSC 197
Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634
FANDS (ACT) Pty Ltd v Commissioner for ACT Revenue [2017] ACAT 65
Holloway v State of Victoria [2015] VSC 526
Instyle Estate Agents Gungahlin Pty Ltd v Hambrook [2020] ACTSC 293
Investments and Minister for Planning [2003] ACTAAT 29
Peter Kohnsdorf Golf Distributors Pty Ltd & Liangis Investments Pty Ltd and Minister for Planning [2003] ACTAAT 29
R v Robertson [1983] 21 NTR 11

R v Saleam (1989) 16 NSWLR 14
R v Saleam [1999] NSWCCA 86
Santos Ltd & Ors v Pipelines Authority of SA [1996] SASC 5628
State of Victoria v Lane & Anor [2012] VSC 328
Young Men's Christian Association Inc & ACT Planning and Land Authority & Ors [2011] ACAT 78

List of Texts/Papers cited: Australian Government, Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009)

Tribunal: Presidential Member H Robinson

Date of Orders: 20 November 2020
Date of Reasons for Decision: 7 December 2020

AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL **AT 52/2020**

BETWEEN:

ILLAWARRA RETIREMENT TRUST ACN 000 726 536
Applicant

AND:

COMMISSIONER FOR ACT REVENUE
Respondent

TRIBUNAL: Presidential Member H Robinson

DATE: 20 November 2020

ORDER

The Tribunal orders that:

1. The Interim Application is dismissed.
2. Immediate access to both parties to inspect, uplift, copy and photocopy the material produced under subpoenas (b) and (c).
3. The Return of Subpoena for subpoena (a) is adjourned to 10:00am on Tuesday 8 December 2020.
4. The matter is listed for further directions at 9:00am on Monday 14 December 2020.
5. The directions 3 to 9 made on 21 August 2020 are vacated.

……*Signed*……..
Presidential Member H Robinson

REASONS FOR DECISION

1. By way of an interim application, the respondent sought to set aside and/or object to production and inspection of documents produced under subpoenas issued to three ACT Government entities, on the grounds that they have no legitimate forensic purpose, are a 'fishing expedition' and that they are oppressive.

2. I delivered an oral decision on 20 November 2020. These are my reasons.

The subpoenas

3. On 9 October 2020 the applicant requested three subpoenas be issued by the Tribunal to:

   (a) The Proper Officer, Commissioner for Revenue (**the Commissioner**);

   (b) The Proper Officer, Access Canberra Land Titles Office (**LTO**); and

   (c) The Proper Officer, ACT Environment, Planning and Sustainable Development Directorate (**EPSDD**).

4. The subpoenas as issued were very broad in scope and sought a range of documents relating to the ownership, development and rates assessments of a number of properties (**the specified properties**) used for retirement villages or aged care facilities.

5. By the time of the hearing of the interim application the scope of the subpoena to the Commissioner had been narrowed considerably, and the applicant only pressed the subpoenas in relation to the following documents:

   (a) Pursuant to subpoena (a), issued to the Commissioner, in relation to the list of specified properties:

      (i) the conveyance duty assessment notice (and any applicable re-assessment notices) issued to the current lessee;

      (ii) all rates assessment notices issued to the current Crown lessee for the period 1 July 2017 to date; and

      (iii) any applicable rates exemption notices issued to the current Crown lessee.

(b) In relation to subpoena (b), issued to the LTO, in relation to a specified list of properties:

(i) the current Crown lease.
(ii) the most recent contract for sale.
(iii) the most recent registered transfer form,
(iv) any development applications submitted by the current Crown lessee.

(c) In relation to subpoena (c), issued to EPSDD in relation to a list of specified properties:

(i) the current Crown lease.
(ii) the most recent contract for sale.
(iii) the most recent registered transfer form,
(iv) any development applications submitted by the current Crown lessee.

6. The respondent did not seek to set aside or object to access to documents produced under subpoena (b) and (c) so far as they related to items (d), i.e. the development applications submitted by the current Crown lessee in relation to the subject properties.

Background

7. By way of these proceedings the applicant, Illawarra Retirement Trust, seeks a review of a decision made by the respondent to disallow an objection (**the objection**) to a rates assessment notice dated 20 February 2020 for a property (**the subject property**) it owns at Block 1 Section 72 Denman Prospect.

8. The applicant contends that the respondent erred in disallowing its objection because the property is not rateable for the purposes of the *Rates Act 2004* (**Rates Act**) as it is land that is leased to a charitable organisation and used exclusively for education, benevolent or charitable purposes, bringing it within an exception in section 8(1)(b)(iii) of the Rates Act.

