HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

PETER KOSTAS & ANOR APPELLANTS

AND

HIA INSURANCE SERVICES PTY LIMITED
T/AS HOME OWNERS WARRANTY & ANOR RESPONDENTS

Kostas v HIA Insurance Services Pty Limited [2010] HCA 32
29 September 2010
S84/2010

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of New South Wales made on 16 September 2009 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.*

3. *First respondent to pay the costs of the appellants.*

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with R J Carruthers for the appellants (instructed by Pryor Tzannes & Wallis)

B W Walker SC with F R Clark and E Raper for the first respondent (instructed by Mills Oakley Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

Kostas v HIA Insurance Services Pty Limited

Courts – Appeals – Jurisdiction and powers – Section 67(1) of *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW) provided for appeal from Consumer, Trader and Tenancy Tribunal to Supreme Court "[i]f, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law" – Appellants purported to terminate building contract because of builder's failure to meet obligations – Validity of termination turned on disputed claims for extension of time – Tribunal decided that material properly before it supported conclusion that disputed claims for extension had been served – Whether that question could be raised on appeal to Supreme Court – Whether "no evidence ground" raises question of law.

Words and phrases – "question with respect to a matter of law", "no evidence ground".

Consumer, Trader and Tenancy Tribunal Act 2001 (NSW), ss 66(2), 67.
Home Building Act 1989 (NSW), ss 48A(1), 48K(1).
Supreme Court Act 1970 (NSW), s 75A.

FRENCH CJ.

Introduction

1 The Consumer, Trader and Tenancy Tribunal of New South Wales ("the Tribunal") is a body set up by the Parliament of New South Wales to entertain a variety of commercial and consumer claims with the object of having such claims determined in an informal, expeditious and inexpensive manner[1]. Until 2008, an appeal lay from the Tribunal to the Supreme Court of New South Wales from a decision of "a question with respect to a matter of law"[2]. A dispute about the scope of that jurisdiction and the ancillary powers of the Supreme Court has led to this appeal.

2 The appeal to this Court comes in the tenth year of a process which began in September 2000, when Peter and Christine Kostas commenced proceedings in what was then the Fair Trading Tribunal, a statutory predecessor of the Tribunal. The proceedings, which arose out of a dispute between Mr and Mrs Kostas, their builder and its statutory insurer[3], HIA Insurance Services Pty Limited ("HIA"), concerned a $330,000 building contract. Mr and Mrs Kostas said they had validly terminated the contract on account of the builder's failure to meet its contractual obligations.

3 The Tribunal decided that Mr and Mrs Kostas had not validly terminated the disputed contract. A judge of the Supreme Court, on appeal, held that they had and that the Tribunal had made a number of errors of law in reaching its decision[4]. On an appeal from the judge's decision, the Court of Appeal of the Supreme Court of New South Wales held that the judge did not have jurisdiction as there was no decision of a "question with respect to a matter of law" before him[5]. For the reasons that follow, the appeal to this Court from the Court of

---

1 *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW), s 3(c).

2 *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW), s 67(1). The *Consumer, Trader and Tenancy Tribunal Act* was amended by the *Courts and Crimes Legislation Amendment Act* 2008 (NSW). Appeals from the Tribunal under s 67 now lie to the District Court of New South Wales.

3 See Pt 6 of the *Home Building Act* 1989 (NSW), which prohibits the undertaking of "residential building work" unless a contract of insurance which complies with the Act and which is provided by an insurer approved by the Minister is in force in relation to the work: see ss 92 and 102.

4 *Kostas v HIA Insurance Services Pty Ltd trading as Home Owners Warranty* [2007] NSWSC 315.

5 *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292.

Appeal should be allowed. The Tribunal made a finding adverse to Mr and Mrs Kostas to the effect that the builder had properly given notice of claims for extensions of time. That was a finding for which there was no evidence before the Tribunal. It was critical to the Tribunal's conclusion that notices of default grounding the termination by Mr and Mrs Kostas were not valid. The primary judge acted within his jurisdiction and powers when he allowed the appeal against the Tribunal's decision.

Procedural history

4 Mr and Mrs Kostas' claim in the Tribunal was for indemnity under a Home Owners Warranty policy with HIA[6]. The claim related to loss and damage suffered because of the alleged failure by Sydney Construction Company Pty Ltd ("SCC") to complete contracted building works at their residence in Blakehurst. Mr and Mrs Kostas alleged that they had terminated the building contract. HIA denied liability. On 14 December 2000, SCC was joined as a defendant to the proceedings. It alleged that the purported termination of the contract was a wrongful repudiation, which it had accepted, and that it had been unable to complete its obligations because of the conduct of Mr and Mrs Kostas.

5 The substantive hearing did not commence until 20 October 2003, more than three years after the proceedings were commenced[7]. Affidavit evidence was tendered and Mr Kostas and other witnesses were cross-examined. On 23 October 2003, the hearing was adjourned. It did not resume until 27 January 2004. It was again adjourned until 8 November 2004. Upon resumption of the hearing, Mr and Mrs Kostas and SCC agreed to withdraw their claims against each other. Mr and Mrs Kostas and HIA agreed, in relation to the continuing claim against HIA, that the Tribunal should determine as a preliminary question whether Mr and Mrs Kostas had lawfully terminated the building contract.

6 Central to the debate on the preliminary question were letters alleging breaches of the building contract, sent by the solicitors for Mr and Mrs Kostas on 4 May 2000 and 12 May 2000 and addressed respectively to SCC and its solicitors. The breaches alleged were inability and unwillingness to complete the

---

6 Clause 42(1)(a)(i) of the Home Building Regulation 1997 (NSW) (made under s 103C of the *Home Building Act*) stipulated that, under an insurance contract required to be entered into under the Act, an insurer must be directly liable to a person on whose behalf residential building work covered by the contract is done. Similar provision is now made in cl 55(1)(a)(i) of the Home Building Regulation 2004 (NSW).

7 The Tribunal decided a preliminary point, not material for present purposes, in June 2002.

work, suspension of work without reasonable cause and failure to proceed diligently with the work. The first letter gave notice, pursuant to cl 24 of the contract, that if the alleged breaches were not rectified within 10 working days the contract would be terminated. It also set out a list of 42 items said to be uncompleted work. The second letter referred to the notice given on 4 May and also gave notice to SCC that it had failed to rectify defective work and was required to do so. It repeated that unless the breaches of contract were remedied by SCC within 10 working days the contract would be terminated in accordance with cl 24. Mr and Mrs Kostas purported to terminate the contract by letter on 29 June 2000[8]. On 4 July 2000, SCC's solicitors replied denying any entitlement to terminate and treating the purported termination as a repudiation.

7 On 10 November 2004, counsel foreshadowed to the Tribunal the evidence they would rely upon in relation to the preliminary question. There followed a short re-examination of Mr Kostas. Written submissions were filed. By then, more than four years had elapsed since the proceedings had been commenced.

8 On 25 May 2005, the Tribunal found that Mr and Mrs Kostas' purported termination was not effective and made an order, declaratory in form, that they had repudiated the contract. It made a direction for the filing of a minute of orders to give effect to its reasons[9].

9 On 22 June 2005, Mr and Mrs Kostas instituted an appeal against the decision of the Tribunal in the Supreme Court under s 67 of the *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW) ("the CTTT Act")[10]. The section creates a right of appeal against a decision by the Tribunal of "a question with respect to a matter of law".

---

8 Their solicitors' letter of that date purported to terminate the contract as between Mr Kostas and SCC. That was consistent with the named parties to the building contract. However, when proceedings were commenced in the Tribunal, they were brought in the name of both Mr and Mrs Kostas. No point has been taken of this discrepancy.

9 *Kostas v HIA Insurance Services Pty Ltd* [2005] NSWCTTT 345.

10 Mr and Mrs Kostas also sought what they described as a "declaration in the nature of certiorari" on the ground of want of procedural fairness, presumably intending to invoke the jurisdiction of the Supreme Court under s 69 of the *Supreme Court Act* 1970 (NSW). The entitlement to prerogative relief was not the subject of any decision in the Supreme Court, nor was it agitated in this Court.

10 The appeal was heard by Rothman J on 14, 15 and 21 June 2006. His Honour did not deliver judgment until 30 October 2007[11]. The reasons for the substantial delay do not appear from the record. His Honour quashed the orders of the Tribunal made on 25 May 2005 and costs orders, which it had made on 20 September 2005. He declared that the termination of the building contract by Mr and Mrs Kostas was lawful and effective. He ordered that HIA pay their costs of the appeal and of the proceedings before the Tribunal. The matter was otherwise remitted to the Tribunal. By that time, more than seven years had passed since the commencement of the proceedings.

