Supreme Court

New South Wales

Case Name:	Z v Mental Health Review Tribunal
Medium Neutral Citation:	[2015] NSWSC 1943
Hearing Date(s):	16 December 2015
Decision Date:	17 December 2015
Jurisdiction:	Equity - Protective List
Before:	Stevenson J
Decision:	Amended Summons dismissed. No order as to costs.
Catchwords:	MENTAL HEALTH – community treatment order – remitter from Court of Appeal – Court of Appeal allowed an appeal from a judge of the division dismissing an appeal from the Mental Health Tribunal – community treatment order expired shortly after decision of Court of Appeal – utility of further consideration of the appeal – whether such utility exists because Court might determine community treatment order made by Mental Health Tribunal not "properly" made – nature of an appeal under the Mental Health Act 2007 (NSW)
Legislation Cited:	Mental Health Act 2007 (NSW) Mental Health Regulation 2013 (NSW)
Cases Cited:	M v Mental Health Review Tribunal [2015] NSWSC 1876 S v South Eastern Sydney & Illawarra Area Health Service [2010] NSWSC 178 Z v Mental Health Review Tribunal [2015] NSWSC 1425 Z v Mental Health Review Tribunal [2015] NSWCA 373
Category:	Principal judgment

Parties:	Z (Plaintiff) (Self Represented) Mental Health Review Tribunal (First Defendant) Attorney General of New South Wales (Second Defendant) Northern Sydney Local Health District (Third Defendant)
Representation:	Counsel: K M Richardson (Third Defendant) Solicitors: Crown Solicitors (Third Defendant)
File Number(s):	SC 2014/348589

JUDGMENT

Introduction

1 By an amended summons filed on 24 June 2015, Z brought an appeal, pursuant to s 163 of the *Mental Health Act 2007* (NSW) ("the Act"), against the making of a community treatment order ("the CTO") by the Mental Health Tribunal on 3 June 2015.

2 The defendants named in the amended summons were the Tribunal, the Attorney General of New South Wales, and the relevant Local Health District.

3 The CTO expired on 2 December 2015.

4 In the meantime, on 28 September 2015 Young AJA dismissed the s 163 appeal: *Z v Mental Health Review Tribunal* [2015] NSWSC 1425.

5 On 6 October 2015, Z filed a summons seeking leave to appeal against Young AJA's decision.

6 The Court of Appeal heard the appeal on 20 November 2015 and, on 1 December 2015 (the day before the CTO was to expire), allowed the appeal (*Z v Mental Health Review Tribunal* [2015] NSWCA 373 (Basten JA and Emmett AJA, Bergin CJ in Eq dissenting).

7 The Court of Appeal made the following orders:

> "(1) Grant the applicant leave to appeal from the judgment in the Equity Division given on 28 September 2015.

(2) Allow the appeal and set aside the order dismissing the appeal under s 163 of the *Mental Health Act 2007* (NSW).

(3) Remit the matter to the Equity Division.

(4) Pursuant to the Court Suppression and Non-publication Orders Act 2010, prohibit the disclosure of information tending to reveal the identity of the applicant, including by disclosure of information which might indirectly lead others to identify the applicant."

8 The effect of the Court of Appeal's orders was that the CTO was not disturbed, and remained in operation until it expired on 2 December 2015.

9 The matter before me is the remitter referred to in order 3 made by the Court of Appeal.

10 So far as concerns the remitter, Basten JA, with whom Emmett AJA agreed, said at [41]:

> "It may well be that there is no further step which can usefully be taken in the appeal, but nevertheless, the appeal should be remitted to the Equity Division where its fate can be determined after the parties have given careful consideration to its utility in the light of whatever recent events may have occurred at the time it is listed for redetermination."

11 Before me, Z appeared for herself and Ms Richardson appeared for the relevant Local Health District.

Application for further CTO in the Tribunal

12 On 27 November 2015, a different Local Health District gave Z notice that it proposed to apply for a further CTO.

13 That application came before the Tribunal on 4 December 2015. On that occasion, the application was adjourned for hearing tomorrow, 18 December 2015 (although I understand that the Tribunal may not be able to hear the matter tomorrow).

The remitter

14 By reason of the remitter, the matter before me is Z's appeal of the 3 June 2015 order of the Tribunal.

15 As I have said, that appeal was brought pursuant to s 163 of the Act, which is in the following terms:

> "(1) A person may appeal to the Court against:

(a) a determination of the Tribunal made with respect to the person, or

(b) the failure or refusal of the Tribunal to make a determination with respect to the person in accordance with the provisions of this Act.

