Supreme Court

New South Wales

Case Name:	McGinn v NSW Civil & Administrative Tribunal
Medium Neutral Citation:	[2019] NSWSC 1696
Hearing Date(s):	18 March 2019
Date of Orders:	29 November 2019
Decision Date:	29 November 2019
Jurisdiction:	Common Law
Before:	Walton J
Decision:	The Court makes the following orders: (1) The summons filed 23 April 2018 is dismissed. (2) Any application for indemnity costs by the second defendant must be filed and served, together with written submissions and evidence, within 7 days of the publication of this judgment. (3) If an application is received in accordance with (2) above, costs will be reserved and a program fixed to hear that application. (4) In the absence of an application in accordance with (2) above, the plaintiff shall pay the costs of the second defendant of the proceedings as agreed or, in default, as assessed.
Catchwords:	ADMINISTRATIVE LAW – judicial review – prerogative and declaratory relief – s 69 of the Supreme Court Act 1970 (NSW) – whether Appeal Panel had jurisdiction to make orders in relation to rental bond when the bond was not lodged with Rental Bond Authority – ss 175, 187, and 188 of the Residential Tenancies Act 2010 (NSW) – grant of relief by way of prohibition, certiorari

	or declaration is discretionary – summons dismissed – orders
Legislation Cited:	Residential Tenancies Act 2010 (NSW) Residential Tenancies Regulation 2010 (NSW) Supreme Court Act 1970 (NSW)
Cases Cited:	Lazarus v Director of Public Prosecutions (NSW) [2015] NSWSC 426 McGinn v Barilla [2018] NSWCATAP 85 Re Refugee Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57 Sophia McGinn v NSW Civil and Administrative Tribunal [2018] NSWSC 630
Category:	Principal judgment
Parties:	Sophia McGinn (Plaintiff) NSW Civil and Administrative Tribunal (First Defendant) Pasquale Barilla (Second Defendant)
Representation:	Solicitors: Crown Solicitor's Office (First Defendant) Peter A Collins & Associates (Second Defendant)
File Number(s):	2018/127488

JUDGMENT

1 **HIS HONOUR:** On 29 November 2017, the second defendant, Pasquale Barilla, lodged an application in the Consumer and Commercial Division of the New South Wales Civil and Administrative Tribunal ("the Tribunal"). The second defendant sought, *inter alia*, an order for the payment of rental bond pursuant to s 175 of the *Residential Tenancies Act 2010* (NSW) ("the Act") from his landlord, the plaintiff in these proceedings, Sophia McGinn. The first defendant is the Tribunal and filed a submitting appearance in these proceedings.

2 The Tribunal constituted by a Member, Mr J Livingston, ordered that the plaintiff pay to the second defendant $3,150 representing the amount of the rental bond of $3,400 paid by the second defendant with respect of residential premises in Ashfield, less an amount of $250 conceded by the second defendant with respect to cleaning ("the rental bond") .

3 An appeal was brought from that judgment essentially on the ground that the Tribunal lacked power to order payment of the rental bond under provisions of the Act relied upon by the Tribunal as constituting the basis for jurisdiction, namely, ss 175, 187(1)(c) and 188(c). The appeal was heard by an Appeal Panel constituted by Mr R C Titterton, Principal Member, and Dr J Lucy, Senior Member.

4 The principal argument before the Appeal Panel was that the Tribunal lacked power to make orders as to the payment of rental bond in circumstances under s 175 of the Act where the rental bond had not been deposited with the Secretary of the Rental Bond Board. The Appeal Panel rejected that contention and alternatively found that power existed under s 187 of the Act: *McGinn v Barilla* [2018] NSWCATAP 85 at [40] and [41].

5 The Appeal Panel determined, however, that the orders made by the Tribunal should be set aside and in lieu thereof made the following orders (at [81(2)]):

> (a) the appellant is directed to return the Commonwealth Bank of Australia cheque no 384541 dated 13 June 2014 to the respondent;
>
> (b) upon receipt of the bank cheque, the respondent is to pay the appellant the sum of $250 within 7 days.

6 By a summons filed 23 April 2018 the plaintiff brought an action for judicial review under s 69 of the *Supreme Court Act 1970* (NSW) for prerogative and declaratory relief (which was amended, by leave, in court at the hearing of the application). The relief claimed was expressed in the summons, as amended, as follows:

(1) An order in the nature of certiorari to remove the records of NSW Civil and Administrative Tribunal Notice of Appeal Application dismissed on 10 April 2018 and the orders made pursuant to s 175, s 187 and s 188 of the *Residential Tenancy Act 2010* (NSW) (the Act) be quashed.

(2) A declaration that the Tribunal has no jurisdiction to make orders in relation to rental bond when the bond cheque is not lodged with Rental Bond Authority.

(3) A declaration that the determination by Principal Member Titterton and Senior Member Lucy that the Tribunal has jurisdiction to make orders in relation to rental bond when the bond cheque was not lodged with Rental Bond Authority is an error of law.

(4) An order in the nature of prohibition restraining the first defendant from determining a rental bond dispute pursuant to s 175, s 187, and s 188 of the Act when the bond cheque is not lodged with Rental Bond Authority.

(5) An order that the second defendant deliver a new bank cheque to the plaintiff in 7 days.

7 The matter had been earlier fixed for hearing on 1 August 2018. That hearing was vacated by Wilson J.

8 Her Honour ordered the plaintiff to pay reasonable costs incurred by the second defendant resulting from vacation of the hearing date. Her Honour further ordered that the proceedings are not to be listed before the Court for further mention or hearing on the application of the plaintiff until the costs had been paid by her. Upon the paying of those costs, the matter has been relisted before the Court.