11 On 16 September 2009, the Court of Appeal (Spigelman CJ, Allsop P and Basten JA) unanimously allowed HIA's appeal against the decision of the primary judge[12]. It did so substantially on the basis that what had been identified by the primary judge as decisions of the Tribunal on questions with respect to matters of law were not such as to attract the jurisdiction of the Supreme Court under s 67 of the CTTT Act. By this time, more than nine years had elapsed since Mr and Mrs Kostas had instituted their proceedings in the Tribunal.

12 Special leave to appeal to this Court was granted by Gummow and Heydon JJ on 12 March 2010. The grounds of appeal are largely directed to the jurisdiction and powers conferred on the Supreme Court by s 67 of the CTTT Act. They require consideration of the legislative scheme relating to the Tribunal's way of operating and appeals from its decisions.

The Tribunal's way of operating

13 The Tribunal was established by the CTTT Act[13]. It replaced the Fair Trading Tribunal and the Residential Tribunal[14]. Its creation was the culmination of a process of amalgamation of smaller specialist tribunals. A number of the statutes creating the precursor tribunals made provision for referrals and appeals

---

11 *Kostas v HIA Insurance Services Pty Ltd trading as Home Owners Warranty* [2007] NSWSC 315.

12 *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292. The appeal was not heard until 29 June 2009. The delay was due in part to HIA's filing of a second amended notice of appeal in final form on 4 December 2008 and its unsuccessful motion to strike out a notice of contention filed by Mr and Mrs Kostas: see *HIA Insurance Services Pty Ltd T/as Home Owners Warranty v Kostas* [2008] NSWCA 297.

13 CTTT Act, s 5(1).

14 CTTT Act, s 88; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 September 2001 at 16892.

to the Supreme Court in language substantially reproduced in ss 66 and 67 of the CTTT Act[15].

14 The Tribunal's jurisdiction, powers and functions are defined as those "conferred on it by this or any other Act"[16]. The jurisdiction invoked by Mr and Mrs Kostas was that created by s 48K of the *Home Building Act* 1989 (NSW), sub-s (1) of which provides that the Tribunal can hear and determine any "building claim"[17] brought before it in which the amount of the claim does not exceed $500,000. There was no dispute that the claim was a "building claim".

15 The Tribunal may, subject to the CTTT Act, determine its own procedure[18]. It is not bound by the rules of evidence and may inquire into, and inform itself on, any matter in such manner as it thinks fit, subject to the rules of procedural fairness[19]. That freedom is enjoyed by many administrative tribunals. The term "rules of evidence" does not lay out with precision its metes and bounds[20]. Nor does it exclude the discretionary application of such rules. But the authority of the Tribunal to "inform itself on any matter in such manner as it thinks fit"[21] indicates that it is able to act upon information whether or not it is embodied in evidence which would be admissible in a court of law.

16 There are qualifications upon the Tribunal's procedural freedom. One, which is explicit, is the requirement to observe procedural fairness. The Tribunal's modus operandi must also serve its function, which, in this case, was to hear and determine a building claim. That function implies a rational process

---

15 *Consumer Credit Act* 1981 (NSW), s 208; *Commercial Tribunal Act* 1984 (NSW), s 20; *Residential Tribunal Act* 1998 (NSW), ss 61 and 62; cf *Fair Trading Tribunal Act* 1998 (NSW), s 61(1) (providing for "an appeal … on a question of law").

16 CTTT Act, s 21(1); see also s 5(2). The Tribunal comprises divisions exercising jurisdiction under specific statutes: CTTT Act, s 10(1); Sched 1 cl 1.

17 A term defined in s 48A(1) of the *Home Building Act*.

18 CTTT Act, s 28(1).

19 CTTT Act, s 28(2).

20 Campbell, "Principles of Evidence and Administrative Tribunals", in Campbell and Waller (eds), *Well and Truly Tried*, (1982) 36 at 39-43; Rees, "Procedure and Evidence in 'Court Substitute' Tribunals", (2006) 28 *Australian Bar Review* 41 at 69-83; Giles, "Dispensing with the Rules of Evidence", (1990) 7 *Australian Bar Review* 233.

21 CTTT Act, s 28(2).

of decision-making according to law[22]. A decision based on no information at all, or based on findings of fact which are not open on information before the Tribunal, is not compatible with a rational process[23].

17 The exercise of the Tribunal's freedom from the rules of evidence should be subject to the cautionary observation of Evatt J in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* that those rules "represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth"[24]. It is a method not to be set aside in favour of methods of inquiry which necessarily advantage one party and disadvantage another[25]. On the other hand, that caution is not a mandate for allowing the rules of evidence, excluded by statute, to "creep back through a domestic procedural rule"[26].

18 The Tribunal is required to act as expeditiously as is practicable[27]. A member may, in any proceedings, give procedural directions including directions that, in the opinion of the member, will enable costs to be reduced and will help to achieve a prompt hearing of the matters in issue between the parties in the proceedings[28]. It was not in dispute that this power would enable the Tribunal to hear and determine, as it did in this case, a particular issue where such determination is likely to expedite the proceedings.

19 It is relevant to the approach to the construction of s 67 of the CTTT Act that the criteria for appointment to the Tribunal do not require, except in the case

---

22 The applicability of substantive and adjectival law (apart from the rules of evidence) appears from the mechanisms, in ss 66 and 67, for referral and appeal in relation to decisions on questions with respect to matters of law.

23 See, eg, *Esanda Finance Corporation Ltd v Murphy* (1989) ASC ¶55-703 at 58,356 per Hunt J, an appeal from the Commercial Tribunal of New South Wales concerning s 19(9) of the *Commercial Tribunal Act*, a precursor to s 28(2) of the CTTT Act.

24 (1933) 50 CLR 228 at 256; [1933] HCA 30.

25 *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256 per Evatt J.

26 *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 at 41 per Brennan J.

27 CTTT Act, s 28(5)(a).

28 CTTT Act, s 29(1) and (4).

of the Chairperson, that a member be a legal practitioner or be qualified for admission as such[29]. Moreover, parties are not entitled to be represented by another person unless such representation is approved by the Tribunal[30]. There is no entitlement to legal representation if the amount claimed or in dispute is less than $10,000[31]. There is no express provision entitling a person to legal representation if the claim is greater.

The jurisdiction and powers of the Supreme Court on an appeal from the Tribunal

20 Part 6 of the CTTT Act deals with appeals and rehearings. Section 65(1) precludes resort to prerogative, declaratory or injunctive relief in respect of matters heard or determined, or to be heard or determined, by the Tribunal. It does not preclude relief in relation to jurisdictional questions and the denial of procedural fairness to a party[32]. But the source of jurisdiction to grant such relief must be found elsewhere – for example, in s 69 of the *Supreme Court Act* 1970 (NSW).

21 Where in any proceedings in the Tribunal a question arises with respect to a matter of law, s 66(2) of the CTTT Act authorises the Tribunal to decide the question or to refer it to the Supreme Court for decision. At the time Mr and Mrs Kostas commenced proceedings in the Supreme Court, an appeal to that Court from a decision of the Tribunal of a question with respect to a matter of law could be brought under s 67 of the CTTT Act. The relevant parts of the section are set out in the joint judgment[33].

22 While ss 66 and 67 are both concerned with questions with respect to matters of law, they serve different functions. A referral of a question to the

---

29 CTTT Act, s 8. By an amendment effected by the *Consumer, Trader and Tenancy Tribunal Amendment Act* 2008 (NSW), both the Chairperson and the Deputy Chairperson (Determinations) must now be Australian lawyers.

30 CTTT Act, s 36(1) and (2). In respect of matters arising under the *Home Building Act*, an application for permission to be represented could only be made if the proceedings involved a claim or dispute for an amount exceeding $25,000: Consumer, Trader and Tenancy Tribunal Regulation 2002 (NSW), cl 14(a). Similar provision is now made in cl 14(a) of the Consumer, Trader and Tenancy Tribunal Regulation 2009 (NSW).

31 CTTT Act, s 36(3).

32 CTTT Act, s 65(3).

33 See below at [75].

Supreme Court under s 66 involves the exercise by that Court of a limited interlocutory function. The Court has no general power under s 66 to dispose completely of proceedings before the Tribunal or to make such order as the Tribunal might, or might be required to, make in light of the Court's determination. The jurisdiction and powers of the Court on an appeal under s 67, however, are not so confined.