(2) An appeal is to be made subject to and in accordance with the rules of the Court."

16 The power of the Court in relation to appeals under the Act is set forth in s 164 of the Act, which is in the following terms:

"(1) The Court has, for the purposes of hearing and disposing of an appeal, all the functions and discretions of the Tribunal in respect of the subject-matter of the appeal, in addition to any other functions and discretions it has.

(2) An appeal is to be by way of a new hearing and new evidence or evidence in addition to, or in substitution for, the evidence given in relation to the determination of the Tribunal, or the failure or refusal of the Tribunal to make a determination, in respect of which the appeal is made may be given on the appeal.

(3) The Court is to have regard to the provisions of this Act and any other matters it considers to be relevant in determining an appeal.

(4) The decision of the Court on an appeal is, for the purposes of this or any other Act or instrument, taken to be, where appropriate, the final determination of the Tribunal and is to be given effect to accordingly.

(5) In hearing and deciding an appeal, the Court may be assisted by 2 assessors selected by the Court from the panel nominated for the purposes of this Chapter, if the Court considers it appropriate to do so.

(6) An assessor is to sit with the Court in the hearing of an appeal and has power to advise, but not to adjudicate, on any matter relating to the appeal."

17 In its decision concerning Z, the Court of Appeal made clear that an appeal under s 163 is an appeal *de novo*.

18 Thus, Emmett AJA said, at [174]:

"Thus, in exercising jurisdiction in an appeal under s 163 of the Act, it was incumbent upon the primary judge to conduct a hearing *de novo* in order to determine whether Z was, at the date of the hearing before his Honour, a person who should be subject to a community treatment order. That function does not entail making a decision as to whether the determination of the Tribunal was correct or incorrect. It requires the judge exercising jurisdiction to make his or her own determination as to whether or not an affected person is a person who should be subject to a community treatment order."

19 The role of the Court in a *de novo* s 163 appeal is to re-determine the matter based on the law and the facts as at the date of the hearing of the appeal (and not as at the date of the relevant determination of the Tribunal). New evidence may be adduced. The Court makes a new decision by re-exercising the powers

of the Tribunal. The appellant does not have to establish error on the part of the Tribunal; indeed, it is not relevant for the Court to consider whether the Tribunal fell into error.

20 Therefore, on a s 163 appeal, the Court must determine for itself the relevant question.

21 The relevant question is set forth in s 53 of the Act which, relevantly, is in the following terms:

> "(1) The Tribunal is, on an application for a community treatment order, to determine whether the affected person is a person who should be subject to the order.
>
> (2) For that purpose, the Tribunal is to consider the following:
>
> (a) a treatment plan for the affected person proposed by the declared mental health facility that is to implement the proposed order,
>
> (b) if the affected person is subject to an existing community treatment order, a report by the psychiatric case manager of the person as to the efficacy of that order,
>
> (c) a report as to the efficacy of any previous community treatment order for the affected person,
>
> (d) any other information placed before the Tribunal.
>
> (3) The Tribunal may make a community treatment order for an affected person if the Tribunal determines that:
>
> (a) no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the person and that the affected person would benefit from the order as the least restrictive alternative consistent with safe and effective care, and
>
> (b) a declared mental health facility has an appropriate treatment plan for the affected person and is capable of implementing it, and
>
> (c) if the affected person has been previously diagnosed as suffering from a mental illness, the affected person has a previous history of refusing to accept appropriate treatment.
>
> (3A) If the affected person has within the last 12 months been a forensic patient or the subject of a community treatment order, the Tribunal is not required to make a determination under subsection (3) (c) but must be satisfied that the person is likely to continue in or to relapse into an active phase of mental illness if the order is not granted.
>
> …
>
> (5) For the purposes of this section, a person has a previous history of refusing to accept appropriate treatment if the following are satisfied:
>
> (a) the affected person has previously refused to accept appropriate treatment,

> (b) when appropriate treatment has been refused, there has been a relapse into an active phase of mental illness,
>
> (c) the relapse has been followed by mental or physical deterioration justifying involuntary admission to a mental health facility (whether or not there has been such an admission),
>
> (d) care and treatment following involuntary admission resulted, or could have resulted, in an amelioration of, or recovery from, the debilitating symptoms of a mental illness or the short-term prevention of deterioration in the mental or physical condition of the affected person. …".

