

JUDGMENT : SMART AJ. Supreme Court New South Wales, Common Law Division Administrative Law List. 29th February 2008

- 1 Pursuant to s 67 of the **Consumer Trader and Tenancy Tribunal Act 2001** the plaintiffs appeal to this Court on a question of law against the Tribunal's decision dated 16 July 2007 holding that it had jurisdiction to order the corporate plaintiff to provide security for the costs of Bresond Pty Limited. The proceedings are within the Home Building Division. Section 48K of the **Home Building Act** provides that the Tribunal has jurisdiction to hear and determine any building claim brought before it in which the amount claimed does not exceed \$500,000. The Tribunal filed a submitting appearance except as to costs.
- 2 The first issue is whether the Tribunal was correct in holding that it had jurisdiction under the **Corporations Act 2001 (Cth)** to order security for costs.
- 3 The Tribunal relied on the decision in **Woodcrest Homes Pty Ltd v Fair Trading Tribunal & Ors** (2002) NSWSC 552 determining that that Tribunal, the predecessor of the current Tribunal, was empowered pursuant to the forerunner of s 1335 of the **Corporations Act** to order that security for costs be provided by one of the parties to the proceedings.
- 4 The Court there said:
"Accepting that the Tribunal is a 'court' in the sense of a body exercising judicial power (the contrary was not contended on this appeal) I consider that in determining an application that a corporate plaintiff be required to give security for costs in respect of a claim before it, the Tribunal to be exercising curial jurisdiction conferred on it by the corporation legislation."
- 5 In the present case the plaintiffs attacked the assumption on which Woodcrest proceeded, namely, that the Tribunal was a court. For the reasons which are given this decision should no longer be followed.
- 6 Section 1335 of the **Corporations Act 2001 (Cth)** provides:
(1) *Where a corporation is a plaintiff in any action or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the corporation will be unable to pay the costs of the defendant if successful in his, her or its defence, require sufficient security to be given for those costs and stay all proceedings until the security is given."*
- 7 Under s 58A(1) of that Act:
court means any court
Court means any of the following courts:
 - (a) the Federal Court
 - (b) the Supreme Court of a State or Territory
 - (c) the Family Court of Australia
 - (d) a court to which s 41 of the **Family Law Act 1975** applies because of a Proclamation made under s 41(2) of that Act
- 8 It is necessary to determine whether the Tribunal is a "court" for the purposes of the **Corporations Act 2001 (Cth)** and the scope of the constitutional concept of a "court". Section 1335 of that Act involves the exercise of the judicial power of the Commonwealth. In **Business Insurance Australia Pty Ltd v District Court of New South Wales & Anor** [2006] NSWCA 383 at [13] Handley JA, with whom, Beazley and Ipp JJA agreed, said in part:
"Section 1335 appears to apply to all Australian courts having civil jurisdiction over principal proceedings brought by a corporation, whether arising under the Corporations Act or not. In accordance with s 39(2) it vests ancillary Federal jurisdiction in the court to order security for costs."
- 9 Section 77(iii) of the **Commonwealth Constitution** provides:
"77. Power to define jurisdiction
With respect to any of the matters mentioned in the last two sections the Parliament may make laws
...
(iii) investing any court of a State with federal jurisdiction.
- 10 In **Trust Company of Australia Limited v Skiwing Pty Ltd** (2006) 66 NSWLR 77, Spigelman CJ with whom Hodgson and Bryson JJA agreed at [82] adopted what Ipp JA had earlier said " ...There are many institutions that exercise judicial powers but are well recognised not to be courts."
- 11 At [59] in **Trust Company** Spigelman CJ held that an essential feature of a court, as that word is used in Ch 3 of the **Constitution**, is that it be an institution composed of judges. He then cited a number of decisions which supported that view in paras [60] – [63]. That point is decisive. In my opinion the attempt to distinguish the basic reasoning of Spigelman CJ in **Trust** was not successful.
- 12 An alternative approach is to consider those aspects of the legislative scheme which support the conclusion that the Tribunal is a court and those which support the opposite conclusion and make a final judgment balancing the two sets of indicia.
- 13 In support of its contention that the Tribunal was a court Bresond relied on the following:
 - *The Tribunal exercises the judicial power of the State in the performance of a substantial number of its statutory functions under the following Acts:*