23 It is significant that s 66 not only provides for referral to the Supreme Court of a question which arises with respect to a matter of law but also empowers the Tribunal to decide such a question for itself. Referral logically requires formulation of a question. A decision of a question with respect to a matter of law by the Tribunal itself may be a decision of a question which it has expressly formulated, or it may be a decision implicit in a finding of the Tribunal. The right of appeal conferred by s 67 is therefore not limited to an appeal against explicit decisions of questions formulated in the proceedings. On its face it extends to decisions which were necessary steps in the Tribunal's reasoning, whether or not made explicit by the Tribunal[34]. This construction of s 67 is compatible with the purpose, nature and composition of the Tribunal, which can be constituted by non-lawyer members. It is also compatible with a legislative scheme under which legal representation before the Tribunal will be the exception rather than the rule. The statutory objects of informality, expedition and inexpensiveness do not stop at the door of the Supreme Court.

24 The extent of the term "a question with respect to a matter of law" is controlled by the words "with respect to". They are to be read and applied having regard to their legislative context[35]. Like the terms "in relation to" or "in connection with", they constitute a "prepositional phrase" of indefinite content[36].

---

34 *Kalokerinos v HIA Insurance Services Pty Ltd* [2004] NSWCA 312 at [47] per Bryson JA, Santow JA agreeing; *Scicluna v New South Wales Land and Housing Corporation* (2008) 72 NSWLR 674 at 676 [3] per Basten JA, 685 [42] per Campbell JA; see also *Custom Credit Corporation Ltd v Commercial Tribunal (NSW)* (1993) 32 NSWLR 489 at 492 per Gleeson CJ; *Ideal Waterproofing Pty Ltd v Buildcorp Australia Pty Ltd* [2004] NSWSC 765 at [27]-[33] per Sperling J.

35 See, in relation to the like term "in respect of", *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412 at 416 per Taylor J; [1966] HCA 56; *Workers' Compensation Board (Q) v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653-655 per Deane, Dawson and Toohey JJ; [1988] HCA 49; *Technical Products Pty Ltd v State Government Insurance Office (Q)* (1989) 167 CLR 45 at 47 per Brennan, Deane and Gaudron JJ, 51 per Dawson J, 54-55 per Toohey J; [1989] HCA 24.

36 *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 376 per McHugh J; [1990] HCA 16.

The decisions they cover clearly include decisions of questions of law[37] but not decisions of questions of fact. Nor does the appeal extend to all aspects of any decision involving a question of law[38].

25 The parties differed on whether the jurisdiction conferred by s 67 extends to decisions of questions of mixed fact and law. HIA contended that such decisions could only be the subject of appeal if the factual aspects of the question decided were not in dispute. That submission would effectively reduce the jurisdiction to one relating to questions of law. Decisions of the Supreme Court and the Court of Appeal which have taken that view of s 67 relied upon decisions construing its precursor provision, s 20(5) of the *Commercial Tribunal Act* 1984 (NSW). That provision took its place in a legislative scheme in which only a legally qualified Chairman or Deputy Chairman of the Commercial Tribunal could decide or refer questions with respect to matters of law[39]. A leading decision on s 67 in this connection is *Kalokerinos v HIA Insurance Services Pty Ltd*[40]. It expressly followed earlier decisions on s 20(5) of the *Commercial Tribunal Act*[41]. Later decisions followed it[42]. However, the language of s 67 is

---

37 Such questions define the grant of judicial review jurisdiction in s 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth).

38 *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292 at [109]-[110] per Basten JA; cf s 51(6) of the *Income Tax Assessment Act* 1922 (Cth) and s 196(2) of the *Income Tax Assessment Act* 1936 (Cth) as considered in *Ruhamah Property Co Ltd v Federal Commissioner of Taxation* (1928) 41 CLR 148 at 151 per Knox CJ, Gavan Duffy, Powers and Starke JJ, 155 per Isaacs J; [1928] HCA 22 and *XCO Pty Ltd v Federal Commissioner of Taxation* (1971) 124 CLR 343 at 348 per Gibbs J; [1971] HCA 37, respectively.

39 *Commercial Tribunal Act*, ss 5(1) and 20(3). See *Esanda Finance Corporation Ltd v Murphy* (1989) ASC ¶55-703 at 58,349 per Hunt J; *Canham v Australian Guarantee Corporation Ltd* (1990) 20 ALD 361 at 368 per Carruthers J; *Sullivan v Waltons Credit Ltd* (1990) ASC ¶56-023 at 59,233 per Carruthers J; *Custom Credit Corporation Ltd (in liq) v Commercial Tribunal of New South Wales* (2000) ASC ¶155-041 at 200,364-200,365 [83]-[90] per Greg James J. See also the discussion by Gleeson CJ in *Custom Credit Corporation Ltd v Commercial Tribunal (NSW)* (1993) 32 NSWLR 489 at 492-493.

40 [2004] NSWCA 312.

41 [2004] NSWCA 312 at [43]-[47].

42 *Grygiel v Baine* [2005] NSWCA 218 at [26] per Basten JA, Mason P agreeing; *Bahadori v Permanent Mortgages Pty Ltd* (2008) 72 NSWLR 44 at 49 [18]-[20] per Tobias JA, Campbell JA agreeing; *Douglas v New South Wales Land and Housing Corporation* [2008] NSWCA 315 at [16]-[17] per Tobias JA, Bell JA and

(Footnote continues on next page)

not as confined as that line of authority would suggest. The words "question with respect to a matter of law" are wide enough to encompass a question of mixed law and fact. Questions of fact and law are often closely intertwined[43].

Section 75A of the *Supreme Court Act*

26 It was submitted for Mr and Mrs Kostas that s 75A of the *Supreme Court Act* "broadens the nature of the appeal" under s 67. That submission, which involved issues of jurisdiction and power, requires consideration of the operation of s 75A.

27 Section 75A applies to an appeal to the Supreme Court and an appeal in proceedings in that Court[44]. It was enacted in 1972 and replaced s 109 of the *Supreme Court Act*[45], which applied to appeals to the Court of Appeal from the Supreme Court in a Division. It applies to statutory appeals from administrative bodies[46]. The qualification that s 75A "has effect subject to any Act"[47] directs attention to the particular appeal jurisdiction in aid of which it is invoked and the limits of that jurisdiction, and of particular powers, accompanying its grant. An appeal is a creature of statute and may take various forms. Therefore, "it is always important, where a process called 'appeal' is invoked, to identify the character of the appeal and the duties and powers of the court or tribunal conducting it"[48]. On the other hand, the qualification that s 75A takes effect subject to any Act must be read in light of its character as a source of ancillary

---

Gyles AJA agreeing. See also *Chapman v Taylor* (2005) Aust Contract Reports ¶90-205 at 88,280 [33] per Hodgson JA, Beazley and Tobias JJA agreeing.

43 *Maurici v Chief Commissioner of State Revenue* (2003) 212 CLR 111 at 116 [8]; [2003] HCA 8.

44 *Supreme Court Act*, s 75A(1).

45 *Supreme Court (Amendment) Act* 1972 (NSW), ss 7(d) and 9(b). The enactment of s 75A was recommended by the Law Reform Commission of New South Wales in *Second Report of the Law Reform Commission on Supreme Court Procedure*, Report No 14, (1971) at 42 [166].

46 As appears from the term "court, body or other person" in s 75A(6) and from other sections of the *Supreme Court Act* contemplating appeals from such bodies: ss 46A(1)(d), 48 and 49.

47 *Supreme Court Act*, s 75A(4).

48 *Walsh v Law Society (NSW)* (1999) 198 CLR 73 at 90 [50] per McHugh, Kirby and Callinan JJ; [1999] HCA 33; see also *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA.

jurisdiction and remedial power. The purpose of s 75A would be defeated if the application of the section were displaced too readily by reference to limits on the primary grant of appellate jurisdiction and the powers incidental to that grant. There is, however, one important sub-section of s 75A which would not sit easily with the limited nature of the appeal right conferred by s 67. That sub-section is s 75A(5), which provides:

> "Where the decision or other matter under appeal has been given after a hearing, the appeal shall be by way of rehearing."

An appeal by way of rehearing requires that the appellant demonstrate "that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error"[49]. The capacity, in such an appeal, to review factual and discretionary error seems at odds with the nature of the jurisdiction conferred by s 67. It is not necessary finally to decide the question here because here the fact finding undertaken by the primary judge was supportable as an exercise of the powers conferred by s 75A(6) and other sub-sections of s 75A.

28 By s 75A(6), the Supreme Court has the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning the drawing of inferences and the making of findings of fact[50]. The Court may also make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made or which the nature of the case requires[51].

29 It may be debatable whether some of the "powers" conferred by s 75A are grants of jurisdiction or powers in aid of jurisdiction[52]. The grant of power under s 75A(6), however characterised, is ancillary to the primary grant, which, in this case, was conferred by s 67 of the CTTT Act. Its exercise will necessarily be

---

49 *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23] per Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 40; see also *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111] per McHugh, Gummow and Callinan JJ; [1998] HCA 67.