9. Section 8(1)(b)(iii) of the Rates Act provides that:

Land leased to charitable organisations and used exclusively for religious, educational, benevolent or charitable purposes.

10. The only matter in dispute in the substantive proceedings is whether the subject property is used for charitable purposes, and in particular whether the land will be:

    (a) "used" for a charitable purpose; and

    (b) used "exclusively" for a charitable purpose.

11. The applicant intends to develop the land to be used for a 130 unit retirement village and 90 aged care units. However, it also intends the development to include a childcare centre, café/restaurant, hairdresser, beautician and physiotherapist (**the ancillary uses**).

12. The respondent's decision to disallow the objection is partly premised on the determination that the ancillary uses are commercial in nature, and accordingly the premises is not used exclusively for charitable purposes.

Legitimate forensic purpose

13. The Tribunal can set aside a subpoena that has no legitimate forensic purpose.

14. Whether a subpoena has a legitimate forensic purpose is determined by a two stage test:[1]

    (a) Has the applicant identified a legitimate forensic purpose for which access is sought?

    (b) Has the applicant established that it is 'on the cards' that the documents sought will materially assist his or her case?

15. The first stage of the test requires the party seeking the subpoena to expressly state its purpose. In this case, the applicant has identified two purposes.

16. First, the applicant says, the subpoenas will demonstrate what kind of services are presently being offered in comparable facilities, with a view to establishing what is an 'ancillary use' linked to charitable use of the property. Evidence

[1] *Alister v R* [1984] HCA 85; *R v Saleam* (1989) 16 NSWLR 14; *R v Saleam* [1999] NSWCCA 86 at [11] (Spigelman CJ, Simpson and Studdert JJ agreeing)

showing that other, similar establishments provide similar services may assist in proving that the services are 'ancillary'. Senior Counsel for the applicant submitted that:

> *...the use of land also includes a certain penumbra of ancillary uses. And ancillary uses are treated as not different uses, but are in fact part of the substantive use for which the property is devoted. Therefore, to use a common example, if you happen to have a fish and chip shop and put a pinball machine in the fish and chip shop, you don't either convert the entire fish and chip shop, or for that matter even the area upon which the pinball machine stands, into a place of entertainment by virtue of including it in the fish and chip shop.*[2]

17. Senior Counsel for the applicant referred to two previous cases of the Tribunal, *Peter Kohnsdorf Golf Distributors Pty Ltd & Liangis Investments Pty Ltd and Minister for Planning* [2003] ACTAAT 29 (***Kohnsdorf***) and *Young Men's Christian Association Inc & ACT Planning and Land Authority & Ors* [2011] ACAT 78 (***YMCA v ACTPLA***) as providing support for the contention that ancillary use is regarded as being part of the substantive use, rather than a separate use. In *Kohnsdorf*, the Tribunal looked to what activities were being undertaken in other golf establishments to determine whether these activities were treated as ancillary,[3] observing at paragraph 67 of the decision that:

> *...the nature of the activities undertaken in the pro shop/showroom is closely related to the dominant use is apparent not only from the nature of the goods sold but also from the fact that all of the golf courses in Canberra have a facility for selling the same products.*

18. The second purpose was to address the question of consistency. This argument took two forms. First, at least in its written submissions, the respondent contended that the subpoenaed documents may demonstrate the consistency or arbitrariness of the respondent's decision making. In support of those submissions, the applicant cites the observations of Brennan J in *Drake and Minister for Immigration and Ethnic Affairs (No 2*) (1979) 2 ALD 634 that "one of the factors to be considered in arriving at the preferable decision in a particular case is its consistency with other decisions in comparable cases."[4] The applicant also notes section 6(e) and (f) of the *ACT Civil and*

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[2] Transcript of proceedings 12 November 2020 page 7, lines 6-10
[3] *Kohnsdorf* at [60] to [67]
[4] *Drake and Minister for Immigration and Ethnic Affairs (No 2*) (1979) 2 ALD 634, 643

Administrative Tribunal Act 2008, which states that the objects of the Tribunal include to enhance the quality of and encourage compliance with decision making under legislation.