Community Land Management Act 1989
Consumer Claims Act
Consumer Credit Administration Act 1995
Credit Act 1984
Credit (Home Finance Contracts) Act 1984
Fair Trading Act 1987
Holiday Parks (Long-term Casual Occupation) Act 2002
Home Building Act 1989
Motor Dealers 1974
Motor Vehicle Repairs Act 1980
Residential Parks Act 1998
Residential Tenancies Act 1987
Retirement Villages Act 1999
Strata Schemes Management Act 1996
Travel Agents Act 1986

- Members are appointed by the Governor (s 7).
 - The Chairperson must either be a legal practitioner or qualified to be admitted as a legal practitioner (s 8(1)).
 - When appointing members (including the Chairperson) the Minister is to have regard to whether the person has the ability to exercise sound and fair judgment and to make objective and independent decisions based on the merits of the case (s 8(3)(a)).
 - The Tribunal has a “jurisdiction to decide matters” (s 21).
 - The Tribunal’s procedure is expressed in terms of “parties to proceedings” (s 26).
 - The Tribunal may make rules in relation to its practice and procedure (s 29).
 - The Tribunal may, in any proceedings, make any amendments to a document (for example, an application) filed in connection with the proceedings that the Tribunal considers to be necessary in the interests of justice (s 32).
 - The Tribunal may examine witnesses and compel answers unless the witness has a reasonable excuse for refusing to answer (s 39).
 - If a person who is served with a summons to attend before the Tribunal fails to comply with the summons the Chairperson (or the Deputy Chairperson (Determinations)) may on proof of the service of the summons, issue a warrant for the apprehension of the person, bring the person before the Tribunal and detain the person in custody for that purpose (s 41).
 - The Tribunal may find a person guilty of contempt of the Tribunal (s 42(1)). Sections 27A and 27B of the **Local Courts Act** apply to and in respect of the Tribunal when constituted by (or by members that include) the Chairperson or the Deputy Chairperson (Determinations) in the same way as those sections apply to and in respect of contempt of a Local Court presided over by a magistrate (s 42(2)). (Bresond stressed that while the Tribunal may refer contempt matters to the Supreme Court, it may also deal with such matters under s 42. There is a limitation. The power may be exercised when the Tribunal is constituted by the Chairperson or the Deputy Chairperson (Determinations) either alone or sitting with other members. These proceedings were before a single member in the Home Building Division.
 - A legal practitioner or witness appearing at the Tribunal has the same protection and immunity as if appearing in the Supreme Court (s44).
 - The Tribunal must provide a statement of reasons for its decision, if requested by one of the parties to the proceedings (s 49).
 - An order for payment of money, other than penalty, upon certification by the Registrar, may be filed in a court and operates as a judgment of that court for a debt of that amount (s 51).
 - The Tribunal may award costs (s 53).
 - There is a right of appeal from the Tribunal to the Supreme Court on a question of law (s 67).
- 14 I do not regard all the factors listed above as supporting the conclusion that the Tribunal is a court. Of considerable weight are the factors that a member holds office for such period as is specified in the instrument appointing the member not exceeding 5 years. Under s 8 of the Act the Chairperson must be a legal practitioner or qualified to be admitted as a legal practitioner. The other members have to possess “such qualifications or skills as may be determined by the Minister.”
- 15 The Governor may remove a member if he or she fails to enter into a performance agreement (Sch 3). A Peer Review Panel is constituted. The Panel may recommend to the Minister that a member should not continue to hold office.
- 16 Having regard to the constitution of the Tribunal and the related matters as to tenure or lack of tenure the Tribunal cannot be regarded as a court. The Tribunal is not entitled to exercise the powers of a court under s 1335 of the **Corporations Act 2001 (Cth)**. **Business Insurance Australia** supports this conclusion esp. [12] – [16].
- 17 Bresond advanced an alternative source of power to make an order for security of costs and stay proceedings until it was provided Section 53 of the **CITT Act** relevantly provides:
“Costs
(1) Subject to this section and the regulations, the parties in any proceedings are to pay their own costs.

