



CONSUMER, TRADER & TENANCY TRIBUNAL BULLETIN

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CASES

The full text of the judgments are available on the Internet at:
www.lawlink.nsw.gov.au/caselaw/caselaw.nsf/pages/sc

1. **Coulter v Rampling [2005] NSWSC 1147**

Background

These proceedings were brought under s67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (CTTT Act). The plaintiff submitted to the Supreme Court that the Tribunal erred in rejecting two of her claims namely (i) the claim for loss of rent and (ii) the claim for pre-judgement interest.

The application before the Tribunal arose out of a building contract whereby the defendant was to undertake building works at the rear of the plaintiff's property. The works comprised both alterations to the existing house (the alterations) and the construction of an additional room (the extension).

The builder represented to the plaintiff that he had obtained Council approval for the works and that he held an appropriate license to undertake the works. Ultimately the Council ordered that the family room extension be demolished and the rear of the existing building be reinstated.

The works were performed without development consent by the Council and contravened s76A of the *Environmental Planning and Assessment Act 1979* (EPA Act).

The defendant never held an appropriate building license and thus the contract was not able to be enforced by the defendant (pursuant to ss 4 and 10 of the *Home Building Act* (HB Act)). Under that same Act (s 10(3)(a)) the defendant was liable for damages and subject to any other remedy in respect of a breach of the contract.

The Tribunal found that the defendant was guilty of misleading and deceptive conduct under s42 of the *Fair Trading Act 1987* (FT Act) when saying that he had applied for and obtained Council consent and in asserting that he had an appropriate building licence. The defendant was also in breach of the contract by failing to obtain development consent and in failing to carry out the works in a proper and workmanlike fashion.

Damages awarded to the plaintiff were calculated on the following basis: (i) In relation to the money paid by the plaintiff to the defendant (\$39,549) the plaintiff was entitled to a refund less the amount of \$10,679.48 which was referable to the alterations; (ii) The cost of rectifying the alterations - \$11,459.60; (iii) The costs of demolishing the extension - \$21,036.26.

Claim for loss of rent: contract

The Tribunal had held that the contract was unenforceable by the plaintiff in respect of its severable illegal portion (construction of the extensions) but otherwise enforceable.

The Tribunal found that the parties had intentionally refrained from inserting into the contract an agreed time for completion. Rather they included the words "subject to Council approval".

This imported an accepted indeterminacy as to the probable result of submitting an application to Council. The contract was also silent as to any genuine pre-estimate of the plaintiff's likely losses. The Tribunal reasoned that in all the circumstances the losses claimed under the contract must fail as being too remote and not reasonably within the contemplation of the parties at the time the contract was made. Nor were there any special circumstances under which the contract was actually made that were communicated to the defendant which would allow recovery.

The Tribunal also held that damages for loss of rent were not sufficiently related to the misrepresentations made to be recoverable under the FT Act. It was not enough to show that the losses claimed would not have occurred but for

the transaction, the loss must flow directly from the inducement.

The plaintiff submitted that the Tribunal had erred in finding that from the plaintiff's view any part of the contract was unenforceable and relied on *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215. If this was correct, then the loss of rent flowed directly from the breach of contract. The plaintiff's alternative claim was that *Westwood v Cordell* (1993) Qd R 277 and *Anthanasopoulos & Ors v Moseley & Ors* (2001) 52 NSWLR 262 were authority for the proposition that where property is damaged, the measure of loss is equal to the value of the loss of rent for that property over the period for which it is uninhabitable.

The defendant initially argued that the summons as a whole did not raise any matters of law. However, Hoeben J rejected this submission. The defendant relied upon *Zullo Enterprises Pty Limited v Sutton* [2002] 2 Qd R 196 in its submissions that the parts of the contract relating to the construction of the extension were unenforceable. His Honour was of the opinion that *Zullo* more appropriately fit the facts and legislation of this case than *Fitzgerald* and found no error of law on behalf of the Tribunal in relation to this issue.

