Costs issues in the Consumer Trader and Tenancy Tribunal

By Phillipa Alexander

JURISDICTION

While s53 of the *Consumer Trader and Tenancy Tribunal Act 2001* (NSW) provides that, subject to s53 and the regulations, the parties in any proceedings are to pay their own costs, the Consumer Trader and Tenancy Tribunal (the Tribunal) can award costs of, or incidental to, any proceedings other than those under the *Strata Schemes Management Act 1996* or the *Community Land Management Act 1989*. The Tribunal may determine by whom and to what extent costs are to be paid and may order costs to be assessed under the *Legal Profession Act 2004* or on any other basis.1 The Tribunal has power to award costs on an indemnity basis.[2]

Clause 20 of the *Consumer Trader and Tenancy Tribunal Regulation 2002* sets out different criteria for the awarding of costs based on the amount in dispute, namely:

- for disputes involving up to $10,000 – costs will be awarded only in exceptional circumstances;[3]
- for disputes involving more than $10,000 and not more than $25,000 – costs will be awarded only in exceptional circumstances or where an order has been made under s30(2) of the Act in respect of 'proceedings causing disadvantage';[4] and
- for disputes involving more than $25,000 – costs may be awarded in such circumstances as the Tribunal thinks fit.[5]

Where a costs order is made, it is usually on the basis that costs be as agreed or assessed under the *Legal Profession Act 2004*. However, the Tribunal may quantify the costs itself where it considers that the amount of costs would not warrant the expense of an assessment by a costs assessor. In *Diamond v KAV Building Services Pty Ltd (Home Building)*,[6] the Tribunal considered a self-represented litigant's claim for costs of $25,509. The Tribunal held that it was bound by the decision in *Cachia v Hanes*,[7] whereby an unrepresented litigant was not entitled to the costs of preparing the case, but was limited to disbursements incurred, and allowed only $750.

SECURITY FOR COSTS NO LONGER AVAILABLE

The legal costs of defending an application in the Home Building Division can be substantial, often exceeding $200,000. Until recently, the Tribunal considered that it had jurisdiction to make an order for security for costs against a corporate applicant based on the decision of Bell J in *Woodcrest Homes Pty Ltd and Fair Trading Tribunal*.[8] In Woodcrest, Her Honour held that the Fair Trading Tribunal, the predecessor of the current Tribunal, had power to order security for costs under s1335 of the *Corporations Act 2001,* on the basis that the Tribunal was a 'court' in the sense of a body exercising judicial power and

that 'in *determining an application for security for costs, the Tribunal was exercising curial jurisdiction conferred on it by the corporations legislation*'.[9]

The Court of Appeal took an opposing view to the classification of the Administrative Decisions Tribunal (ADT) in *Trust Company of Australia Limited v Skiwing Pty Ltd*,[10] holding that it was not a 'court' of the state and thus had no jurisdiction under the *Trade Practices Act 1974*.

While Senior Member R Connolly acknowledged the similarities between the Tribunal and the ADT in *Da Silva and Da Silva Constructions P/L v Bresond*,[11] he held that he was bound by Woodcrest and determined that the Tribunal had jurisdiction to determine a security for costs application.

On appeal to the Supreme Court,[12] Smart AJ held that the Tribunal was incorrect in determining that it had jurisdiction under the *Corporations Act 2001* to order security for costs. The premise on which Bell J had proceeded in *Woodcrest* – namely, that the Tribunal was a court – was considered to be incorrect in light of the *Trust Company* decision in which Spigelman CJ confirmed that many institutions may exercise judicial powers but are not courts.[13] Spigelman CJ considered the defining feature of a court to be that of an 'institution composed of judges'.[14]

Bresond's alternate submission, that the Tribunal could rely on its power to order costs under ss53 and 30 of the Act was also unsuccessful. Although Smart AJ recognised the desirability of the Tribunal having the power to order security for costs, His Honour held that the Tribunal has no legislative jurisdiction to make such an order.

This decision leaves the respondent to proceedings commenced by an impecunious corporate applicant in a potentially disadvantaged position, in that a successful respondent may be unable to recover or secure recovery of all or any of their party:party costs. This issue may need to be considered when making disclosure of the range of costs that may be recovered if the client is successful in the litigation under s309(f)(i) of the *Legal Profession Act 2004*. It may also be an appropriate matter for legislative amendment.

INTERLOCUTORY COSTS ORDERS

The Tribunal has recently confirmed that a party that is successful in resisting an interlocutory application may obtain a costs order which is payable before the conclusion of the substantive proceedings.[15] Given that the Tribunal has power to stay proceedings[16] and that arguably an outstanding costs order could provide grounds for such an order[17], it could prove worthwhile to ensure that any interlocutory costs orders made in favour of a client are made on a 'payable forthwith' basis.