Issues

9 The gravamen of the plaintiff's application for judicial review was that the Tribunal did not have jurisdiction to make orders for the payment of a rental bond in circumstances where no bond had been lodged with the Rental Bond Board; in particular, the Appeal Panel did not have power to direct the plaintiff to return the bank cheque to the second defendant.

10 The plaintiff contended that the Appeal Panel erred in law in finding that the Tribunal had jurisdiction to make orders as to the payment of a rental bond which had not been deposited with the Secretary pursuant to s 175 of the Act or alternatively s 187 of that Act.

11 It was accepted that the order of the Appeal Panel under challenge was expressed as follows (*McGinn v Barilla* at [81(2)]):

> (a) the appellant is directed to return the Commonwealth Bank of Australia cheque no 384541 dated 13 June 2014 to the respondent;
>
> (b) upon receipt of the bank cheque, the respondent is to pay the appellant the sum of $250 within 7 days.

The Appeal Panel Decision

12 After setting out the provisions of s 175 of the Act, the Tribunal gave the following reasoning for the finding of power (*McGinn v Barilla* at [23]-[39]):

> [23] This power is not expressed to be limited in any way, including in the manner suggested by the landlord, that is, that it only operates when the rental

bond has been paid to the Secretary. A "rental bond" is defined in s 157 of the Act as:

> "an amount of money paid or payable by the tenant or another person as security against any failure by a tenant to comply with the terms of a residential tenancy agreement."

[24] The landlord's principal argument was that the Tribunal did not have power to "make an order as to the payment of the amount of the rental bond" under s 175(1) of the Act. This was because no bond had been paid to the Secretary (that is, the Commissioner for Fair Trading, Department of Finance, Services and Innovation; see Act, ss 3(1) (definition of "Secretary") and 162).

[25] The landlord's argument that s 175 only applies if a bond has been paid to the Secretary gains some support from the structure of Part 8 of the Act ("Rental Bonds") and the location of s 175 within that structure. Part 8 provides relevantly for the payment and deposit of rental bonds (Div 2), the release of rental bonds (Div 3) and for financial matters (Div 6). Section 175 is located in Division 3.

[26] Pursuant to s 162(1), in Division 2 of the Act, a landlord who receives a rental bond must deposit it with the Secretary "within the deposit period." Where, as in this case, the bond is paid to an agent, the bond must be deposited 10 working days after the end of the month in which the bond is paid (s 162(3)(b)). Failure to deposit the bond as required is an offence punishable by 20 penalty units (s 162(4)).

[27] All bonds paid to the Secretary are to be paid into a Rental Bond Account (Act, s 185(1)(a) in Div 6). There is to be paid from the Rental Bond Account the amount of any rental bonds payable under the Act (Act, s 185(2)(a)).

[28] Division 3 of Part 8 deals with the release of rental bonds. Pursuant to s 163(1), a claim may be made to the Secretary for the payment of a rental bond by a tenant, landlord or agent. The Secretary must then give written notice of the claim to the other parties, stating that the Secretary will pay the claim unless notified in writing by a party within 14 days that the claim is the subject of proceedings before the Tribunal or a court (s 164(2), (5)). The Secretary must pay the amount of the claim if, in essence, there is no dispute about it (s 167). If the Secretary is notified that the claim is the subject of proceedings before the Tribunal or a court, the Secretary may only pay the claim in certain circumstances, including if ordered to do so by the Tribunal or a court (s 168(1), (2)).

[29] The Tribunal's powers in relation to rental bonds are contained in s 175, the penultimate provision in Div 3. The terms of that provision are set out above. The other provisions in Div 3 are mainly concerned with the release of rental bonds which have been paid to the Secretary. They provide for a claim for the bond to be made to the Secretary and the payment of that claim by the Secretary, depending upon whether it is disputed or not. The final provision of Div 3, s 176, provides for proof of the deposit of the bond with the Secretary by way of a certificate. All of these provisions are concerned with payment of the bond in circumstances where it is held by the Secretary (or, in the case of s 176, where the question of whether it is so held is in issue). The heading of the Division, "Release of rental bonds," may also (implicitly) support a construction of the Division as being concerned with release of a bond from the Rental Bond Account, which is managed by or on behalf of the Secretary.

[30] The references to the Tribunal elsewhere in Div 3 (including in s 164(5), 168(2) and (3) and 169) contemplate the Tribunal having a role in determining disputes concerning rental bonds held by the Secretary.

[31] The tenant submitted that accepting the landlord's construction of s 175 would mean that a landlord would not be subject to the Tribunal's order-making powers concerning the bond money, where a landlord takes the money and fails to lodge the bond. We do not accept that this is the case. The Tribunal has ample powers elsewhere in the Act to make relevant orders. Section 187, for example, in Part 8 of the Act ("General Powers of Tribunal"), provides that the Tribunal may, on application by a landlord or tenant or other person under the Act, or in any proceedings under the Act, make an order that requires an action in performance of a residential tenancy agreement and an order for the payment of an amount of money (s 187(1)(b) and (c)). The landlord accepted that s 187 would empower the Tribunal to make orders concerning the bank cheque paid as a bond in this case (and not banked) and the amount of that bank cheque if, as she submitted, s 175 did not apply.

[32] All of these factors support the landlord's construction of s 175. We accept that it is a construction which is open. However, we do not think it is the better construction of the provision, for the reasons which follow.

Reading words in

[33] The construction contended for by the landlord requires the Tribunal to "read words in" to s 175 of the Act; that is, to read it as if it contained additional words. Those words would limit the operation of the provision to circumstances where a rental bond has been lodged with the Secretary. In *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105–106, Lord Diplock made the following comments about the circumstances in which it is permissible to depart from a literal construction by reading additional words into a provision:

> "My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) L*td [1971] AC 850 provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts."