The defendant submitted that some of the Tribunal's findings posed an additional problem for the plaintiff's claim. These were the findings that damages for loss of rent were not a category of damages which may reasonably be supposed to have been in the contemplation of the parties when they made the contract and that there were no special circumstances under which the contract was made which were communicated to the respondent or known to both parties. The defendant submitted these were findings of fact that bound the plaintiff. Hoeben J cited a passage from *Azzopardi v Tasman UEB Industries Pty Ltd* (1985) 4 NSWLR 139 that stated that the question of whether or not evidence of a fact should be accepted is a question of fact and not law. His Honour concluded that the finding was a finding of fact which completely barred the plaintiff from establishing error of law with respect to the claim for loss of rent based on breach of contract.

Claim for loss of rent: FT Act

The plaintiff's final submission was that the Tribunal had stated the correct test but wrongly applied the test to the facts.

The defendant submitted that the claim for loss of rent was too remote and there was no evidence to enable calculation of the loss.

Hoeben J found that the need to demolish the premises was directly due to the misrepresentation and that a direct consequence of the demolition was the time taken to demolish the premises and reinstate the premises. His Honour held that the most appropriate way to value this loss was by reference to market rental. The order of the Tribunal dismissing the plaintiff's claim for loss of rent was set aside. The defendant was ordered to pay the plaintiff \$19,800.

Claim for pre-judgment interest

The plaintiff submitted that the entitlement to interest arose as a separate head of damages and reliance was placed on *Sanrod Pty Ltd & Ors v Dainford Ltd* (1984) 54 ALR 179, where it was said that "interest awarded as a component of damages ... is not for loss of use of the money awarded as damages, but for loss of the use of the money paid over in consequence of the misleading conduct and is directly related to the misleading conduct."

Hoeben J held that that this issue raised a matter of law being based on there either being a lack of power or a lack of entitlement.

His Honour accepted the plaintiff's submission that there would have been an entitlement to interest calculated by reference to the two progress payments to the defendant. However, as the matter was not raised in this fashion before the Tribunal, the claim was rejected as it was not open to the plaintiff to raise a different claim in the present proceedings.

2. Micron Constructions P/L v Goodridge & Anor [2005] NSWSC 1224

Background

In the Tribunal the owner (defendant) commenced proceedings against the builder (plaintiff) for defective work including defective painting. The builder commenced proceedings against the painter (a sub-contractor). The matters were heard together and were set down for a hearing on 11 February 2004.

At a telephone directions hearing on 6 February 2004 the Tribunal ordered that the matters be heard separately; the owner's application to proceed on 11 February 2004 and the builder's application to proceed at a later date. The builder's representative opposed this direction arguing that it would prejudice the builder who relied upon the painter to appear as a witness at the hearing.

At the hearing on 11 February 2004 the builder's Counsel renewed the objection, arguing that as there was no time to summons the painter to give evidence the severance was prejudicial and an adjournment was requested for the matters to be heard together. The request was denied.

On Appeal

The plaintiff relied upon both ss 65 and 67 of the CTTT Act.

Her Honour Associate Justice Harrison quoted Brennan J in *Kioa v West* (1985) 159 CLR 550 at 628: "A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interest which the repository of the power proposes to take into account in deciding upon its exercise..."

In *Kioa* Mason J stated that the law had now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention. Procedural fairness as a notion is a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case (584-585).

Her Honour quoted Grove J in *Kearns & Anor v Fair Trading Tribunal of NSW & Anor* [2001] NSWSC 951 at para 25; "There is ample authority that procedural fairness is denied if a decision maker fails to adjourn proceedings where such a failure has the effect of depriving a person of adequate opportunity to prepare or present a case..."

Associate Justice Harrison stated that whether there is a denial of procedural fairness depended on the circumstances in each case. The decision to grant an adjournment is a discretionary one and factors to be taken into account are set out in *State of Queensland v JL Holdings* (1997) 189 CLR 146; *Sali v SPC Ltd & Anor* (1993) 116 ALR 625; *Thomas & Anor v Nedeljkovic* [2004] NSWSC 524.