FUNDING FOR LEGAL ASSISTANCE

Sections 12 and 13 of the *Fair Trading Act 1987* provide for consumers who wish to bring proceedings in relation to the supply of goods or services, or the disposal to the person of an interest in land, to apply for financial assistance in the conduct of the proceedings. Such assistance extends to the costs of legal representation and prescribed expenses. Under s14, the director-general may assign a case to an Australian legal practitioner who has indicated a willingness to undertake the conduct of the cases of assisted persons. ■

Notes: **1** Consumer, Trader and Tenancy Regulation 2002, cl 20. **2** *Moloney & Maloney v Katsianos* (Home Building) [2008] NSWCTTT 1144 (7 July 2008). **3** Consumer, Trader and Tenancy Regulation 2002, cl 20(2). **4** *Ibid*, cl 20(3). **5** *Ibid*, cl 20(4). **6** *Diamond v KAV Building Services Pty Ltd* (Home Building) [2008] NSWCTTT 1013 (23 May 2008). **7** *Cachia v Hanes* (1994) 179 CLR 403. **8** *Woodcrest Homes Pty Ltd and Fair Trading Tribunal* [2002] NSWSC 552 (1/07/2002). **9** *Ibid*, at [25]. **10** *Trust Company of Australia Limited v Skiwing Pty Ltd* (2006) 66 NSWLR 77. **11** *Da Silva and Da Silva Constructions P/L v Bresond* (Home Building) [2007] NSWCTTT 380 (16 July 2007). **12** *Da Silva and Da Silva Constructions Pty Ltd v Bresond Pty Ltd & Anor* [2008] NSWSC 158 (29 February 2008). **13** *Trust Company of Australia Limited v Skiwing Pty Ltd* (2006) 66 NSWLR 77 at 82. **14** *Ibid*, at 59. **15** *Da Silva v Bresond* (Home Building) [2008] NSWCTTT 1120 (30 June 2008). **16** Consumer, Trader and Tenancy Act 2005, s28(5)(j). **17** For example, see *Diamond v Birdon Contracting Pty Limited & Anor* [2008] NSWLEC 302 (21 October 2008).

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Make your voice heard!

By Kimberley Moran

As many of you will be aware, on 10 December 2008 the federal government announced a national consultation on human rights in order to seek the views of the Australian community on how human rights and responsibilities should be protected in the future. Father Frank Brennan, professor at the Australian Catholic University, has been charged with heading a consultation committee aimed at ascertaining community opinions on:

- which human rights (including corresponding responsibilities) should be protected and promoted?
- are these human rights currently sufficiently protected and promoted?
- how could Australia better protect and promote human rights?

A key issue is whether Australia should adopt a federal charter of rights. The government has expressly stated that it will not consider a constitutionally entrenched charter of rights. The issue, therefore, is whether Australia should adopt a charter in the form of a human rights act, such as that already operating in the ACT and Victoria.

The Australian Lawyers Alliance supports the adoption of a charter, as it believes that formally enshrining human rights in legislation would both protect individuals and foster a community that is more conscious and respectful of the needs and rights of others. We encourage all members to become involved in the consultation process and have their say by:

1. writing a submission to the committee. The deadline for submissions is 29 May 2009.
   Submissions can be made at www.humanrightsconsultation.gov.au; emailed to humanrightsconsultation@ag.gov.au; or mailed to
   National Human Rights Consultation Secretariat
   Attorney-General's Department
   Central Office
   Robert Garran Offices
   National Circuit
   BARTON ACT 2600
2. attending a community roundtable to debate the issues and options. Dates and details for community roundtables will be posted on www.humanrightsconsultation.gov.au.
3. signing the partition and emailing a politician at www.charterpetition.com.au.
4. talking to friends and families and encouraging them to become involved.
5. writing to local newspapers to inform people in your community about the issues and how to become involved in the process.

Over the coming months, a number of Alliance members who specialise in human rights will be speaking to community groups about the possible impact of a charter and the reasons for introducing one. Community groups keen to offer the Alliance such speaking engagements should email kimberley@lawyersalliance.com.au.

If you have any queries about how a human rights act would operate, or would like some more information on the issue, feel free to contact the Alliance's Legal and Policy Officer, Tilda Hum, at tilda@lawyersalliance.com.au or call 02 9258 7700. A detailed discussion paper can also be viewed online at www.hrlrc.org.au by clicking on the feature article link.

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