22 Thus, on the hearing of an appeal, the Court must determine, for itself, "whether the effected person is a person who should be subject to" a CTO for the purposes of s 53(1) of the Act.

23 For that purpose, the Court must consider the matters set forth in s 53(3) and (3A) of the Act (see, for example, the orders made by Lindsay J very recently in *M v Mental Health Review Tribunal* [2015] NSWSC 1876).

24 Basten JA said in *Z v Mental Health Review Tribunal*, at [40]:

> "…it will be relevant if any further order is sought to know whether the applicant is subject to a community treatment order at a particular point in time. The answer to that question may depend upon a somewhat different issue, which was not addressed before this Court, namely the effect of setting aside a community treatment order on appeal. For example, it seems unlikely that, if, after a period during which the order had been acted upon, it was set aside on appeal, earlier actions would thereby become in some sense unlawful. It seems more likely, at least for some purposes, that the appeal would operate prospectively."

25 I agree that the Court's function is to look at the matter prospectively. The Court must decide whether, at the date of its decision, and taking into account all relevant circumstances at that date (including all pertinent medical evidence), the affected person should continue to be subject to the CTO.

26 But, here, the CTO has expired. The question of whether Z should continue to be subject to the CTO does not arise.

27 Accordingly, on the face of it, there appears to be no utility in me considering Z's appeal further.

28 Z argued, nonetheless, that there was utility in me determining the merits of the appeal for two reasons.

29 The first was that the doctor who was proposing the further CTO (foreshadowed on 27 November 2015 and before the Tribunal tomorrow), who I will refer to as "Dr X", had given Z:

> "An undertaking that if [the] appeal is successful (on the merits) then he will withdraw his application for an extension of community treatment order".

30 Z relied upon the following comments that Dr X made before the Tribunal on 4 December 2015:

> "It's pretty straightforward. I mean, I've summarised it and [Z] can as well. Yes, we would like [Z] to be on a community treatment order but as it's absolutely [Z's] right to appeal to the Supreme Court and subsequently gone to the Court of Appeal. The Court of Appeal has made an order which you have in front of you on page, I think, 3 which basically says that [Z's] allowed to go back and have the matter reheard in the Supreme Court. I don't think it's reasonable from my point of view, to try and make an order while this is in play. Now, in the event that the appeal is not upheld, then we would obviously proceed to apply for a community treatment order. In the event that the Supreme Court agrees upon its decision, if I had a CTO in place I would think we would not be acting in good faith to continue that. So, frankly until we know what happens in the Supreme Court then I'm going to request that the Mental Health Review Tribunal defends the matter in the Supreme Court trying to get that expedited; I don't think it's appropriate that we proceed. It's pretty straightforward. It's going to be a complex hearing but why the legal minds now are further considering this and frankly I think this is a (inaudible)."

31 I do not read Dr X's comments as amounting to the undertaking for which Z contends.

32 That Dr X did not give Z such an undertaking is, in my opinion, made clear by a later statement that Dr X made at the hearing as follows:

> "I know that [Z] doesn't want a CTO and is obviously going to a lot of effort not to have one. [Z] understands it from my point of view but of course doesn't agree that I would like [Z] to have a community treatment order. I just think, I would like to have a step back and think for 14 days. I may in 14 days decide that I do want to push on the CTO hearing even though the Supreme Court matter is still to be resolved. I need to think about that and lay out what is the right thing to do from a clinical point of view as well as a legal point of view. I don't think it's fair for anyone to rush on and do that and I'd like to have a proper discussion with [Z] beforehand why I've decided to do A or B."

33 Second, Z submitted that there was utility in me determining her appeal because:

(a) the application for a further CTO is pending in the Tribunal;

(b) the matters for consideration by the Tribunal under s 53(3)(c) of the Act in relation to that application may be affected if the Tribunal concludes that, within the last 12 months, Z has been

"the subject of" a CTO. That is because, by reason of s 53(3A), if the Tribunal so concluded it would not need to, as a condition precedent of making a CTO, consider that Z "has a history of refusing to accept appropriate treatment" but need only (my word) consider whether Z was "likely to continue in or relapse into an active phase of mental illness" if the CTO were not made;

(c) s 53(3A) should be construed so that it is enlivened only if Z had been "properly" the subject of a CTO; and

(d) disposition of Z's appeal might have the result that I conclude that the order of the Tribunal making the CTO be set aside or quashed, and thus that Z was never "properly" the subject of the CTO.