The builder was found to have had an expectation prior to 6 February 2004 that the painter would be present as a party on 11 February 2004 and could have given evidence. Through the severance of the builder's application the painter was no longer a party to the proceedings and would not be present at the hearing. This meant that the builder had in effect two working days to obtain an order from the Tribunal to serve a summons.

In the view of Her Honour the builder was prejudiced by the refusal to grant an adjournment. The owner could have been awarded a costs order in his favour if an adjournment had been granted. The builder was in effect denied the real opportunity to call the painter to give evidence.

The Court ordered that the appeal was upheld, set aside the Tribunal's decisions of 11 February 2004 and 17 December 2004 and remitted the matter to the Tribunal to be determined according to law.

3. Grygiel v Baine & Ors [No.2] [2005] NSWCA 434

Background

The Court of Appeal allowed an appeal from a decision of the Master with respect to a limited question only namely:

“(3) set aside the decision of the Tribunal as to its jurisdiction in relation to the proposed claims against Mr Baine and the law firm with respect to the provision of legal advice in relation to the supply of building goods and services to the First Opponent (Mr Baine).”

The judgement of the Master “in that regard” was set aside and the Court of Appeal made the following order in relation to costs:

“(5) order that Anthony James Baine, pay the Claimant one-half of his costs, (i) of the Appeal before the Master; and (ii) of the proceedings in this Court.”

The present case considers a subsequent notice of motion filed by the Claimant (Grygiel) seeking a variation of the costs order so that it would read:

“(5A) Order that Anthony James Baine and Janice Wiley pay the Claimant one-half of his costs, (i) of the appeal before the Master, and (ii) of the proceedings in this Court.

(5B) Order that Anthony James Baine and Janice Wiley pay the Claimant 40% of his costs of the motion before the Tribunal.

(5C) Order that Carroll & O’Dea pay the Claimant one-half of his costs, (i) of the appeal before the Master; and (ii) of the proceedings in this Court.

(5D) Order that Carroll & O’Dea pay the Claimant 40% of his costs of the motion before the Tribunal.”

In addition, the Claimant sought orders that Mr Baine and Ms Wiley (the co-owners of the house on which the building work was undertaken) and Carroll & O’Dea (the law firm of which Mr Baine was a partner) pay one-half of the costs of the present motion.

Grounds

The Court should “correct” its costs orders and that it make additional orders in relation to costs pursuant to Part 52A, r5 of the Supreme Court Rules.

Decision

The application in respect of orders 5B and 5D was rejected because the matter was not raised in a timely manner. However His Honour Basten JA indicated that the Court was unlikely to embark on process of unravelling issues covered by the Tribunal’s order on costs, especially where it hadn’t been demonstrated that the Tribunal couldn’t reconsider its own

interlocutory order as to costs in the light of any decision made by the Court.

So far as the orders in the Court of Appeal were concerned, they depended upon reopening the orders made on 29 June 2005. The issue on which the Claimant was successful was limited to the legal basis on which his attempt to join Mr Baine, not as house-owner, but as solicitor, and vicariously, the other partners in the firm of which he was a member, was rejected.

Basten J A stated, “It should have been readily apparent to a competent practitioner that with the possible exception of the ‘clarification’ in relation to costs orders made by the Master, this was an application to reopen the judgment of the Court given on 29 June 2005. Nevertheless, no attention was given to the principles according to which the Court might be prepared to reconsider a judgment before the entry of orders. Nor was any attention given to the prior judgments of this Court resisting applications in relation to variation of costs orders, for the purpose of making submissions which should properly have been made at the hearing and were not: see, eg, *Timabarra Protection Coalition Inc v Ross Mining Ltd & Ors* [1999] NSWCA 335.”

Accordingly the motion by Mr Grygiel to vary the orders made by the Court on 29 June 2005 with respect to costs was dismissed with costs.

4. Wise v Consumer, Trader & Tenancy Tribunal & Ors [2005] NSWSC 947

Background

The plaintiff (92 years old) had resided in unit 1 of a block of eight units for about 37 years.

The second and third defendants were property developers with current financial difficulties. These defendants acquired the block of units in 2000. Subsequently the units became the subject of a strata plan and the defendants sold seven of the units.