- (2) *The Tribunal may, in accordance with the regulations, award costs in relation to any proceedings.*
- (3) *If costs are to be awarded by the Tribunal in accordance with regulations, the Tribunal may:*
- (a) *determine by whom and to what extent costs are to be paid, and*
 - (b) *order costs to be assessed on the basis set out in Division 6 of Part 11 of the Legal Profession Act 1987 or on any other basis.*
- (4) *In this section costs includes the costs of, or incidental to, proceedings.*
...”
- 18 Regulation 20 deals with the question of costs on a sliding scale and in substance enlarges the powers of the Tribunal when taken in conjunction with s 53(2) of the **CTTT Act**. The Court was told that the claim was about \$80,000 and the cross claim was in excess of \$100,000. Thus the relevant Regulation was 20(4) which enables the Tribunal to award costs in relation to the proceedings in such circumstances as it thinks fit.
- 19 Section 28(1) enables the Tribunal to determine its own procedure. Section 28(5)(i) provides that the Tribunal may order that any proceedings be stayed. Section 29(1) provides that a member may, in any proceedings, give procedural directions in relation to the proceedings.
- 20 Section 30 relevantly provides:
“Proceedings causing disadvantage
- (1) *This section applies if the Tribunal is of the opinion that a party in any proceedings is conducting the proceedings in such a way that unreasonably disadvantages another party in the proceedings by any conduct (including by failing to comply with an order or direction of the Tribunal).*
- (2) *The Tribunal may:*
- (a) *if the party causing the disadvantage is the applicant – order that the proceedings (or part of the proceedings) be dismissed or struck out, or*
 - (b) *if the party causing the disadvantage is not the applicant:*
 - (i) *determine the proceedings (or part of the proceedings) in favour of the applicant and make any appropriate orders, or*
 - (ii) *order that the party causing the disadvantage be struck out of the proceedings (or part of the proceedings).”*
- 21 Bresond relied on a combination of sections 53 and 30 of the **CTTT Act**. It submitted that it would be to its unreasonable disadvantage if an impecunious corporate applicant were able to commence or maintain proceedings with the respondent having no prospects of recovering any costs pursuant to a costs order made in its favour at the end of the proceedings. It was further submitted that in such circumstances a respondent, in the position of Bresond should be able to apply to the Tribunal for orders that an application be dismissed if an impecunious corporate applicant fails to provide adequate security for costs. This point was not raised before the presiding member but it was squarely raised and debated on the hearing of the appeal. It really amounted to a contention that the member’s determination was correct for reasons other than those given by the member.
- 22 The Tribunal should have power in proceedings involving more than \$25,000 (or perhaps \$50,000) to order security for costs where there is an impecunious corporate plaintiff. Building disputes are notoriously costly. Although not perhaps relevant at this stage, whether security was ordered and in what amount may depend on the extent to which the claim and the cross-claim covered the same ground.
- 23 The traditional order where security for costs in a specified amount is ordered by a specified date provides that the proceedings be stayed pending the provision of the security ordered. If the security is not provided as ordered the party seeking the security may move to have the proceedings dismissed. Whether that occurs if a cross claim is being pressed is another matter.
- 24 Despite the desirability of the Tribunal having the power to order security for costs the question remains whether it has been given that power. It does have the power to stay proceedings.
- 25 In my opinion the various provisions of the Act to which reference has been made do not either singly or in combination authorise the Tribunal to make an order for security for costs. Applications for security for costs may involve complex and interwoven factors. Simply because a party (be it a corporation) is impecunious does not involve conducting the proceedings in such a way that unreasonably disadvantages another party. Orders for security for costs are not made against an impecunious plaintiff in person who resides within the jurisdiction absent exceptional circumstances. None of the general provisions authorise an order for security for costs being made by the Tribunal and the staying of the proceedings until the security is provided.
- 26 The following declaration is made:
Declare that the Tribunal does not have jurisdiction to make an order that the corporate plaintiff provide security for the costs of Bresond Pty Ltd of the claim of the corporate plaintiff.
- 27 I remit my decision on the question of law raised to the Tribunal. It should now proceed with the hearing of the action, giving such directions as it thinks fit.
- 28 Order that Bresond Pty Ltd pay the costs of the plaintiffs of these proceedings.

- 29 Consequent upon the decision of *Trust Company of Australia Ltd v Skiwing Pty Ltd* [2006] NSWCA 387 Bresond Pty Ltd, if eligible, is granted a certificate under the *Suitors' Fund Act 1951 (NSW)* in respect of the costs of these proceedings. Leave to the Attorney-General or a representative of the Suitors' Fund to apply to discharge the grant of such certificate within 21 days of service of such certificate. The Court is prepared to hear argument as to the grant of a certificate if such an application is made.

M Painter (First Plaintiff) instructed by Adams & Partners (First Plaintiff)

Martin Walsh (First Defendant) instructed by Snelgroves (First Defendant); I V Knight (Second Defendant - submitting)