19. A second aspect of the consistency argument was advanced in oral argument at the hearing:

> *...we do not yet know what evidence may be called by the Commissioner and it is at least possible that somebody will say that this is not appropriate to be regarded as charitable or for this reason there is too much of this, what might be viewed as or asserted to being, extraneous activity and in the cross-examination of such a person it may well be that what the Commissioner has done elsewhere may be relevant to the cross examination of that person.*[5]

20. In other words, as well as consistency being relevant to the decision itself, it is contended that consistency may be "relevant to any evidence given by a particular witness."[6]

21. In response to the application the respondent submitted that the questions in the substantive hearing turn exclusively on a legal construction of subsection 8(1)(b)(iii) of the Rates Act. The proper construction of the Rates Act must be determined by reference to the text of the Act only, and evidence as to the application of the Rates Act to other retirement or aged care facilities is an irrelevant consideration. Counsel for the respondent submitted that:

> *...as far as the Commissioner can identify, the purpose of the subpoena is not to produce material to assist the Tribunal to reach the correct and preferable decision in accordance with law...it is to assert the tribunal should make a decision despite the meaning of the terms of the Act and the application of the facts of this case to the Act.*[7]

22. The respondent further says that statements as to the desirability of consistency in decision-making have no possible application in a case such as this, as they cannot negate the Tribunal's statutory function to make the correct and preferable decision according to law. Consideration of whether the decision under review is consistent with other decisions would be in error.

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[5] Transcript of proceedings 12 November 2020 page 9, lines 33-39
[6] Transcript of proceedings 12 November 2020 page 10, line 10
[7] Transcript or proceedings 12 November 2020 page 4, lines 21-28

23. I agree with the respondent that this is not a matter where consistency, in the sense of consistent decision making, can play a role in determining whether the correct and preferable decision was made. Consistency would be a consideration were this matter to involve, for example, a review of an exercise involving multiple decision makers and broad discretion, but this is not such a case.

24. However, it is possible that evidence as to consistency of decisions may be relevant in other ways. Assuming that evidence demonstrating what kinds of activities are typically undertaken in nursing homes is relevant to the substantive matter, evidence about the circumstances where those activities have been treated differently by decision makers in relation to rates and duties may show what, if anything, has changed in the industry, or provide a basis for cross examination on related questions about what is an ancillary use.

25. I do not need to be satisfied of the consistency argument, however. I am satisfied that there is a legitimate forensic purpose in identifying what activities are undertaken by other nursing homes and retirement villages in order to determine what activities may be ancillary to the charitable use of the land, consistent with the approach taken in in *Kohnsdorf*.

26. Turning to the documents being sought, a subpoena has a legitimate forensic purpose if there is a reasonable possibility that the document sought will materially assist the party.[8] Mere speculation that the documents would assist is not sufficient, as this would amount to 'fishing', and nor is mere relevance,[9] but I do not need to be satisfied that the documents will assist the applicant's case, only that they may.[10] This involves consideration of what the documents could add to the proceeding.

27. In terms of the exploration of ancillary purposes, the development applications will doubtlessly be the most relevant. The respondent does not object to the production of those in relation to the specified properties.

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[8] *Alister v R* [1984] HCA 85
[9] *Alister v R* [1984] HCA 85; *State of Victoria (Department of Justice) v Lane & Anor* [2012] VSC 328 at [19]-[20]; *Holloway v State of Victoria* [2015] VSC 526 at [51]
[10] *Alister v R* [1984] HCA 85

28. I am satisfied that the Crown leases are relevant to determining whether services provided in other establishments are provided as 'ancillary services' or in accordance with broader purpose clauses. This question of whether property may be able to be used for multiple activities would be relevant were it to be contended that certain 'ancillary' activities undertaken on specified properties are merely alternative uses of the land, or that certain activities may not be charitable at all.

29. The forensic purpose for which the other documents are sought under the subpoenas is more tenuous and involves a few jumps. However, I am satisfied rates assessment notices and exemption notices may (and I would not put it higher than that) materially affect a question before the tribunal, being what could presently be considered an ancillary use. The documents may also be relevant to cross examination as to the differences between the services offered in different retirement villages or nursing homes over time.

30. Having regard to these considerations, I am satisfied that the subpoenas serve a legitimate forensic purpose.

'Fishing', de facto discovery and oppression

31. The respondent submits that the subpoenas constitute a 'fishing' exercise, as they are intended not to obtain evidence, but to discover whether the applicant has a case at all – effectively, the applicant has asked for the subpoena to be issued in the hope of finding something relevant, rather than to obtain documents or evidence that may 'throw light'[11] on an existing question.