In February 2001 a termination notice was served on the plaintiff and an application lodged with the Tribunal. At the time, the plaintiff had not entered into any written agreement. He had a periodic tenancy. In June 2001, the parties entered into a new arrangement. The plaintiff executed a residential tenancy agreement (the agreement) which gave him a fixed-term lease for two years. Prior to the expiry of that lease the plaintiff sought a renewal.

The defendants gave notice of termination – a no grounds termination pursuant to s58 of the *Residential Tenancies Act 1987* (the Act). The section is expressed not to apply to a residential tenancy agreement that creates a tenancy for a fixed-term. The plaintiff did not vacate and the defendants applied to the Tribunal.

The application came before the Tribunal on a number of occasions and leave was granted to the defendants to amend the application to include grounds relating to hardship of the landlords. The Tribunal made final orders for the tenancy to be terminated as from 21 December 2004 with vacant possession to be given by the tenant to the landlord on 15 February 2005.

Appeal

The plaintiff brought proceedings in the Supreme Court pursuant to s 67 of the *Consumer, Trader and Tenancy Tribunal Act 2001*. The plaintiff propounded two areas of challenge. One was presented as a jurisdictional question while the other concerned the exercise of what has been described as the discretion had by the Tribunal.

The jurisdictional question asserted that correspondence between the parties gave rise to a fixed-term tenancy for a period of a further two years and that no valid termination notice had been given (the contention was that what should have been done was the giving of a notice of termination of a fixed-term agreement).

Associate Justice Malpass stated that he considered that the plaintiff's contention was not only devoid of merit, it was also one in the circumstances that should not be entertained as it had not been ventilated before the Tribunal.

The second area of challenge related to the task to be performed by the Tribunal pursuant to s64(2) of the Act which requires the Tribunal to consider the circumstances of the particular case before it and to then decide whether or not it is appropriate to make a termination order.

Associate Justice Malpass stated, "It appears from the reasons that a consensus emerged between the parties as to what were the 'main relevant factors'. It was to these that the Tribunal looked in considering the circumstances of the case and in deciding that it was appropriate to make an order terminating the agreement. The plaintiff is now seeking to agitate matters which were not selected by it as issues to be

relied on in opposing the application and as a result were not ventilated before the Tribunal. It is unnecessary to address the question of whether or not any of them have relevance. In my view, the court should not allow them to be ventilated now."

Orders

The proceedings were dismissed with costs.

5. Ormes v Lewis [2006] NSWSC 16

In the course of an appeal the plaintiff filed a notice of motion in the following terms:

1. The plaintiff has leave to file and serve a second further Amended Summons herein adding a further ground of appeal that "The Tribunal was in error in finding that the contract entered into between the parties was a credit contract within the meaning of the Consumer Credit Code (New South Wales) (The Code)
2. The plaintiff has leave to file and serve further affidavits relating to additional evidence which was not before the Consumer, Trader and Tenancy Tribunal.

Background

The plaintiff (as vendor) and the defendants (as purchasers) entered into a contract for sale of land (the contract). The contract provided for the sale of property at Dapto for \$200,000. The balance of the price (\$188,000) was to be payable as per the "Instalment Payment." The contract had an instalment payment schedule. Clause 1 thereof was in the following terms:

1. This schedule shall apply to vary the provisions of the contract to the extent outlined. The operation of this schedule will commence on the possession date.

A credit code disclosure statement also formed part of the contract. It contained an offer of instalment arrangements for the payment of the balance price (the maximum amount of credit was expressed to be \$188,000 and provision was made for payment of interest commencing upon the possession date).

The defendants took possession, accepted the offer of instalments and made payments in the order of \$58,000. There was default and the contract was brought to an end.

The defendants brought an application in the Tribunal. The application was based on alternate grounds. It was contended that the contract was a credit contract within the meaning of s5 of the Code. In the alternative, it was contended that there was jurisdiction having a limit of \$25,000 under the *Consumer Claims Act 1998*.

Before the Tribunal counsel for the plaintiff conceded that the Tribunal had jurisdiction and there was no challenge to the proposition the Code applied to the contract. The defendants proceeded before the Tribunal relying on the concession as to jurisdiction and no evidence was led on the alternative ground.