[34] This passage was cited by the New South Wales Court of Appeal with approval in *Austral Monsoon Industries Pty Ltd v Pittwater Council* [2009] NSWCA 154 at [68] (Spigelman CJ, McColl JA and Handley AJA agreeing) and was given qualified support by French CJ, Crennan and Bell JJ in *Taylor v Owners — Strata Plan No 11564* (2014) 253 CLR 531 at 549.

[35] In our view, the application of the literal meaning of s 175 does not lead to results which would "clearly defeat the purposes of the Act". Whilst the purpose of Div 3 of Part 8 appears (from the other provisions) to be principally concerned with the release of rental bonds held by the Secretary, this is not exclusively so (see ss 174 and 176). The three "conditions" identified by Lord Diplock do not appear to us to lead inexorably to the conclusion that any words should be read into s 175. It is not possible to determine precisely the mischief which Div 3 is designed to remedy (the first condition); whilst it may be the fair resolution of disputes about rental bonds held by the Secretary, it could also be broader than this. We do not consider that the draftsman has overlooked a matter required to be dealt with for "the purpose of the Act" to be achieved (the second condition). The broader construction of s 175 is consistent with the Act's apparent purpose. Thirdly, the words which have been allegedly omitted have to be capable of being stated with certainty; this condition is probably satisfied if the landlord's construction is accepted. The words would be, following the first "rental bond" in s 175(1), "which has been deposited with the Secretary."

[36] Fulfilment of Lord Diplock's conditions is not, in any event, determinative, the Tribunal's task being to construe the words the legislature has enacted: *Taylor v Owners — Strata Plan No 11564* (2014) 253 CLR 531 at 549 [39]. The task of statutory construction must begin with a consideration of the text itself (see, for example, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47] per Hayne, Heydon, Crennan and Kiefel JJ). The text of the Act, including the broad definition of "rental bond," indicates, in our view, that the legislature intended the Tribunal to have broad powers in relation to rental bonds, whether or not they have been paid to the Secretary. The term "rental bond" includes an amount which is "payable." Preferring a construction which would promote the purpose of the Act (*Interpretation Act 1987*, s 33) supports the tenant's interpretation of s 175, as this allows the Tribunal to make orders, under that provision, where a landlord or landlord's agent has failed to comply with the obligation to lodge the bond money.

[37] On balance, we consider that there is insufficient justification for adding the words into s 175 which would be necessary to achieve the construction contended for by the landlord. While there are some indications that Div 3 of Pt 8 is principally concerned with the release of rental bonds which have been deposited with the Secretary, the landlord's construction cannot be justified on purposive grounds, and departs from the language chosen by the legislature. It is not sufficient that the reading is "reasonably open having regard to the statutory scheme": *Taylor v Owners — Strata Plan No 11564* (2014) 253 CLR 531 at 549 [39].

[38] As indicated above, we consider that the tenant's interpretation of s 175 best achieves the legislature's purpose. To take a simple example, let us assume that a tenant pays the landlord a bond in cash. The landlord does not pay the bond to the Rental Bond Board on behalf of the Secretary, but instead spends it. When the residential tenancy agreement terminates, can it be seriously suggested that, because the landlord did not lodge the bond with

> Rental Bond Services as required, the Tribunal cannot order the landlord to return the bond (which was provided to them) to the tenant under s 175? We think not; in our view s 175(1) empowers the Tribunal to do so.
>
> [39] Our view is fortified by s 175(2) which provides that the Tribunal may make an order whether or not the amount of a rental bond has been paid by the Secretary. In other words, even if the Secretary (through the Rental Bond Board) has released a bond, the Tribunal may still make an order. This puts beyond doubt that the Tribunal's powers are not limited to making orders directed at funds held by the Secretary.

13 The Tribunal then explored the question of power under s 187 of the Act in the event that it was wrong as to the operation of s 175 (*McGinn v Barilla* at [41]-[43]) as follows:

> [41] In case we are wrong, we also consider that s 187 of the Act empowers the Tribunal to make the orders it did concerning the rental bond. Section 187(1)(c) relevantly provides that the Tribunal, on application by a landlord or tenant or some other person under the Act, or in any proceedings under the Act, may make an order for the payment of an amount of money. Further, under s 187(1)(e), the Tribunal may make an order that a party to a residential tenancy agreement perform such work or take such other steps as the order specifies to remedy a breach of the agreement. Section 188(c), on which the Tribunal relied, allows the Tribunal to make ancillary orders.
>
> [42] The landlord submitted that orders under s 187 in respect of the bond money could only be made if the nature of the claim were advised to her in advance. She said that the Tribunal may be able to make orders concerning the bank cheque if it were alleged that she had breached the residential tenancy agreement by failing to lodge that cheque. However, she argued that it would be a breach of procedural fairness for the Tribunal to make such orders without the case against her being put first. Had it been alleged that she had breached the residential tenancy agreement, she says she would have sought to join her former real estate agent to the proceedings (the agent apparently not having lodged the cheque for the bond when it was provided to the agent). She also said that she did not lodge a claim against the bond because there was (in her view) no bond; if the tenant's claim was about breaches of the residential tenancy agreement, she had counter claims she wished to make.
>
> [43] We consider that the landlord was sufficiently on notice of the tenant's claim, which was for refund of the bond, as an entitlement at the end of the residential tenancy agreement. As the tenant submitted, the rental bond was his money, provided to the landlord as security. Whilst the landlord did not receive the money (only the cheque, being a promise by the bank to pay), the tenant paid the bank for the cheque and the bank took the tenant's funds. The landlord and her agent were required by the Act to deposit the cheque with the Secretary and failed to do so. There was no breach of procedural fairness in the Tribunal making orders about the payment of the amount of the rental bond under s 187(1)(c) in these circumstances. The landlord could have applied for the agent to be joined to the proceedings, but did not do so. She made counter claims, although she did not provide evidence in support of them, but had an opportunity to do so. We do not consider that there was any error in the Tribunal making an order under s 187 in respect of the rental bond,

or the cheque paid as a rental bond, assuming s 175 to be inapplicable. We note that it relied upon both provisions.