50 The predecessor to s 75A(6), s 109(3)(b), conferred similar powers by reference to those of the "court, judge, justice or person whose decision is under appeal".

51 *Supreme Court Act*, s 75A(10).

52 See *Osland v Secretary to the Department of Justice* (2010) 84 ALJR 528 at 535 [19] per French CJ, Gummow and Bell JJ; 267 ALR 231 at 238-239; [2010] HCA 24 and authorities cited therein; and see the analogous provision of s 44 of the *Administrative Appeals Tribunal Act*, defined as a grant of jurisdiction in s 44(10).

restrained by the need to have regard to the limited nature of the appeal right conferred by s 67.

30 By s 67(3)(a) of the CTTT Act, the Supreme Court, where an appeal is successful, may make such orders as the Tribunal should have made. That power is properly exercised where the Court's decision of a question of law leaves only one possible outcome, having regard to undisputed facts or facts found by the Tribunal[53]. Invocation of the ancillary jurisdiction and/or power conferred by s 75A(6) of the *Supreme Court Act* enables the Court, inter alia, to draw inferences from facts found by the Tribunal or to find facts on materials before the Tribunal which were not in dispute. An occasion for the use of that power would arise, as in this case, where limited fact finding would avoid the need for a remitter to the Tribunal and the imposition upon the parties of additional expense and delay.

31 In *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council*[54], Spigelman CJ, with whom the other members of that five-member Court agreed, said of s 75A[55]:

> "Such a jurisdiction conferred on a court which has 'all jurisdiction which may be necessary for the administration of justice in New South Wales' (s 23 of the *Supreme Court Act*) should not be narrowly construed. Nor can the words 'subject to any Act' be found to be satisfied save by clear statutory provision to that effect."

His Honour also said[56]:

> "This Court must be concerned that the course of administration of justice in this State does not impose unnecessary cost burdens on parties by adopting a narrow interpretation of statutory powers conferred upon the Court to ensure the just and efficient administration of justice. Where no new findings of primary fact are required to be made, this Court should exercise a power conferred upon it in wide terms so as to ensure that the cost of legal disputation is minimised and thereby apply the guiding principle in s 56 of the *Civil Procedure Act* 2005 to the exercise of powers conferred by an Act other than that Act or by Rules of Court, so as to

---

53 See *Baird v Magripilis* (1925) 37 CLR 321 at 334 per Starke J; [1925] HCA 49.

54 (2007) 71 NSWLR 230.

55 (2007) 71 NSWLR 230 at 251 [97].

56 (2007) 71 NSWLR 230 at 252 [103].

facilitate the just, quick and cheap resolution of the issues in dispute in civil proceedings."

32 The conclusion that s 75A would not convert an appeal under s 67 into an appeal by way of rehearing would not involve a rejection of the observations of Spigelman CJ. They were put to one side by the Court of Appeal in subsequent decisions on the basis that they were not part of the ratio in *Thaina Town*[57]. Basten JA, in the Court of Appeal in the present case, held that, when an error of law had been identified in an appeal under s 67 and the Court could make orders which ought to have been made by the Tribunal, the Court should not "engage in a fact-finding exercise of its own, rather than making such order as it thinks appropriate, on the basis of facts agreed or fully found"[58]. That approach, with respect, took inadequate account of the remedial scope of s 75A, the objectives of the CTTT Act and the capacity of the Court of Appeal to inform the exercise of its discretionary jurisdiction and powers under s 75A with appropriate restraint. The observations made by Spigelman CJ in *Thaina Town*, so far as they went, were correct.

Whether the jurisdiction of the Supreme Court was properly invoked

33 An appellant invoking s 67 should identify the decisions of the Tribunal of questions with respect to matters of law which are the subject of the appeal[59]. A decision of a question with respect to a matter of law is not merely a condition of the jurisdiction conferred by s 67, it is the subject matter of that jurisdiction[60]. The requisite identification did not happen in this case. Nevertheless, the grounds of appeal to the Supreme Court asserted errors of law and of mixed law and fact on the part of the Tribunal constituting, or reflective of, decisions

---

57 *B & L Linings Pty Ltd v Chief Commissioner of State Revenue* (2008) 74 NSWLR 481 at 503 [75] per Allsop P, Giles and Basten JJA agreeing; *GPT RE Ltd v Belmorgan Property Development Pty Ltd* (2008) 72 NSWLR 647 at 670-671 [98]-[99] per Basten JA, Bell JA and Young CJ in Eq agreeing.

58 *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292 at [120].

59 *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646 at 653-654 [18], 654 [20] per McHugh, Gummow and Heydon JJ; [2005] HCA 55; *Kalokerinos v HIA Insurance Services Pty Ltd* [2004] NSWCA 312 at [58] per Bryson JA; *Grygiel v Baine* [2005] NSWCA 218 at [29] per Basten JA, Mason P agreeing; *Bahadori v Permanent Mortgages Pty Ltd* (2008) 72 NSWLR 44 at 47 [2] per Giles JA, 53 [33] per Tobias JA.

60 See the like observation made by Gummow J with respect to s 44 of the *Administrative Appeals Tribunal Act* in *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175 at 178.

amenable to appeal under s 67. They raised a number of questions including that which is dispositive of this appeal, namely, whether there was any evidence before the Tribunal upon which it could make particular findings. That is a question of law[61].

34 Mr and Mrs Kostas submitted, in the first place, that the particular question for decision by the Tribunal, namely, whether they had validly terminated the contract, was a question with respect to a matter of law within the meaning of s 67(1) of the CTTT Act and that the Supreme Court had jurisdiction to determine whether the Tribunal erred in answering that question. In the alternative, they submitted that there were "sub-questions" contained within the larger question of the validity of the termination of the contract which "separately and cumulatively grounded the Court's jurisdiction in the appeal". It may be accepted that the "question with respect to a matter of law", which is the subject of a decision under appeal pursuant to s 67, may be defined with varying degrees of generality. It may be defined as a single question or multiple questions which can be regarded as subsumed in one decision or separately decided. In this case, as appears below, the decision that Mr and Mrs Kostas had not validly terminated the contract turned upon errors of law, including a finding of fact as to the service by SCC of claims for extensions of time which was not grounded in any evidence, material or information properly before the Tribunal.

The material before the Tribunal

35 On 10 November 2004, counsel for Mr and Mrs Kostas told the Tribunal that the evidentiary issues necessary for the determination of the preliminary point had been covered in the earlier hearing. Counsel foreshadowed a short re-examination of Mr Kostas and the tender of "some parts of the evidence" on the question of repudiation. The matter could then, it was said, proceed without cross-examination of the witnesses whose evidence Mr and Mrs Kostas had indicated they would rely upon. Counsel said: "We will indicate what those pieces of evidence are." There would be no need to trouble the Tribunal "with the mass of evidence which has already been served". Counsel for HIA relied upon a tender bundle of documents, including documents which had been put to Mr Kostas in cross-examination, and agreed to provide the Tribunal with a folder of the relevant material. Counsel did not indicate any intention to rely upon the affidavits of SCC's principal, Mr Turrisi, which had been filed in the proceedings but not read or tendered. Counsel for Mr and Mrs Kostas agreed to deliver with their submissions copies of the material upon which they relied. A list of the

---

61 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 per Mason CJ (with whom Brennan J agreed), 368 per Deane J, 387 per Toohey and Gaudron JJ; [1990] HCA 33. See also *Brown v Repatriation Commission* (1985) 7 FCR 302 at 304.

relevant documents had already been provided by letter to HIA's counsel. Mr Kostas had been cross-examined. It was agreed during the discussions on 10 November that he spoke for himself and Mrs Kostas and that his cross-examination would speak "for both of them".

36 On 8 December 2004, Mr and Mrs Kostas filed in the Tribunal copies of the evidence already before the Tribunal upon which they relied in support of their submissions on the termination issue[62]. This comprised affidavits sworn by Mr and Mrs Kostas, other witness affidavits and expert reports prepared by Paul Rappoport, an architect, and George Zakos, a builder and arbitrator, which related, inter alia, to the state of completion of the works as at 12 June 2000 and defects in the works.

37 It was one of the complaints made by Mr and Mrs Kostas in their appeal to the Supreme Court that, absent any tender of Mr Turrisi's affidavits and absent any notice that HIA wished to rely upon them, the Tribunal nevertheless appeared to have based its findings in relation to the termination issue in part on material in Mr Turrisi's affidavits. The Tribunal did not refer to the affidavits in its reasons at all.

The building contract

38 The named parties to the building contract were Mr Kostas and SCC, although, as noted earlier[63], the proceedings seem to have been conducted as though Mrs Kostas was a party. The terms were contained, for the most part, in "[g]eneral conditions of contract" which formed part of a standard-form home building contract executed by the parties.