The Tribunal satisfied itself that the contract was a credit contract within the meaning of the Code and proceeded to consider the question of reopening the transaction under s70 of the Code. A finding was made that the contract was unjust and relief in the amount of \$28,000 was granted.

Appeal

The plaintiff filed a summons in the Supreme Court seeking to disturb the decision of the Tribunal on the basis of error of law. The grounds were initially directed to what was done by the Tribunal pursuant to s70 of the Code.

Findings and Orders

The plaintiff contended that there was no credit extended as there was no deferment of debt in the sense contemplated by s4 of the Code and that, despite the concession made by counsel before the Tribunal, the plaintiff should be allowed to argue the additional ground of appeal.

The plaintiff relied on views expressed by Anthony Duggan and Elizabeth Lanyon in *Consumer Credit Law* (Butterworths, Sydney, 1999) where the authors criticise the decision made in *Rafiqi and Thomas v Wacal Investments Pty Ltd* (1988) ASC 155-224 (District Ct (Qld)). The publication contains the following:

It follows that in the case of a sale where the contract does not name a date for payment in advance of completion, no debt is incurred until conveyance. There is no provision of credit up to that point. Nor is credit provided afterwards because in the usual case there will be no debt deferment. The purchaser's obligation is to pay when the debt is incurred upon conveyance. In the case of a sale where the price is payable by instalments under the

contract in advance of the conveyance, a debt is incurred each time an instalment falls due. Again, however, credit is not provided because there is no debt deferment. [p47]

His Honour Associate Justice Malpass did not dwell on the correctness of the statement as he found there was no application to the contract under consideration. The contract had its own unique features. The balance purchase price was payable on completion. The contractual provisions provided credit in respect of the balance purchase price. The schedule operated as a variation amendment to the standard claims and further clauses which commenced on the possession date. The acceptance of the offer of instalments had the effect of deferring the plaintiff's entitlement to completion and payment of the balance price.

Accordingly, His Honour did not accept the contention that there was an arguable case that the Tribunal lacked jurisdiction.

His Honour went further and stated that as jurisdiction had been conceded by the plaintiff and the defendants did not press the alternative ground for jurisdiction he did not consider that the plaintiff should now be allowed to change his stance and argue the proposed additional ground.

As to the second order sought by the plaintiff, His Honour stated that it concerned a procedural step and was not dependent on the success of the application for leave to amend as it did not concern the jurisdictional question but related to the grounds concerning the reopening of the transaction.

Nevertheless he found it to be a misconceived application.

His Honour saw the application to add the affidavits, which were expressed to demonstrate there was other evidence available to the plaintiff that could have been led, as an attempt to add substance to the grounds of appeal in order to overcome the public policy of finality in litigation.

In the narrow avenue of appeal under s67 of the CTTT Act, restricted to cases where the Tribunal decides a question with respect to a matter of law, a decision of the Court not to affirm a decision of the Tribunal may result in an order for rehearing of the proceedings by the Tribunal. If that were to happen fresh evidence may be given on the rehearing before the Tribunal.

In the circumstances, His Honour did not grant leave to file and serve the affidavits and dismissed the notice of motion with costs.

6. Persian Art Gallery P/L v Lorang & Anor [2005] NSWSC 913

Background

The plaintiff (Persian Art Gallery) cleaned and trimmed the defendant (Dr Lorang's) carpet to which there was irreparable damage. The Tribunal found in favour of Dr Lorang and ordered that the carpet be replaced at a cost of \$8,000 and that the cost of cleaning and trimming the carpet be refunded at \$1,200. A later rehearing application was dismissed.

On 2 March 2005 Mr Shabestari (of Persian Art Gallery) received Dr Lorang's application form together with a notice to attend conciliation and hearing on 10 March 2005 at the CTTT. On 2 March 2005 Mr Shabestari contacted the CTTT and deposed that an officer of the CTTT informed him that the initial hearing was merely a preliminary conference to discuss the relevant issues of the application and that he would not need any legal representation or to bring any evidence with him.