Background Circumstances

14 The Court had before it an affidavit of the plaintiff sworn 29 May 2018 and the second defendant affirmed 5 May 2018.

15 The following facts and circumstances were primarily derived from uncontentious findings of fact found by the Tribunal (see *McGinn v Barilla* at [8]).

16 The plaintiff and the second defendant entered into a residential tenancy agreement made on 13 October 2016 for a fixed term of 12 months with a commencing weekly rent of $850 increasing to $900 from 13 October 2016 and a rental bond of $3,400 to be paid by the second defendant ("the agreement") for the premises at Ashfield ("the premises").

17 The agreement was not in evidence but was apparently prepared by a managing agent for the plaintiff.

18 In June 2014, the second defendant paid the rental bond by a bank cheque delivered to the managing agent in the sum of $3,400 (made out to the "Rental Bond Board"). That amount represented four weeks' rent and was the amount of money payable by a tenant as security against any failure by the tenant to comply with the terms of the residential tenancy agreement.

19 About one month after making the agreement, the plaintiff discontinued with the services of the managing agent. Upon termination of its retainer, the managing agent provided the plaintiff with its file for the premises, which included the bank cheque. The managing agent had not lodged the rental bond with the Secretary as it was required to do so under s 162 of the Act.

20 Upon receipt of the file, which included the bank cheque, the plaintiff did not lodge the bank cheque with the Rental Bond Services (as she was required to do under s 162 of the Act). The plaintiff contended that no lodgement was undertaken because she had not seen the bank cheque. The bank cheque subsequently went stale.

21 On 16 November 2017, the second defendant gave vacant possession and claimed return of his rental bond.

22 On 29 November 2017, the second defendant lodged an application in the Consumer and Commercial Division of the Tribunal. The second defendant sought, *inter alia*, an order regarding the payment of the rental bond (relying on s 175 of the Act). In relation to the rental bond, on his application to the Tribunal, the second defendant stated:

> The bond was never lodged, and the bank cheque we used has since expired (bank cheques are only valid for 18 months according to CBA). The landlord is still in possession of the bank cheque, and is asking that we pay any repair costs before she surrenders the cheque back. I have attempted to organise with the landlord a fair price for what she considers repairs required for the property, however our negotiations have broken down. I don't have any guarantees that the bank will actually buy back the expired bank cheque. As we cannot come to an agreement, I would like the tribunal to order the landlord to submit the bond to the bond board, or surrender the bank cheque back to me. I am happy to pay a fair price for whatever maintenance may be required that is not considered usual wear and tear. However I am uncomfortable with the manner in which the landlord would like us to pay that amount. I would prefer those payments come out of the bond, because that's what the bond is for. I would also like the tribunal to order the landlord to pay any additional processing fees that the bank may impose by having them buy back an expired bank cheque.

23 On 18 December 2019, the Tribunal ordered the plaintiff to pay the second defendant $3,150. That amount represented the rental bond of $3,400 paid by the second defendant in respect of the premises, less an amount of $250 conceded by the second defendant in respect of cleaning. The plaintiff appealed the decision.

24 On 19 March 2018, the plaintiff's appeal against the 18 December 2019 decision was heard by the Appeal Panel.

25 On 10 April 2018, the Appeal Panel made, *inter alia*, the following orders:

> 1. The appeal is allowed in part, and order 1 made in application RT 17/50841 is set aside.
>
> 2. In lieu thereof, the Appeal Panel makes the following orders:
>
> (a) The [plaintiff] is directed to return the Commonwealth Bank of Australia cheque no 384541 dated 13 June 2014 to the [second defendant];
>
> (b) Upon receipt of the bank cheque, the [second defendant] is to pay the [plaintiff] the sum of $250 within 7 days;

> 3. To effect order 2(a) the Tribunal directs the Registrar to deliver up the bank cheque to the [second defendant] immediately.
>
> 4. Save as provided above the appeal is dismissed, and leave to appeal is refused.
>
> …

26 In the result, the plaintiff was partially successful on her appeal, with the earlier order of the Tribunal requiring the plaintiff to pay the second defendant $3,150 being set aide, and in lieu thereof the Tribunal was ordered to return to the bank cheque to the second defendant: *McGinn v Barilla* at [57]. The second defendant was also directed to pay the plaintiff $250, which was earlier conceded as owed to the plaintiff for cleaning: *McGinn v Barilla* at [58]-[59].

27 In April 2018, pursuant to order 3 above, the bank cheque was provided to the second defendant by the Tribunal (it appears that the Registrar was in possession of the cheque at the time of those proceedings). The second defendant returned the bank cheque to the Commonwealth Bank.

28 The second defendant no longer has possession or control of the bank cheque although Ms McGinn contended in submissions (not supported by evidence), that the bank cheque had been cashed in favour of the second defendant.

29 On 23 April 2018, the plaintiff filed the application before the Court as presently constituted, seeking judicial review (see at [6] above).