39 The contract works were to commence within 28 working days of the date of the contract, which was 5 August 1999, and were to be completed within 30 calendar weeks from the date of commencement (cl 5). SCC could seek extensions of time when the work was delayed for one or more specified causes (cl 6). An extension of time was to be claimed by notice in writing setting out the cause and estimated length of the delay. The notice was to be given within 10 working days from the causative event or from the date of agreement to a contract variation giving rise to the delay. A procedure for effecting contract variations was set out (cl 12).

---

62 As appears from the affidavit of their solicitor which was filed in the appeal from the Tribunal to the Supreme Court.

63 See above at n 8.

40 Clause 24 specified defaults on the part of SCC for which the contract could be terminated. They included suspension of the work before completion without reasonable cause, failure to proceed diligently with the work and failure to remedy defective work or remove faulty or unsuitable materials which substantially affected the work. Mr and Mrs Kostas could notify SCC in writing of a remediable default and indicate that, unless the default were remedied within 10 working days or such longer time as was specified, Mr and Mrs Kostas would end the contract. Clause 24 also provided for termination of the contract by written notice where SCC had not complied with a request by Mr and Mrs Kostas within the time allowed or where the default could not be remedied.

41 Clause 27 set out the ways in which a written notice "must be given" under the contract. They were: handing it to the other party; leaving it with a person apparently over 16 at the other party's business or residential address; posting it by certified mail to the last known address of the other party; or sending it by facsimile transmission to the last known facsimile number of the other party. A notice not handed to the other party was to be taken to have been received three working days after being posted or the following day if left with a person at the other party's address or transmitted by facsimile.

The Tribunal's decision

42 In answer to Mr and Mrs Kostas' submission that they had terminated the contract, HIA contended that on 31 March 2000 and 23 May 2000, SCC had sent notices to Mr and Mrs Kostas claiming extensions of time pursuant to cl 6 of the contract. It submitted that the effect of the notices was that the date for practical completion was deemed to be extended to the end of September 2000. Mr and Mrs Kostas' evidence was that they never received the claims. They also submitted that there was no evidence that either of the claims had been sent. They submitted that HIA could not rely upon Mr Turrisi's affidavits, which it had not tendered.

43 In an affidavit sworn on 15 August 2003, Mr Turrisi said that the claim of 31 March 2000 had been sent. He did not say how. He also said he had "sent a letter" on 23 May 2000 claiming an extension of time but did not say whether it was by certified mail. In his affidavit of 3 October 2003, he said Mr and Mrs Kostas would not agree to the extensions of time he claimed on 31 March 2000 and 23 May 2000. He did not elaborate by reference to the time, place or mode of those rejections.

44 The Tribunal made findings adverse to the credibility of Mr and Mrs Kostas. It rejected Mr Kostas' evidence that he had prepared his list of defects without the aid of a building consultant. On that basis – and, it appears, on that basis alone – the Tribunal reached the sweeping conclusion that it was

"not prepared to accept the Owners as reliable witnesses unless their evidence on the point is corroborated by another witness or other, reliable, material"[64].

45 The Tribunal said that it was satisfied on the evidence that SCC had sent the extension of time claims to Mr and Mrs Kostas. Reflecting its general finding adverse to the credibility of Mr and Mrs Kostas, it said that it was "not satisfied that they did not receive [the claims]"[65]. It did not specify the evidence upon which it relied for its positive finding that the claims were received. There were extension of time claims for 31 March 2000 and 23 May 2000 in the tender bundle but no evidence as to their despatch or receipt. They were not countersigned by Mr or Mrs Kostas. An earlier claim for extension of time dated 24 January 2000, which was not in dispute, bore the signature of one of them. Without any reference to cl 27 of the contract, the Tribunal nevertheless concluded[66]:

> "that the notices were validly served and that the Builder's time under the varied contract to complete was extended … It is not a matter … of relying upon the deemed service portion of Clause 6 of the contract. It is a finding of service, despite the evidence of the Owners. There was no notice of dispute, as required by the contract."

46 The conclusion as to service, for which there was no evidence, was critical to the outcome of the case. Based on that conclusion the Tribunal found that, at the time of the notice of default sent to SCC on 4 May 2000, the extended contract had four months to run. It said[67]:

> "The position therefore is that as at the date of the first notice, the contract still had 4 months or so to run, and major progress with the works was dependent upon action by the Owners."

The inference to be drawn, according to the Tribunal, was that "after a minor delay, the Builder intended to proceed with its essential promises"[68]. The Tribunal held that the notice of 12 May 2000 was not valid because it referred to

---

64 [2005] NSWCTTT 345 at [10].

65 [2005] NSWCTTT 345 at [11].

66 [2005] NSWCTTT 345 at [11].

67 [2005] NSWCTTT 345 at [17].

68 [2005] NSWCTTT 345 at [17].

"defective works" without specifying what they were[69]. A further notice of 16 May 2000 also could not be relied upon[70].

47 The termination letter of 29 June 2000 was found not to be effective because of the want of a "valid preliminary notice to rectify default"[71]. It was held to constitute a repudiation of the contract by Mr and Mrs Kostas. The Tribunal also held that SCC had not, by its conduct, repudiated the contract. It referred to a submission on behalf of Mr and Mrs Kostas that there was no evidence from SCC to support a conclusion that Mr and Mrs Kostas were responsible for delays in the completion of the contract[72]. This was the only reference in the Tribunal's reasons to the submissions on behalf of Mr and Mrs Kostas that there was no evidence from SCC.

The grounds of appeal from the Tribunal to the Supreme Court

48 The summons by which Mr and Mrs Kostas instituted their appeal did not identify in terms a decision of the Tribunal of a question with respect to a matter of law which would support the invocation of the jurisdiction conferred on the Supreme Court by s 67 of the CTTT Act. However, the grounds of appeal set out in a schedule to the summons did assert errors of law on the part of the Tribunal and, for the reasons already given, raised questions with respect to matters of law allegedly decided by the Tribunal[73].

49 The grounds raised complaints about reliance by the Tribunal on material not in evidence (grounds (a) and (b)), inconsistency between the Tribunal's orders and earlier orders made on 19 June 2002 (ground (c)), factual findings made without evidence (ground (d)), misconstruction of the contract (grounds (e) and (h)), findings contrary to "incontrovertible evidence of the plaintiffs" (grounds (f), (i), (j), (l) and (p)), erroneous shifting of the onus of proof (ground (g)), misinterpretation of the *Home Building Act* (ground (k)), erroneously based credibility findings (grounds (m), (n) and (o)) and inadequate reasons (ground (q)).

---

69 [2005] NSWCTTT 345 at [18].

70 [2005] NSWCTTT 345 at [19].

71 [2005] NSWCTTT 345 at [25].

72 [2005] NSWCTTT 345 at [28].

73 The grounds were also relied upon, without discrimination, to support the claim for prerogative relief under s 69 of the *Supreme Court Act*.

The primary judge's reasoning

50 The primary judge held that errors of law infected the findings of the Tribunal and that the appeal should be allowed. He referred to conclusions unsupported by evidence, failures to act upon uncontested and uncontradicted expert evidence, and errors in the construction of the contract[74]. The errors included a failure to refer to cl 27, the erroneous finding, absent any evidence, that SCC had served written claims for extensions of time in accordance with any of the procedures prescribed in that clause and the finding that the notices of default of 4 and 12 May 2000 were ineffective in law and contrary to the requirements of the contract. His Honour held that the notice of 4 May 2000 made clear that the 42 items it listed referred to uncompleted work and that Mr and Mrs Kostas also relied upon previous suspension of works, without reasonable cause, by SCC and its failure to proceed diligently[75]. The letter of 12 May 2000 reiterated those complaints[76]. There was uncontested and uncontradicted evidence that SCC had suspended works for a period in May 2000 and made little or no progress until termination of the contract on 29 June 2000[77]. His Honour found it unnecessary to determine a complaint of want of procedural fairness based on the Tribunal's alleged reliance on the affidavits of Mr Turrisi[78].

51 The primary judge held that the correction of the Tribunal's erroneous decisions required that he make findings. These led him to conclude that on 29 June 2000 Mr and Mrs Kostas were entitled to terminate the contract in accordance with cl 24. The failure of SCC to reply, within the requisite time, stating that it would comply with the contract, was confirmation of its unwillingness to perform its obligations. The termination of the contract was held to be lawful[79].

52 The primary judge decided a question, namely, the lawfulness of the termination of the contract, which was a question with respect to a matter of law. It is not necessary to determine whether the multiplicity of "decisions" identified by his Honour as decisions of the Tribunal informed by errors of law should be

---

74 [2007] NSWSC 315 at [165].

75 [2007] NSWSC 315 at [110].