32. I am not satisfied that one can put the situation quite so broadly. The exercise is not a blind one, aimed at digging up a case. The applicant filed and relied on a statement filed by a solicitor, Ms Kosa, in which it had identified from publicly available resources what it understands to be the name, address, owner or developer and services provided at each retirement village in the ACT. For some properties the information is complete, in others it is sparse, the remainder fall in between. The respondent, EPSDD and the LTO have documents that may shed further light on these questions. Some of that information is available to

[11] *Santos Ltd & Ors v Pipelines Authority of SA* [1996] SASC 5628 at [53]

the respondent, not to the applicant. Additionally, the evidence sought has now been narrowed and is well defined. If there is a degree of 'fishing', it amounts to fishing in a small pond as opposed to trawling the ocean.

33. Still, there is some 'fishing'. It is probably true that the applicant cannot know the strength of its case unless and until it obtains the documents sought. Additionally, some of the documents sought appear to relate mainly to assessing the respondent's case, or perhaps at best to putting the parties on an even footing in terms of access to certain kinds of contextual information. Perhaps for this reason, the applicant appears to have made a concession that some of the documents sought may be more in the nature of discovery than the kind of matter for which a subpoena would generally be used in a court or forum that had a discovery process, interrogatories or a notice to produce.

34. Senior Counsel suggested that the absence of such procedures in the tribunal warrants a broader approach being taken to what can be sought under a subpoena.[12] In support of this contention, he referred to the decision of President Neate AM in *FANDS (ACT) Pty Ltd v Commissioner for ACAT Revenue* [2017] ACAT 65, where it was acknowledged that:

> *In the absence of a process for discovery of documents (as would apply in conventional litigation), parties before the Tribunal use subpoenas to obtain documents that are not provided otherwise (for example as part of the T documents).*[13]

35. The respondent urged the Tribunal to adopt a broader test of relevance, consistent with this observation, being a decision of the Associate Justice of the ACT Supreme Court in *Canberra Cleaners Pty Limited & Ors v Commissioner for ACT Revenue* [2017] ACTSC 197 at [4]:

> *The test for relevance of a subpoena is whether the production of documents would be reasonably likely to add in the end to the relevant evidence in the case, including apparent or adjectival relevance, in the sense that the documents could 'possibly throw light on the issues in the main case'.*

[12] Transcript of proceedings 12 November 2020 pages 10-11, lines 28-33
[13] *FANDS (ACT) Pty Ltd v Commissioner for ACAT Revenue* [2017] ACAT 65 at [45]

36. Counsel for the Commissioner, however, rejected the contention that subpoenas should be used for purposes akin to discovery or interrogatories, submitting that:

> *In relation to the test to be applied in the Tribunal, the fact that there is no discovery … this is a factor that weighs against a broader application of the test because subpoenas can't be used to circumvent a limitation on the jurisdiction of the Tribunal. If the intention of the Act, and construed in line with its objects, in that there is not a general right to discovery, subpoenas can't be used to circumvent that limitation.*[14]

37. The respondent also noted that in the more recent case of *Instyle Estate Agents Gungahlin Pty Ltd v Hambrook* [2020] ACTSC 293 at [22], McWilliam AsJ adopted the more traditional formulation of the test of relevance, although in doing so her Honour noted that the test of relevance was low:

> *When assessing what meets the threshold for relevance, although a mere 'fishing' expedition is impermissible, it will be sufficient if it appears to be 'on the cards' that the documents will materially assist the defence: Alister v R [1984] HCA 85; (1984) 154 CLR 404 at 414. The principle has been stated in different ways in numerous authorities, but from the above it can be seen that the threshold for relevance of the documents sought under a subpoena is low.*

38. Broadly, discovery is a process whereby the parties in a civil proceeding provide each other with a list of all the documents which are or have been in their control and which relate to any matter in question in the proceeding. It is intended to give the parties to a proceeding access to documents that may advance or rebut their case, to minimise surprise, and to promote settlement.