Course of the Proceedings

30 On 8 May 2018, Button J dismissed an application for the second defendant for summary dismissal of the summons: *Sophia McGinn v NSW Civil and Administrative Tribunal* [2018] NSWSC 630.

31 On 19 June 2018, the plaintiff filed a notice of motion seeking a default judgment for liquidated damages in the sum of $3,150. The matter was stood over for hearing on 1 August 2018, with the substantive matters, before Wilson J.

32 On 1 August 2018, there was no appearance by Ms McGinn. Her Honour made the following orders in Chambers:

> On the basis that the plaintiff has neither appeared at the hearing of this matter, nor provided a medical certificate to explain her non-attendance, the Court orders that:

> 1. The hearing date on 1st August 2018 be vacated.
>
> 2. The Plaintiff is to pay the reasonable costs incurred by the Second Defendant resulting from vacation of the hearing date determined pursuant to Section 98 of the Civil Procedure Act 2005 (NSW), in the amount of $1,260.00, inclusive of GST.
>
> 3. These proceedings are not to be relisted before the Court for further mention or hearing on the application of the plaintiff until such time as the costs referred to in Order 2 have been paid to the solicitor on record for the Second Defendant.
>
> 4. The Second Defendant is to advise the Registrar of the Court by letter or email that the plaintiff has paid the costs referred to in Order 2, within 24 hours of that occurring, if it occurs.
>
> 5. Direct the Registrar to provide a copy of these orders to the plaintiff forthwith.

33 The matter was next listed for directions before the Registrar on 8 February 2018. Registrar Bradford listed the matter for hearing on 18 March 2019 for an estimate of half a day.

34 On 18 March 2019, the matter was heard by the Court as presently constituted.

SUBMISSIONS OF THE PARTIES

35 The plaintiff appeared on her own account and the second defendant was represented by Mr Peter Collins, solicitor.

The Plaintiff's Submissions

36 In substance, the plaintiff contended that a literal reading of s 175 made clear that the Tribunal did not possess jurisdiction to make an order for the payment of the amount of rental bond if the rental bond had not been deposited with the Secretary. This was confirmed, it was submitted, by the terms of s 175(2).

37 In an affidavit filed by the plaintiff on 7 July 2018, a submission was made as to the operation of ss 175 and 187 in the following terms:

> 16. S187 is a provision relates to the general power of the Tribunal, therefore, the provision alone does not give the Tribunal power to order a payment of rental bond.
>
> 17. The pre-condition for an order of payment under s175 is when the rental bond is lodged with the rental bond authority.
>
> 18. The second defendant admitted that if the bond was paid by cash to the landlord and it is not deposited with Rental Bond Authority, then the Tribunal does not have the power to make orders. (McGinn v Barilla [2018] NSWCATAP 85 at [31])

19. It makes no difference when it is paid by bond cheque when it is not lodged.

20. The fact that the first respondent defended the second defendant's admission constitutes an admission of allegation of facts.

21. Accordingly, a declaration the Tribunal has no power to make orders under s175 and s 187 when the bond is not lodged with rental bond authority.

22. The fact that the first respondent acknowledged it might be wrong, but distorted my submission to 'claim of rental bond' to justify the findings constitutes an admission that it has no power under s 187 either.

38 During oral submissions, the plaintiff contended that the Appeal Panel did not have jurisdiction to make the orders at [81(2)] of *McGinn v Barilla*, which were in the following terms:

> [81] For the above reasons, we make the following orders:
>
> (2) … the Appeal Panel makes the following orders:
>
> > (a) the appellant is directed to return the Commonwealth Bank of Australia cheque no 384541 dated 13 June 2014 to the respondent;
> >
> > (b) upon receipt of the bank cheque, the respondent is to pay the appellant the sum of $250 within 7 days.

39 The plaintiff emphasised that s 187 was a general power which gave no jurisdiction in the absence of a power found elsewhere in the Act such as s 175.

The Second Defendant's Submissions

40 The second defendant made a written submission in the following terms:

6. The Second Defendant submits that the language and intent of Section 175(1) is clear in empowering the First Defendant to make an order as to the payment of the amount of a rental bond, without restriction.

7. The Second Defendant further submits that there is no basis for reading into Section 175(1) the limitation on its empowering function contended for by the Plaintiff to the effect that it is subject to the rental bond money having been paid to the Rental Bond [Board].

8. The Second Defendant understands it to be contented [sic] by the Plaintiff that sub-section (2) of Section 175 has the effect of limiting the First Defendant's power pursuant to sub-section (1) such that the jurisdiction provided for in sub-section (1) only applies if the rental money was paid to the Rental Bond Board. The Second Defendant submits that is not correct. The Second Defendant says that sub-section (2) does not limit the operation of sub-section (1). Rather, it expands it so that the First Defendant retains jurisdiction even if the Rental Bond Board has already paid the bond money to either of the parties to a lease.

9. The Second Defendant submits that the First Defendant was empowered to determine the dispute between the Plaintiff and the Second Defendant and did so properly in exercise of that power.

41 The second defendant also relied upon the provisions of s 187 of the Act as conferring jurisdiction.

The Legislative Provision

42 Part 8 of the Act concerns "Rental bonds". Division 1 is entitled "Preliminary" and concerns, *inter alia*, definitions and online rental bond service.

43 A "rental bond" is defined in s 157 as meaning an amount of money paid or payable by the tenant or other person as security against any failure by a tenant to comply with the terms of a residential tenancy agreement (s 157). The tenant includes a former tenant. A residential tenancy agreement is defined in s 3 as being "see s 13". Section 13(1) provides:

> **13 Agreements that are residential tenancy agreements**
>
> (1) A ***residential tenancy agreement*** is an agreement under which a person grants to another person for value a right of occupation of residential premises for the purpose of use as a residence.