76 [2007] NSWSC 315 at [115].

77 [2007] NSWSC 315 at [102].

78 [2007] NSWSC 315 at [166].

79 [2007] NSWSC 315 at [171].

treated as elements of the one overarching decision concerning the lawfulness of the termination of the contract or whether they each stood as distinct decisions for the purposes of s 67. Nor is it necessary to decide whether any of the "decisions" related to questions of mixed law and fact. On any view, his Honour exercised the jurisdiction and powers conferred on him by s 67 and the ancillary jurisdiction and powers conferred on him by s 75A(6) of the *Supreme Court Act*.

The reasoning and orders of the Court of Appeal

53 The principal judgment in the Court of Appeal was delivered by Basten JA. His Honour referred to the errors found by the primary judge in the Tribunal's reasons. He held that those matters had not been identified by the Tribunal as questions for decision with respect to matters of law. An appeal under s 67 could encompass decisions which were impliedly made, or necessarily formed part of the decision-making process[80]. But s 67 would prevent a point of law being taken for the first time on appeal[81]. His Honour held that the primary judge's attempt to identify questions of law decided by the Tribunal from which an appeal could lie had failed[82].

54 Spigelman CJ agreed generally with Basten JA. He held the words "with respect to" in s 67 to be words of limitation intended to make it clear that no appeal would lie with respect to a matter of fact[83]. The subject matter of the appeal was the "matter of law" and not other matters connected to it[84]. The primacy intended to be given to the Tribunal as the finder of fact and the maker of any evaluative judgment required the jurisdiction provision in s 67(1) and the provision conferring power in s 67(3) to be understood as a single, coherent and congruent scheme[85].

55 Allsop P also generally agreed with Basten JA. He cautioned that the extent to which a decision with respect to a matter of law could be implicit in the reasoning of the Tribunal was not amenable to convenient definition[86]. The

---

80 [2009] NSWCA 292 at [129].

81 [2009] NSWCA 292 at [129], citing Handley JA in *Smith v Collings Homes Pty Ltd* [2004] NSWCA 75 at [61].

82 [2009] NSWCA 292 at [160].

83 [2009] NSWCA 292 at [16].

84 [2009] NSWCA 292 at [6]-[7].

85 [2009] NSWCA 292 at [20].

86 [2009] NSWCA 292 at [26].

question whether a "no evidence" ground would fall within the expression "a decision on a question with respect to a question of law" might depend on the circumstances[87].

56 The orders made by the Court of Appeal were:

> "1. Allow the appeal and set aside the orders and declarations made in the Common Law Division on 30 October 2007.
>
> 2. In lieu thereof,
>
> a. dismiss the summons filed by the plaintiffs on 22 July 2005;
>
> b. order the plaintiffs to pay the costs of the first defendant in the Common Law Division.
>
> 3. Order the first and second respondents to pay the appellant's costs in this Court.
>
> 4. Grant the respondents an indemnity certificate under the *Suitors' Fund Act* 1951 (NSW) in respect of the appeal."

57 For reasons already given, the approach taken by the Court of Appeal reflected an unduly narrow view of the jurisdiction and powers conferred on the Supreme Court by s 67 of the CTTT Act and s 75A of the *Supreme Court Act*.

Conclusions and disposition

58 HIA's submissions as to the scope of the Supreme Court's jurisdiction and powers under s 67 involved the following propositions:

1. On an appeal under s 67(1) it is necessary to identify a decision of the Tribunal of a question with respect to a matter of law that was before the Tribunal. A "decision" in this context refers to the adjudication of a dispute, difference or controversy between the parties before the Tribunal. The matter of law may only include mixed questions of law and fact where the factual issues are resolved, that is, the facts found by the Tribunal are not in dispute.

2. The broad question for which Mr and Mrs Kostas contended, namely, whether they had validly terminated the contract, could not, at that level of generality, yield a decision of a question within the meaning of s 67(1).

---

87 [2009] NSWCA 292 at [27].

Nor did the questions identified by the primary judge identify such a decision.

3. The powers of the Supreme Court on an appeal under s 67 were limited to correcting legal error and remitting the matter back to the Tribunal (if necessary) or applying the law, properly understood, to the facts as found by the Tribunal.

4. The Tribunal had made no decision of the question whether cl 27 was relevant to the dispute before the Tribunal. There was no consideration of the question in the Tribunal's reasoning. Therefore the question did not arise for appellate review.

HIA made submissions about the state of the evidence before the Tribunal which included the following:

1. It would have been open to the Tribunal to conclude, if it had not accepted the SCC evidence concerning the extension of time, that Mr and Mrs Kostas nonetheless did not have a basis for termination given their own acts and omissions.

2. The finding that the contract had been extended was not critical to the decision that SCC had not repudiated it given that Mr and Mrs Kostas' conduct in issuing the notice of termination was itself a repudiation of the contract. Other acts of Mr and Mrs Kostas were found to have resulted in a disentitlement to terminate the contract.

3. There was evidence of the service of the extension of time notices. The notices themselves were in evidence.

HIA also argued that it was open to Basten JA to conclude that Mr Turrisi's affidavits were available to the Tribunal given that the written submissions of the parties referred to the Turrisi affidavits and that the submissions were read in the proceedings. For the reasons already given, that submission cannot be accepted.

59 Mr and Mrs Kostas submitted that:

1. The jurisdiction conferred by s 67 extended to decisions on questions of mixed law and fact.

2. Once error of law was shown in an appeal under s 67, the Supreme Court, under s 67(3)(a), could determine any other question which in its opinion would enable it to make orders that should have been made in relation to the proceedings.

3. The decision under appeal did not have to be a decision of a question expressly disputed by the parties before the Tribunal.

4. A decision of the Tribunal for which there was no evidence could be characterised as a decision of a question with respect to a matter of law.

For the reasons already given, propositions one, three and four should be accepted.

60 Mr and Mrs Kostas submitted that it was open to the primary judge, once his jurisdiction was established, to find that the time for completion by SCC had not been extended to September 2000, that SCC's conduct justified the giving of the default notices under cl 24 on the grounds of suspension of the works without reasonable cause and lack of diligence, and that SCC's failure to correct its conduct justified termination on 29 June 2000. Those propositions should also be accepted. Having found error of law informing the Tribunal's decision that Mr and Mrs Kostas had not validly terminated the contract, the primary judge was entitled on the factual material, which was largely uncontradicted, to make the findings he did and in so doing to bring finality to the determination of the preliminary question which had been defined by the Tribunal in November 2004.

61 The appeal should be allowed. I agree with the orders proposed in the joint judgment.

62 HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. In August 1999, the appellants contracted with a builder (Sydney Construction Co Pty Ltd – "the builder") for renovation of their residence in suburban Sydney[88]. The works were to take 30 weeks and were to cost $330,000. Before the works were finished, the contract was terminated. More than 10 years later, the appellants and the first respondent, the insurer of the builder's performance of its contract[89], continue to litigate about whether it was the appellants or the builder who wrongfully terminated the contract.

63 The appeal to this Court is from orders of the Court of Appeal of the Supreme Court of New South Wales (Spigelman CJ, Allsop P and Basten JA)[90]. The Court of Appeal had allowed the insurer's appeal against orders of a judge of the Common Law Division of the Supreme Court (Rothman J)[91]. By those orders, Rothman J set aside the "findings and orders" of the Consumer, Trader and Tenancy Tribunal ("the Tribunal") made on 25 May 2005 and declared that the appellants' termination (on 29 June 2000) of the contract with the builder "was lawful and effective".

64 The central issue in this Court is about the nature of an appeal from the Tribunal to the Supreme Court. What kinds of issue can be raised in such an appeal?

65 The Tribunal determined[92] a question which the parties had agreed should be decided separately. No order was made by the Tribunal expressly directing that an issue be tried separately. Instead, directions were given for the filing and service of written submissions on a question, described in those directions as "the question of the termination of the contract", and in the Tribunal's reasons as being "whether or not the Owners [the present appellants] had validly terminated the contract with the Builder". In the course of the proceedings which led to the parties agreeing that an issue be decided separately, the issue had been described as the "repudiation issue".

---

88 Only the first appellant is named as a party to the contract. Throughout the proceedings both appellants have been treated as contracting parties. It is convenient to continue to act on that basis.

89 Under the *Home Building Act* 1989 (NSW).

90 *HIA Insurance Services Pty Ltd v Kostas* [2009] NSWCA 292.

91 *Kostas v HIA Insurance Services Pty Ltd* [2007] NSWSC 315.

92 *Kostas v HIA Insurance Services Pty Ltd* [2005] NSWCTTT 345.