34 In my opinion, the answer to this submission is that there is no possible resolution of Z's appeal that could result in me setting aside or quashing the Tribunal's decision or otherwise finding that it had not been "properly made".

35 There are two bases upon which a person the subject of a CTO can appeal to the Court.

36 The first is under s 163, which I have set out above. The second is under s 67(1) which is in the following terms:

> "(1) The affected person under a community treatment order made by the Tribunal may at any time appeal to the Court:
>
> (a) if the term of the order exceeds 6 months or no term is specified in the order, against the duration of the order, or
>
> (b) on any question of law or fact arising from the order or its making."

37 Either way, the Court's powers on the appeal are as set out in s 164 (a matter noted as being common ground, and seemingly accepted by Brereton J as being correct in *S v South Eastern Sydney & Illawarra Area Health Service* [2010] NSWSC 178 at [22]).

38 Thus, were I to proceed to hear the appeal, it would be a *de novo* hearing. My function would be to re-exercise the Tribunal's "functions and discretions" (see s 164(1)) and decide for myself whether, at the date of the Court's decision, Z "should be" subject to a CTO. My decision would then, by virtue of s 164(4), be "taken to be" the Tribunal's decision.

39 If my decision, when made, were different to the Tribunal's 3 June 2015 decision, it would not follow that the Tribunal's decision was not "properly

made" and not effective while it lasted. There would be no call (and probably no power) for me to set aside or quash the Tribunal's decision. The effect of any order I made would be that from (and only from) the date of the order, the Tribunal's decision would be "taken to be" as the Court determined. If anything, that might amount to a variation of the Tribunal's order. It could not alter the fact that, for the purposes of s 53(3A) of the Act, Z was "subject" to the CTO during its pendency.

40 Z also drew attention to the fact that s 67(1)(b) of the Act provides that a person subject to a CTO can appeal "on any question of law or fact arising from the order or its making".

41 But Z did not appeal under s 67 of the Act; her appeal was expressed to be, and was treated by Young AJA and by the Court of Appeal as being, under s 163 of the Act.

42 In any event, even if Z's appeal were under s 67, the Court's power to deal with it is that under s 164. Exercise of that power does not call for or permit findings as to the correctness or otherwise of the Tribunal's decision.

43 My attention was also drawn to r 9 of the Mental Health Regulation 2013 (NSW), which is in the following terms:

> "On the hearing of an appeal under section 67 of the Act, the Tribunal may make an order revoking, varying or confirming the order the subject of the appeal."

44 That Regulation has no bearing on an appeal under the Act to the Court.

45 It is plainly directed to an appeal to the Tribunal from a Magistrate under s 67(2) of the Act, which is in the following terms:

> "(2) The affected person under a community treatment order made by a Magistrate may at any time appeal to the Tribunal:
>
> (a) if the term of the order exceeds 6 months or no term is specified in the order, against the duration of the order, or
>
> (b) on any question of law or fact arising from the order or its making."

46 Z sought to develop an argument that there was included in the "functions and discretions of the Tribunal" that the Court can exercise pursuant s 164(1) "for

the purposes of hearing and disposing of an appeal" the functions thus conferred by r 9 on the Tribunal.

47 But the functions in r 9 are not conferred on the Tribunal "in respect of the subject matter of the appeal" under s 164(1) (namely, the Tribunal's power to itself make a CTO). They are functions of the Tribunal when it deals with an appeal made to it of a decision of a Magistrate to make a CTO.

48 That regulation cannot have the effect of conferring on the Court a power to "revoke, vary or confirm" a decision made by a Tribunal. For the reasons I have outlined, I think it clear that the Court is not called upon to exercise any such function.

Conclusion as to the utility of the appeal

49 For those reasons, I see no utility in the appeal proceeding. To adopt the language of Basten JA in *Z v Mental Health Review Tribunal* at [39], it would be "practically futile" for the Court to deal with the appeal because, now that the CTO has expired, no decision as to its prospective effect can be made.

50 Z's appeal also challenged other orders made by the Tribunal which the Court of Appeal described as "spent" orders.

51 Before me, Z stated that she did not seek to agitate any appeal rights in respect of those "spent" orders.

52 Accordingly, the order I propose to make is that Z's appeal be dismissed.

53 It is agreed that there should be no order as to costs.

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