44 Section 157A of the Act deals with online rental bond service. By s 157A(1) the Act provides that the Secretary may establish an online rental bond service for, *inter alia*, the deposit of the rental bond with the Secretary, the making of a claim for payment of a rental bond and the making of a payment of an amount of the rental bond.

45 The Secretary is defined in s 3 of the Act as the Commissioner for Fair Trading, Department of Finance, Services and Innovation or if there is no person employed as the Commissioner, the Secretary of the Department of Finance, Services and Innovation.

46 Division 2 of Pt 8 of the Act concerns the "Payment and deposit of rental bonds".

47 Section 159(1) provides as follows:

> **159 Payment of bonds**
>
> (1) A landlord, landlord's agent or any other person must not require or receive from a tenant or another person a rental bond of an amount exceeding 4 weeks rent under the residential tenancy agreement for which the bond was paid (as in force when the agreement was entered into).

48 Section 162 provides for the deposit of rental bonds.

49 Section 162(1) provides:

> **162 Deposit of rental bonds**
>
> (1) A landlord, landlord's agent or other person who receives an amount of rental bond must deposit that amount with the Secretary within the deposit period together with a notice in the approved form.

50 Division 3 of Part 8 concerns the "Release of rental bonds" and incorporates ss 163-176 of the Act. Section 163(1)-(3) provide as follows:

> **163 Claims for rental bonds**
>
> (1) A claim may be made to the Secretary for the payment of a rental bond by:
>
> (a) the tenant or an agent of the tenant, or
>
> (b) the landlord or an agent of the landlord, or
>
> (c) jointly by the landlord and the tenant or agents for them.
>
> (2) A claim is to be made in the approved form.
>
> (3) A claim must not be made before the termination of a residential tenancy agreement unless:
>
> (a) it is made jointly by or on behalf of the landlord and all the tenants, or
>
> (b) it is made by or on behalf of the landlord and directs that the rental bond be paid to all the tenants, or
>
> (c) it is made by or on behalf of all the tenants and directs that the rental bond be paid to the landlord.

51 Section 164 provides for the notice of a claim. Section 164(1), (2) and (3) provide as follows:

> **164 Claim notice to be given to other party**
>
> (1) This section applies if a claim for the whole or part of a rental bond is made by a landlord or a tenant without the consent of all the other parties to a residential tenancy agreement.
>
> (2) The Secretary must give written notice of the claim to all of the other parties to the residential tenancy agreement as known to the Secretary.
>
> (3) A notice under this section may be addressed to one or more parties to the residential tenancy agreement.

52 Section 167 deals with payments of rental bonds where there is no dispute. Section 168 deals with disputed rental bond claims. Section 168 is extracted in full below:

> **168 Disputed rental bond claims**

(1) This section applies if the Secretary is notified in writing within the claim notice period or before payment of a claim for a rental bond that a claim for the payment of an amount of rental bond is the subject of proceedings before the Tribunal or a court.

(2) The Secretary may pay the claim only in the following circumstances:

(a) if the party who disputes the claim gives the Secretary written notice of the party's consent to payment of the claim,

(b) in accordance with an order of the Tribunal or court,

(c) if any applicable order of the Tribunal or court has been satisfied,

(d) if the proceedings are withdrawn.

(3) If any applicable order of the Tribunal or a court has been wholly or partly satisfied before a claim for an amount of rental bond is paid, any amount of rental bond no longer required to satisfy the order must be paid to the party who would, but for the claim, be entitled to the amount.

(4) The Secretary must not pay an amount of a claim until proceedings affecting the claim are finally determined if, before any amount is paid, the Secretary is given written notice of an appeal against a relevant decision of the Tribunal or a court.

(5) A payment by the Secretary of an amount under this section in accordance with an order of the Tribunal or a court is for all purposes taken to be a payment by the person subject to the order.

53 Section 169 provides as follows:

169 Appeals may be made despite payment

A person may appeal against a decision of the Tribunal or a court affecting the payment of an amount of rental bond even though the Secretary has paid an amount of rental bond under this Division.

54 Section 175 lies at the centre of one of the controversies in this matter. That provision, which is found in Div 3, is in the following terms:

175 Powers of Tribunal

(1) The Tribunal may, on application by a landlord or tenant or any other person (including a former co-tenant) who has an interest in the payment of a rental bond, make an order as to the payment of the amount of the rental bond.

(2) The Tribunal may make an order whether or not the amount of a rental bond has been paid by the Secretary.

(3) An application for an order must be made within the period prescribed by the regulations.

55 The Tribunal is defined in s 3 as meaning the Civil and Administrative Tribunal (NSW).

56 Part 9 of Div 1 of the Act deals with the powers of the Tribunal. Section 187(1) provides as follows:

> **187 Orders that may be made by Tribunal**
>
> (1) The Tribunal may, on application by a landlord or tenant or other person under this Act, or in any proceedings under this Act, make one or more of the following orders:
>
> (a) an order that restrains any action in breach of a residential tenancy agreement,
>
> (b) an order that requires an action in performance of a residential tenancy agreement,
>
> (c) an order for the payment of an amount of money,
>
> (d) an order as to compensation,
>
> (e) an order that a party to a residential tenancy agreement perform such work or take such other steps as the order specifies to remedy a breach of the agreement,
>
> (f) an order that requires payment of part or all of the rent payable under a residential tenancy agreement to the Tribunal until the whole or part of the agreement has been performed or any application for compensation has been determined,
>
> (g) an order that requires rent paid to the Tribunal to be paid towards the cost of remedying a breach of the residential tenancy agreement or towards the amount of any compensation,
>
> (h) an order directing a landlord, landlord's agent or tenant to comply with a requirement of this Act or the regulations,
>
> (i) a termination order or an order for the possession of premises,
>
> (j) an order directing a landlord or landlord's agent to give a former tenant or person authorised by a former tenant access to residential premises for the purpose of recovering goods of the former tenant or fixtures that the former tenant is entitled to remove.