66 The Tribunal found that the appellants had repudiated the contract. A step critical to the Tribunal's finding of repudiation was that the time for performance of the contract had been extended to the end of September 2000. That, in turn, depended upon finding that the builder had "served in the manner set out in the contract"[93] two claims for extension of time – one on 31 March 2000, the other on 23 May 2000 – and that the appellants had not disputed those claims in the manner required by the contract.

67 The appellants contended that there was no material properly before the Tribunal which supported the finding that the disputed claims for extension of time had been served on the appellants. Was that a question which could be raised on appeal to the Supreme Court? That depends upon what is meant by the phrase "the Tribunal decides a question with respect to a matter of law" when used in s 67(1) of the *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW) ("the Tribunal Act"). Section 67(1) of the Tribunal Act provided, at the relevant time, that a party in proceedings before the Tribunal who was dissatisfied with a decision of that kind (a decision of "a question with respect to a matter of law") may appeal to the Supreme Court against the decision. (The Tribunal Act has since been amended to provide for such appeals to lie to the District Court, rather than the Supreme Court.)

68 As the case was argued in the Supreme Court, both at first instance and on appeal, attention was also directed to what orders the Supreme Court could make if the Tribunal did decide a question with respect to a matter of law and a party dissatisfied with the decision appealed to the Supreme Court against the decision. Those arguments proceeded on the footing that to make orders of the kind sought by the appellants, it was (or may be) necessary to examine issues of law or fact, or of mixed fact and law, other than the question said to have been erroneously decided. In this Court, however, the first respondent did not dispute that if, as the appellants argued, the Tribunal in this case decided a question with respect to a matter of law erroneously, the orders made by the primary judge should stand. It is therefore not necessary to explore, in these reasons, a number of the arguments that were considered in the Supreme Court. In particular, it will not be necessary to examine whether, on an appeal alleging an erroneous decision of a question with respect to a matter of law, the Supreme Court may determine questions of fact or law, or mixed fact and law, other than the particular question erroneously decided.

---

93 [2005] NSWCTTT 345 at [9].

69 The central issue in this Court should be resolved in favour of the appellants. Section 67(1) of the Tribunal Act permitted the appellants to appeal to the Supreme Court against the Tribunal's decision that there was material properly before the Tribunal which supported the conclusion that the disputed claims for extension of time had been served on the appellants. The conclusion that there was material of that kind, necessarily implicit in making the finding that the disputed claims had been served, was a decision with respect to a question of law.

The Tribunal Act

70 Although the immediate focus of the appeal to this Court falls upon the provisions of s 67 of the Tribunal Act (governing appeals), it is necessary to set those provisions in the context of other provisions of the Act that established the Tribunal and governed its procedures.

71 The Tribunal has functions "conferred or imposed" on it[94] by or under a number of Acts including the *Home Building Act* 1989 (NSW) ("the Home Building Act"). Section 48K(1) of the Home Building Act provided that the Tribunal has jurisdiction to hear and determine any "building claim" brought before it (in accordance with the relevant Part of that Act) in which the amount claimed does not exceed $500,000. A "building claim" was defined in s 48A(1) in a way that included the claims made by the appellants against the builder.

72 The objects of the Tribunal Act include[95] ensuring "that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair". They also include enabling "proceedings to be determined in an informal, expeditious and inexpensive manner". The progress of this dispute both within the Tribunal, and since, has been anything but expeditious and inexpensive.

73 Subject to the Act, the Tribunal may determine its own procedure[96]. It is "not bound by the rules of evidence" and "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of procedural fairness"[97]. The Tribunal is "to act with as little formality as the circumstances of

---

94 *Consumer, Trader and Tenancy Tribunal Act* 2001 (NSW), s 5(2).

95 s 3.

96 s 28(1).

97 s 28(2).

the case permit"[98]. It is to act "according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms"[99]. It is "to act as expeditiously as is practicable"[100] and must "ensure, as far as practicable, that all relevant material is disclosed to [it] so as to enable it to determine all of the relevant facts in issue"[101]. It "must ensure"[102] that each party is "given a reasonable opportunity" to call or give evidence and present its case, and "to make submissions in relation to the issues in the proceedings". A party to proceedings has the carriage of his or her own case and is not entitled to be represented by any person except as the Act provides[103]. All of these provisions are consistent with the stated object of having the Tribunal determine proceedings informally, expeditiously and inexpensively. But the Tribunal's decisions are not necessarily final; they are subject to appeal. When does appeal lie?

74 Part 6 of the Tribunal Act (ss 65-69) dealt with what the heading of the Part described as "Appeals and rehearings". Section 65 was a privative provision directed to preventing review by prerogative writ. It is not necessary to examine the application of that section. Section 66 provided for referral of questions of law to the Supreme Court, and s 67 for appeals against a decision of the Tribunal with respect to a matter of law.

75 Section 67 of the Tribunal Act, so far as now relevant, provided at the relevant time:

> "**Appeal against decision of Tribunal with respect to matter of law**
>
> (1) If, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law, a party in the proceedings who is dissatisfied with the decision may, subject to this section, appeal to the Supreme Court against the decision.

---

98 s 28(3).

99 s 28(3).

100 s 28(5)(a).

101 s 28(5)(b).

102 s 35.

103 s 36(1).

(2) An appeal is to be made in accordance with the rules of the Supreme Court. The rules of the Supreme Court may provide that an appeal (or such classes of appeal as may be specified in the rules) may be made only with the leave of the Court.

(3) After deciding the question the subject of such an appeal, the Supreme Court may, unless it affirms the decision of the Tribunal on the question:

(a) make such order in relation to the proceedings in which the question arose as, in its opinion, should have been made by the Tribunal, or

(b) remit its decision on the question to the Tribunal and order a rehearing of the proceedings by the Tribunal.

...

(8) A reference in this section to a matter of law includes a reference to a matter relating to the jurisdiction of the Tribunal."

76 It will be observed that s 67 referred to a question "with respect to a matter of law". Section 66(2) provided for the Tribunal to decide for itself, or to refer to the Supreme Court for decision, "a question [which] arises with respect to a matter of law". Section 67(1) provided for an appeal to the Supreme Court "[i]f, in respect of any proceedings, the Tribunal decides a question with respect to a matter of law". The parties advanced arguments about what followed from the use of similar language in provisions dealing in one case with reference for decision by the Supreme Court, and in the other with conferral of a right of appeal. But, as will later be explained, the determination of this case does not depend upon resolving whether any of those arguments are correct.

77 Something more must be said at this point about the decisions at first instance in the Supreme Court and on appeal to the Court of Appeal.

The appeal to the Supreme Court

78 The Tribunal having decided that the appellants had repudiated the building contract, the appellants appealed to the Supreme Court claiming (among other relief) orders "setting aside the orders ... by which the Tribunal found ... that the [appellants] had repudiated" the contract, and orders under s 67(3)(a) making what they contended were the determinations that the Tribunal should have made. Numerous grounds of appeal were stated in terms that would have been apposite had there been a general appeal to the Supreme Court by rehearing.

The question or questions of law alleged to have been wrongly decided by the Tribunal were not distinctly identified. Nonetheless, one of the several submissions made on the appellants' behalf was that there was no evidence that the builder had served the two critical claims for extension of time. (It will be recalled that the conclusion that those two claims for extension had been validly served was a necessary step in the Tribunal reaching its conclusion that the appellants had repudiated the contract.)

79 The primary judge accepted[104] the appellants' submission that there was no evidence before the Tribunal that the builder had served either of the two critical claims for extension of time and that, accordingly, the Tribunal had made an erroneous decision with respect to a question of law. The primary judge further concluded[105] that the Tribunal had made, or must be taken to have made, several other wrong decisions with respect to questions of law. At least some of the further questions which the primary judge identified as wrongly decided were questions about the proper construction and application of the contract that arose if, as the primary judge held, the Tribunal was wrong to conclude that there had been valid extensions of time for the builder's performance of the contract.

80 Whether there was any evidence before the Tribunal that the relevant claims for extension of time had been served was a matter of controversy in the Supreme Court. The Tribunal had concluded[106] that the claims had been served but did not, in its reasons, identify the evidence relied on for that conclusion, and did not specify how or when the claims had been served. An affidavit sworn by the principal of the builder, deposing to service of the claims, had been filed in the Tribunal, but that affidavit was not part of the material which the parties put before the Tribunal for its consideration in deciding the separate issue of repudiation. The material which the parties put before the Tribunal for that purpose included documents in the form of claims for extension of time but included no material which showed whether, or how, those documents had been served.

81 The appellants submitted to the primary judge that, without the affidavit of the builder's principal, there was no evidence of service and that, if the Tribunal acted on the affidavit, the appellants had been denied procedural fairness. The

---

104 [2007] NSWSC 315 at [95]-[99].

105 [2007] NSWSC 315 at [144], [170].