On 10 March 2005 the Member advised the parties to try and resolve the matter in a separate room and discuss ways in which to settle the matter. Dr Lorang refused to participate unless there was a guarantee of at least one more person in the room. The Tribunal Member informed Dr Lorang that that could not be arranged immediately and that "it's not compulsory to go to mediation, but see what we can do. Just come forward to the table, thanks. ..." [t4.2-5]. Importantly, the Tribunal Member did not say specific words to the effect that she was going to proceed to the actual hearing. Nor was Mr Shabestari asked if he was ready to proceed with the hearing.

Mr Shabestari did avail himself of the right to defend himself against Dr Lorang's evidence verbally, but did so without the benefit of evidence to support his case. Mr Shabestari also contended that the Tribunal Member's closing remark that the decision would be reserved indicated that the decision would be made after more documentation was sought and information gathered from independent sources.

Grounds for Appeal:

The plaintiff relied upon both ss 65 and 67 of the CTTT Act.

The plaintiff claims that in relation to the hearing and determination made on 10 March 2005 it was denied natural justice. The grounds of appeal were: i) the plaintiff did not understand that the matter was being heard and determined; ii) the plaintiff was not given the opportunity to present evidence in support of its case; iii) the plaintiff relied on advice by the second defendant (CTTT) that the matter would not be heard on 10 March 2005; iv) the plaintiff was not given the opportunity to adjourn the hearing; v) the plaintiff was not given the opportunity to be heard in relation to all the proceedings; vi) the Tribunal Member failed to delineate between the conciliation and hearing of the matter; vii) the Tribunal Member relied on evidence given during conciliation in coming to its decision and in support of its reasons; and viii) the Tribunal Member departed from the procedure outlined in information supplied to the plaintiff both orally and in writing such as to cause the plaintiff confusion and misapprehension. Summarily, the plaintiff's case was that its Director, Mr Shabestari, was under the misapprehension that the actual Tribunal hearing would be at a later date, and that what transpired was actually a conciliation hearing.

The plaintiff also claimed that in relation to the rehearing submitted on 12 April 2005, it was denied natural justice. The grounds of appeal were i) the Tribunal Member failed to properly give reasons with respect to the decision; ii) the plaintiff was not given the chance to properly present evidence in support of its case; iii) the plaintiff was not given the opportunity to be heard in relation to the matter; and iv) the Tribunal Member misdirected herself as to the law in relation to the denial of natural justice.

Findings on appeal

Associate Justice Harrison referred to Mason J's statement in *Kioa v West* (1985) 159 CLR 550. See page four of this bulletin *Micron Constructions*.

Her Honour stated that:

"Section 35 [of the CTTT Act] provides that the Tribunal "must ensure" that each party is given "a reasonable opportunity" to present its case. Where necessary this will entail the offering of an adjournment, whether sought or not. There are provisions which allow the Tribunal a significant degree of flexibility in adapting procedures to the exigencies of the case in determining the manner

in which the proceedings will be conducted.” [36]

In the view of Her Honour the Tribunal Member should have ensured that both parties were aware that a formal hearing was about to take place and should have asked Mr Shabestari if he was ready to proceed. In light of the advice given to Mr Shabestari prior to the hearing that he was not required to bring witnesses on that day and in the absence of the Tribunal Member informing him that the hearing was about to take place and that if he hadn't marshalled his evidence he could apply for an adjournment, the plaintiff had been denied procedural fairness.

The Court upheld the appeal and ordered that the decision of 10 March 2005 be set aside with the matter remitted to the Tribunal for determination according to law.

On about 21 March 2005, Persian Art Gallery lodged an application for rehearing. On 12 April 2005 the Tribunal Member did not grant the rehearing.

The question of whether the decision upon a rehearing application under s 68(8) can be the subject of challenge in the Supreme Court (see converse decisions of *Mah v CTTT*[2005] NSWSC 476 and *Rowland v CTTT* [2003] NSWSC 730) did not need to be determined because the matter had been remitted to the Tribunal.