57 Section 188 provides:

> **188 General order-making power of Tribunal**
>
> The Tribunal may, in any proceedings before it under this Act, make any one or more of the following orders:
>
> (a) an order that the Tribunal may make under this Act,
>
> (b) an order that varies or sets aside, or stays or suspends the operation of, any order made in proceedings or earlier proceedings,
>
> (c) any ancillary order the Tribunal thinks appropriate,
>
> (d) an interim order.

58 Section 189 provides:

> **189 Application of provisions relating to Tribunal**

> (1) A provision of this Act that enables a landlord or tenant to apply for an order by the Tribunal and the Tribunal to make an order also applies, where appropriate, to a former landlord or a former tenant.
>
> (2) (Repealed)

59 Part 9 of Div 2 concerns power of the Tribunal relating to breaches of residential tenancy agreements.

60 Section 190 provides:

> **190 Applications relating to breaches of residential tenancy agreements**
>
> (1) A landlord or a tenant may apply to the Tribunal for an order in relation to a breach of a residential tenancy agreement within the period prescribed by the regulations after the landlord or tenant becomes aware of the breach or within such other period as may be prescribed by the regulations.
>
> (2) An application may be made:
>
> > (a) during or after the end of a residential tenancy agreement, and
> >
> > (b) whether or not a termination notice has been given or a termination order made.
>
> (3) A landlord's agent may make an application on behalf of a landlord.

Consideration

61 The Act applies to residential tenancy agreements in respect of residential premises (see s 6 of the Act). A residential tenancy agreement is, *inter alia*, an agreement under which a person grants to another person for value a right to occupation of a residential premises for the purpose of use as a residence (s 13(1) of the Act).

62 Part 2 deals with general provisions relating to such agreements and the terms of the same. Part 3 deals with the rights and obligations of landlords and tenants, including provisions concerning rent (and the regulation by the Tribunal in certain respects such as rent increases (s 41) or excessive rent (s 44)) and rights and limitations of occupation and the use of residential premises, the repair of premises and the searching and safety of residential premises.

63 Part 4 deals with changes to the tenant and landlord and Part 5 with the termination of residential tenancy agreements including a provision dealing with disputes about termination (s 111). Part 6 deals with recovery of possession of premises and Pt 7 social housing tenancy agreement.

64 It follows that the Act constitutes a comprehensive scheme of regulation of residential tenancy agreements and provides extensive powers to resolve disputes as to such arrangements by the Tribunal (see Pt 9).

65 Part 8 Divs 2 and 3 provide for the payment, deposit of and the release of rental bonds. A rental bond means monies paid by a tenant as "security" against a failure by the tenant to comply with a residential tenancy agreement.

66 The rental bond must be deposited with the Secretary within a specified period (s 162(1)). A breach of that provision may result in a civil penalty.

67 The release of rental bond may arise from claims by tenants or landlords (or both) (s 163(1)). The Secretary may make payment of a claim where there is no dispute (s 167) or where there is a dispute as to a claim (s 168).

68 The power of the Secretary to make payment of a claim under s 168 is confined to circumstances where the Secretary holds the rental bond. This follows from s 168(1) of the Act, which provides that the provision only applies if the Secretary is notified in writing in the claim notice period (as defined in s 157) or "before payment for a rental bond". The claim notice relates to rental bonds held by the Secretary (see s 164). In such cases the Secretary may make payment of the claim, *inter alia*, in accordance with an order of the Tribunal. However, no such confinement exists in relation to an appeal against a Tribunal or court affecting the payment of a rental bond as the provisions of s 169 provide that such an appeal may be brought "even though the Secretary has paid an amount of rental bond under the Division".

69 The construction of a 175(1) should be undertaken by its text, the immediate content within the provision, namely, s 175(2), and in the wider context: see *Malvina Park Pty Ltd v Johnson* [2019] NSWSC 1490 ("*Malvina*") at [61]-[64], [66].

70 The relevant principles of statutory construction were summarised in *Malvina* (at [61]-[64], [66]) and are extracted below:

> [61] The principles of statutory construction were outlined by French CJ and Hayne J (with whom Kiefel J agreed in this respect) in *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378; [2012] HCA 56 at [23]-[26] as follows:

> [23] It is as well to begin consideration of this issue by re-stating some basic principles. It is convenient to do that by reference to the reasons of the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:
>
> > "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."
>
> [24] The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, "[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute" (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision "by reference to the language of the instrument viewed as a whole", and "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".
>
> [25] Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of a statute resides in its text and structure. Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted…
>
> [26] A second and not unrelated danger that must be avoided in identifying a statute's purpose is the making of some a priori assumption about its purpose…
>
> [Footnotes omitted.]

In *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 the High Court (French CJ, Crennan and Bell JJ) further dismissed those principles and stated at [39] as follows:

> [39] Lord Diplock's three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution (a firm)*) accord with the statements of principle in *Cooper Brookes* and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock's three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that "the modified construction is reasonably open having regard to the statutory scheme" because any modified meaning must be consistent with the

> language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour's further observation, "[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances."

[63] In *SZTAL v Minister for Immigration and Border Protection* (2017) 347 ALR 405; [2017] HCA 34, Kiefel CJ, Nettle and Gordon JJ said at [14]:

> [14] The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> [Citations omitted.]