106 [2005] NSWCTTT 345 at [11].

primary judge held[107] that the affidavit was not evidence before the Tribunal. It followed that there was no evidence of service of the notices in accordance with the contract[108].

The appeal to the Court of Appeal

82 The principal reasons of the Court of Appeal were given by Basten JA. Subject to some qualifications, the other members of the Court (Spigelman CJ and Allsop P) agreed with Basten JA. The central conclusion reached[109] by Basten JA was that the "preferable view is that while a 'no evidence' ground may support judicial review, it does not form a basis for a statutory appeal under s 67(1)". Allsop P accepted[110] that a "finding of fact made in the absence of supporting evidence is an error of law", but concluded[111] that "[s]uch a finding may or may not amount to or involve 'a decision on a question with respect to a matter of law'". In his Honour's view, whether a finding of fact, made without supporting evidence, amounts to a decision on a question with respect to a matter of law might depend[112] "upon the context of that aspect of the Tribunal's reasoning and approach". But what aspects of the Tribunal's reasoning or approach bear upon whether a finding of fact, made without evidence, amounts to a decision of a question with respect to a matter of law was not further explored, whether generally, or by reference to the finding made by the Tribunal in this case, that claims for extension had been made and served on the appellants.

83 Basten JA sought to identify a taxonomy of those appeals that are "restricted in some way to legal error". He identified[113] three "broad categories" of appeal provisions, although he also said[114] that "there are more variations than

---

107 [2007] NSWSC 315 at [87].

108 [2007] NSWSC 315 at [98].

109 [2009] NSWCA 292 at [137].

110 [2009] NSWCA 292 at [27].

111 [2009] NSWCA 292 at [27].

112 [2009] NSWCA 292 at [27].

113 [2009] NSWCA 292 at [83].

114 [2009] NSWCA 292 at [83].

the categorisation would suggest". The first category (where the right of appeal is given from a decision that "involves a question of law") was identified[115] as the broadest category and exemplified by the provisions considered in *Ruhamah Property Co Ltd v Federal Commissioner of Taxation*[116]. The second category was said[117] to be exemplified by provisions permitting an appeal "on a question of law from a decision of" a tribunal. Reference was made to *Brown v Repatriation Commission*[118]. This second category of appeal was said[119] to be one where the question of law is "the sole subject matter of the appeal, to which the ambit of the appeal is confined". The third, and narrowest, class was said[120] to be "one restricted to 'a decision of a Tribunal on a question of law'". In such a case it was said[121] that "it is not sufficient to identify some legal error attending the judgment or order of the Tribunal; rather it is necessary to identify a decision by the Tribunal on a question of law, that decision constituting the subject matter of the appeal".

84 Basten JA rejected[122] an argument advanced by the present appellants that, once error in a question of law was established, the Supreme Court was entitled to determine any other question of fact or law (or mixed fact and law) that was necessary to exercise its power under s 67(3)(a) of the Tribunal Act to "make such order in relation to the proceedings in which the question arose as, in its opinion, should have been made by the Tribunal". As noted earlier in these reasons, it is not necessary to consider the validity of this argument.

85 Basten JA examined each of the questions which the primary judge had identified as a question with respect to a matter of law that had been wrongly

---

115 [2009] NSWCA 292 at [84].

116 (1928) 41 CLR 148; [1928] HCA 22.

117 [2009] NSWCA 292 at [85].

118 (1985) 7 FCR 302 at 304.

119 [2009] NSWCA 292 at [85].

120 [2009] NSWCA 292 at [86].

121 [2009] NSWCA 292 at [86].

122 [2009] NSWCA 292 at [105], [110], [113].

decided by the Tribunal and concluded that none was a question of that kind. As to the "no evidence" ground, he said[123]:

> "There is something highly artificial in suggesting that the Tribunal would ask itself whether there was evidence 'capable of' supporting a particular factual conclusion, as opposed to whether the assertion should be accepted. The preferable view is that while a 'no evidence' ground may support judicial review, it does not form a basis for a statutory appeal under s 67(1)."

The arguments in this Court

86 The appellants and the first respondent each advanced submissions about what was said to be the preferable construction of the phrase "question with respect to a matter of law". The appellants submitted that the connecting expression "with respect to" is, and should be understood in this context as, a broad expression, which permitted appeal to the Supreme Court in a wide range of circumstances. The appellants further submitted[124] that once "a question with respect to a matter of law" was identified, the Supreme Court could, on finding error in dealing with that question, "determine any other question of fact or law or mixed fact and law as would enable it to make appropriate orders" including orders of the kind contemplated by s 67(3)(a): "such order in relation to the proceedings ... as ... should have been made by the Tribunal".

87 By contrast, the first respondent submitted that s 67 does not give the Supreme Court the capacity to find facts differently from the Tribunal or to find facts not found by the Tribunal. In effect, the first respondent submitted that the task of the Supreme Court, on an appeal under s 67 of the Tribunal Act, was to determine only "the question [or questions] with respect to a matter of law" that founded its jurisdiction (including, perhaps, applying the correct legal holding to the facts, as found by the Tribunal). That conclusion was said to be supported by, even to follow from, the fact that, on reference under s 66 of "a question ... with respect to a matter of law", the Supreme Court would answer that question and none other. On such a reference, the Court could make no decision or order with respect to any other question or issue in the proceedings in the Tribunal.

---

123 [2009] NSWCA 292 at [137].

124 Referring to the *Supreme Court Act* 1970 (NSW), s 75A and *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council* (2007) 71 NSWLR 230 at 251-252 [95]-[101] per Spigelman CJ.

88 Because the first respondent accepted that, if there was the erroneous decision of a question with respect to a matter of law, the primary judge's orders should be restored, it is not necessary to decide the issues presented by these competing submissions about what follows from a finding that the Tribunal has erred in determining a question with respect to a matter of law. Further, there are considerable difficulties presented by expressing the operation of the relevant provisions in the fashion described. First, it is not useful to attempt to chart the metes and bounds of the task given to the Supreme Court by s 67 of the Tribunal Act, and to attempt to do so is dangerous. Secondly, to attempt such a task at the level of abstraction at which the submissions of the parties were cast, or in terms divorced from the circumstances of a particular case, would invite error.

89 Likewise, when considering whether a question is a question with respect to a matter of law, it is not useful, with respect, to attempt a taxonomy of the kind proposed by Basten JA. First, as his Honour pointed out[125], "there are more variations than the categorisation [which he proposed] would suggest". Secondly, the adoption of such a taxonomy would lead to error if the classes identified were treated as useful starting points for consideration of the effect of particular statutory provisions for appeal. The language of the statute must be the relevant starting point, not a taxonomy which seeks to reduce a wide variety of statutory provisions to a few discrete categories.

90 It is sufficient, for present purposes, to determine that the ground usually described as a "no evidence ground" raises a question of law. And the first respondent accepted that a no evidence ground may form a basis for a statutory appeal under s 67(1). The first respondent further submitted, however, that whether "there was sufficient evidence before the Tribunal such that a 'no evidence' submission could not be made ... is a factual question rather than the identification of a decision of the Tribunal of a question with respect to a matter of law".

91 The first respondent's further submission should be rejected. Whether there was no evidence to support a factual finding is a question of law, not a question of fact. The Tribunal's factual finding in this case, that the builder had served the two relevant claims for extension of time, necessarily depended upon its first accepting that there was evidence to support the finding. As Dixon CJ said in *Gurnett v The Macquarie Stevedoring Co Pty Ltd [No 2]*[126]:

---

125 [2009] NSWCA 292 at [83].

126 (1956) 95 CLR 106 at 113; [1956] HCA 29.

> "in the legal dichotomy between questions of fact and questions of law we place under the latter head a question whether there is sufficient evidence to submit to a jury in support of a cause of action. That is because it is a question for the court to decide and not for a tribunal of fact."

A tribunal that decides a question of fact when there is "no evidence" in support of the finding makes an error of law[127]. What amounts to material that *could* support a factual finding is ultimately a question for judicial decision. It is a question of law. And in this case, for the reasons given by the primary judge, there was no evidence before the Tribunal, when it decided the separate question identified by the parties, upon which the Tribunal could find that the disputed notices had been served.

Conclusion and orders

92 In this case, the Tribunal made a wrong decision with respect to a question of law. As already noted, the first respondent accepted that if that were so, it followed that the orders made by the primary judge should be restored. There should be orders that the appeal to this Court is allowed with costs. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 16 September 2009 should be set aside and in their place there should be orders that the appeal to the Court of Appeal is dismissed with costs.

---

127 *Lombardo v Federal Commissioner of Taxation* (1979) 28 ALR 574 at 578 per Bowen CJ; *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175 at 187 per Gummow J.