39. Discovery is common in civil litigation in courts, but despite the tribunal's civil jurisdiction, neither the ACAT Act nor the ACT Civil and Administrative Tribunal Procedures Rules 2020 (**the Rules**) provide for it, nor for interrogatories or notices to produce. This is likely because the cost of discovery is often very high, and that cost is often disproportionate the utility of the documents discovered.[15] The process, requiring affidavits, is also burdensome. The introduction of a routine discovery process would be

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[14] Transcript of proceedings 12 November 2020 page 16, lines 34-40

[15] Australian Government, Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), Recommendation 8.2.

inconsistent with the tribunal's stated objective that access to the tribunal is simple and inexpensive, for all people who need to deal with the tribunal.[16]

40. Even in courts, discovery is available far less frequently (if ever) in administrative review in any jurisdiction. There are alternative procedures built into the administrative review process in the Tribunal. Rule 130 of the Rules requires the respondent to prepare tribunal documents containing:

> *...a copy of every document or part of a document in the respondent's possession or control that the respondent considers to be relevant to the review of the decision by the tribunal (the **tribunal documents**).* [emphasis in original]

41. Where an applicant to a matter in the tribunal's administrative review jurisdiction considers the respondent to hold documents that are relevant, but have not been disclosed, then the usual course would be to seek orders from the tribunal for more complete tribunal documents. That was not done in this case, likely because the applicant does not consider them relevant.

42. Notwithstanding the availability of tribunal documents, subpoenas are nonetheless regularly issued at the request of applicants in administrative review proceedings seeking additional documents from the respondent or another government entity. From a practical perspective, a subpoena is often the most efficient approach.

43. Other options are also available. The tribunal has on occasion made interim orders under sections 23 and 56 of the ACAT Act requiring parties to produce documents. Such orders are made sparingly, where it has considered it necessary or convenient, having regard to the tribunal's obligation to conduct matters ensuring the procedures of the tribunal are as simple, quick, inexpensive and informal as is consistent with achieving justice.[17] Where made, such orders need not involve the affidavit process associated with discovery in other jurisdictions.

44. As such, notwithstanding the absence of a formal process for discovery, there is nothing in the ACAT Act that suggests that the Tribunal is not intended to

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[16] ACAT Act section 6(b)
[17] ACAT Act section 7(a)

have document production powers, and indeed quite the opposite. The powers exist but are exercised more flexibly than the procedures in other forums, as is consistent with the objects of the ACAT Act.

45. Consistent with the observations of the President in *FANDS*, in considering whether a subpoena is properly requested, and whether it is a mere 'fishing' exercise, it is a relevant, contextual consideration that there is no discovery process, and that a subpoena is the only method by which the applicant can obtain documents that it contends may be relevant, but which are in the possession of the respondent, and which would be available to the respondent but not itself.

46. The key consideration in this case is whether it is at least "on the cards" that the evidence contained in the documents could materially assist. I am satisfied that they may shed light on what activities are ancillary to the use of land as a retirement village. I am satisfied that documents that shed light on the assessments of other properties may be relevant to considering whether similar operations are being conducted as ancillary to the retirement villages, or as separate commercial activities that benefit from co-location. The applicant has done what research it can, using publicly available information, and has articulated its case based on this information. The subpoena is not a mere fishing expedition.

Oppression

47. The final objection to the subpoena is based on an argument of oppression. In some cases, the volume of material sought makes compliance with the subpoena oppressive. A subpoena may be oppressive when it requires the respondent to extensively examine their documents and determine whether there is anything that is relevant.[18]

48. This argument had weight in relation to the subpoena to the Commissioner, as drafted. However, in the wake of the revised scope, the applicant conceded that this ground is now largely tied to the argument that the subpoenas were a 'fishing' exercise. I am not satisfied that the evidence supports that any of the

[18] *R v Robertson* (1983) 21 NTR 11

remaining searches are oppressive, although time for compliance with subpoena (a) will need to be extended.

The Taxation Administration Act

49. In its written submissions the respondent argued that the Commissioner is not compellable to provide the documents by reason of the operation of section 99 of the *Taxation Administration Act 1999*. At hearing the respondent conceded that this argument would fall away were the Tribunal satisfied that the subpoenas served a legitimate forensic purpose. As the Tribunal is satisfied that the subpoenas have a legitimate forensic purpose, there is no prohibition on the production of the documents.

The Tribunal orders that:

(a) The Interim Application is dismissed.

(b) Immediate access to both parties to inspect, uplift, copy and photocopy the material produced under subpoenas (b) and (c).

(c) The Return of Subpoena for subpoena (a) is adjourned to 10:00am on Tuesday 8 December 2020.

(d) The matter is listed for further directions at 9:00am on Monday 14 December 2020.

(e) The directions 3 to 9 made on 21 August 2020 are vacated.

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Presidential Member H Robinson

Date(s) of hearing	12 November 2020
Counsel for the Applicant:	Mr Walker SC
Solicitors for the Applicant:	Minter Ellison
Counsel for the Respondent:	Mr Nigel Oram
Solicitors for the Respondent:	ACT Government Solicitor