[64] Reference may also be made to *Ryde Developments Pty Ltd v Property Investors Alliance Pty Ltd* [2017] NSWCA 339 per Payne JA (with whom Beazley P and Barrett AJA agreed) at [39]-[40]:

> [39] The relevant principles of construction were not controversial on the appeal. The meaning of words and phrases is influenced by the immediate context in which they are used. The meaning of the whole may be different to the sum of the meaning of the parts: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389; [1996] HCA 36 at 396-397 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ) citing Lord Hoffmann in R v Brown [1996] 1 AC 543 at 561.
>
> [40] The modern approach to statutory interpretation uses "context" in its widest sense "to include such things as the existing state of the law and the mischief which, by legitimate means … one may discern the statute was intended to remedy": *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; [1997] HCA 2 at 408 (per Brennan CJ, Dawson, Toohey and Gummow JJ).

…

> [66] A construction that would promote the principle or object underlying the Act (whether or not that purpose or object is expressly stated in the Act) shall be preferred to a construction that would not promote that purpose or object (s 35(a) of the Victorian Interpretation Act).

71 Section 175(1) contains no limitation of the kind contended for by the plaintiff, that is, power is confined to the making of an order with respect to rental bonds held by the Secretary. Nor is such an implication available when the provision is considered in context.

72 Section 175(2) expressly contemplates that an order may be made whether or not the rental bond "has been paid by the Secretary". Plainly the provision contemplates the resolution of rental bond disputes when the Tribunal adjudicates upon a claim in circumstances where rental bond amounts previously held by the Secretary are no longer held by the Secretary.

73 Further, in the absence of an express limitation (and there is none), on a purposive construction, the legislation should not be taken to have limited the Tribunal's powers to circumstances where the Secretary is in possession of the rental bond because a landlord had not deposited the rental bond in accordance with the Act.

74 Any such a construction would be antithetical to the purposes of the Act. Part 8 regulates the taking of securities by means of restraint upon the amount of security taken and the requirement to deposit such bond with an independent agency so that at the end of tenancies claims as to such bond may be properly and securely managed particularly given the monies constitute no more than a security. The failure to make such deposits are penalised. The curtailment of the Tribunal's powers to resolve disputes as to bonds where the landlord has failed to deposit the rental bond and in accordance with the Act would undermine in a significant way that scheme of security protection and regulation.

75 It is unnecessary in these circumstances to decide the scope of the power under s 187. It was accepted by the plaintiff that the Tribunal would have the power to make the orders it did under that provision, but only if power existed under s 175 of the Act (it being contended that s 187 was only facilitative). No party raised an issue as to the power to make an order that there be forwarded a bank cheque. (It may be noted that the "standard form residential tenancy agreement" in Sch 1 of the *Residential Tenancies Regulation 2010* (NSW), provides for payment of rent (being "the amount payable by a tenant under a residential tenancy agreement for the right to occupy premises for a period of the agreement", s 3 of the Act) by means of cash, cheque or into a bank account nominated by the landlord. Further, it is stipulated that "the landlord or landlord's agent must permit the tenant to pay the rent by at least one means

for which the tenant does not incur a cost (other than bank or other account fees usually payable for the tenant's transactions)". A rental bond is "an amount of money paid or payable by the tenant or another person as security…" (s 157 of the Act). Therefore, a bank cheque is effectively a form of currency and, in the absence of argument, there is no reason to consider that the Tribunal could not make the order).

76 Lastly, the remedies sought by the plaintiff are discretionary. The grant of relief either by way of prohibition or certiorari is discretionary: *Lazarus v Director of Public Prosecutions (NSW)* [2015] NSWSC 426 at [20] and [95] (per Garling J); see also *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 at [43]-[60] (per Gaudron and Gummow JJ). So too is declaratory relief.

77 The bank cheque has been returned to the Commonwealth Bank of Australia. The instrument was spent. It is said by the plaintiff that the second defendant received the value of the cheque but there is no evidence of the same. It is difficult to conceive in those circumstances how there may be any utility in the orders sought by the plaintiff unless an additional party was joined.

78 The summons is dismissed.

Costs

79 In a handwritten document entitled "Submissions for Second Defendant" dated 8 May 2018 (Tab 4 of the Court Book filed on 11 July 2018), the solicitor for the second defendant intimated that if successful on the application resisting the summons, indemnity costs may be sought by his client. It may be noted that no reference was made to those submissions during the course of the proceedings, but rather reliance was placed upon a written submission dated 30 July 2018 that was produced at the hearing. By that submission, the second defendant noted an intention to put further submissions as to costs. Whilst it is evident that an order for costs should be made in favour of the second defendant on an ordinary basis, given his success in having the summons dismissed, it is not clear why the second defendant should have indemnity costs.

80 In the event that the Court receives an application for indemnity costs from the second defendant, with accompanying submissions and evidence, strictly

within 7 days of this judgment, costs will be reserved and a program fixed to hear that application. In the absence of any application of that kind made within that time frame, the Court would otherwise propose to make orders for costs in favour of the second defendant on the ordinary basis.

Order

81 The Court makes the following orders:

(1) The summons filed 23 April 2018 is dismissed.

(2) Any application for indemnity costs by the second defendant must be filed and served, together with written submissions and evidence, within 7 days of the publication of this judgment.

(3) If an application is received in accordance with (2) above, costs will be reserved and a program fixed to hear that application.

(4) In the absence of an application in accordance with (2) above, the plaintiff shall pay the costs of the second defendant of the proceedings as agreed or, in default, as assessed.

****