7. Fair Trading Administration Corp v Woods & Ors [2005] NSWSC 1294

Background:

An insurance claim was made by the first defendants (Woods and Wilson) against the plaintiff (FTAC) for two aspects of defective building work – defective drainage and defective roofing. Both claims were denied by the plaintiff on the basis of delay in notification. Woods and Wilson lodged an application with the Tribunal. The Tribunal Member found that the claim for defective drainage was made in time and the claim for defective roofing was not.

On 24 November 2004 the Tribunal Member made an order that FTAC pay the applicants their costs of the proceedings as agreed or assessed on an indemnity basis. On 24 February 2005 the Tribunal Member handed down his written reasons on costs. FTAC appealed the order that costs be made on an indemnity basis and that some apportionment should have been made.

Grounds for Appeal:

The plaintiff relied upon s 67 of the CTTT Act.

FTAC appealed on the grounds that firstly, the Tribunal erred in awarding costs; secondly, the Tribunal erred in awarding indemnity costs; thirdly, by awarding indemnity costs the Tribunal took into account irrelevant factors, and fourthly, the Tribunal erred in law in awarding costs against FTAC in relation to an issue in which it succeeded.

Findings on appeal

Associate Justice Harrison agreed with the reasoning of Master Malpass in *Building Insurers' Guarantee Corporation v CTTT & Ors* [2005] NSWSC 503 at paragraphs [13]-[14]:

“13 The section [67] is intended to provide a very narrow avenue of appeal... There is authority for the proposition that it should be confined to a pure question of law.

14 In this case, the Tribunal decided a question of costs. It seems to me that the decision made in this case is not a decision with respect to a matter of law... the decision made by the Tribunal was one that was to be reached by the exercise of a discretion.”

Her Honour agreed that:

“an appeal on the issue of costs does not usually raise a question of law. If I am wrong and this appeal does raise a question with respect to a matter of law because costs were awarded on an indemnity basis...the decision made by the Tribunal was one that was to be reached by the exercise of a discretion.” [14]

On the matter of apportionment of costs, FTAC submitted that because there had been “a mixed outcome to the proceedings” it was erroneous in principle for the Tribunal not to apportion costs. In Her Honour's view the Tribunal Member was entitled in the exercise of his discretion to come to this decision and that the decision was not unreasonable or plainly unjust. There was found to be no error of law.

In relation to costs being payable on an indemnity basis the plaintiff submitted the Tribunal erred in

three ways: i) having determined FTAC's conduct was not wilful or dishonest it wrongly concluded that the conduct could found an award of indemnity costs; ii) the Tribunal made no criticism of FTAC's conduct during the hearing; and iii) given the conduct was not a primary source of the delay the Tribunal erred in regarding the conduct of officers as a special or unusual circumstance.

Again Her Honour found that the Tribunal Member was entitled in the exercise of his discretion to depart from the usual rule as to costs (see *Colgate-Palmolive v Cussons Pty Ltd*; *Cussons Pty Ltd v Colgate-Palmolive Company and Colgate-Palmolive Pty Limited* No NG594 of 0989 FED No 801/93 Costs (1993) 46 FCR 225 and *MKIC v OCBC* [2004] VSC 351) and that the decision he reached was not plainly unjust or unreasonable. There was found to be no error of law.

The appeal was dismissed, the decision of the Tribunal Member was affirmed and the plaintiff was ordered to pay the first defendants' costs as agreed or assessed.

ISSUES & GUIDELINES

Residential Tenancies Amendment (Social Housing) Act 2005 No 79

Second reading speech made: Legislative Assembly, 12.10.2005; Legislative Council, 19.10.2005. Assented to 26.10.2005. Date of commencement, Sch 2.4 excepted, 28.11.2005, sec 2 and GG No 142 of 25.11.2005, p 9655; date of commencement of Sch 2.4, assent, sec 2 (2).

Varies the applicability of the *Residential Tenancies Act 1987* (RTA) to tenancy agreements with the New South Wales Land and Housing Corporation. A number of provisions do not apply, while there are other provisions which apply to such agreements, including additional terms, additional rights for termination and altered obligations with respect to rent records and rent increases. The RTA also makes special provision for tenancy agreements with social housing providers.