**ORDER:** In each application:

1. application for extension of time within which to file the notice of appeal and to apply for leave to appeal granted
2. leave to appeal granted
3. appeal dismissed
4. appellants Tamawood Limited and Phil Martyn Constructions Pty Ltd pay the respondent's costs of the application and appeal to be assessed on the standard basis

**CATCHWORDS:** Procedure – Inferior Courts - Queensland – Commercial & Consumer Tribunal - Costs - where person successful in action against two companies before the Tribunal - where the two companies were ordered by Tribunal to pay damages - where no order for costs made in favour of the person - where Tribunal found each party was justified in engaging legal representation - where all parties appealed to the District Court - where District Court judge confirmed decision of Tribunal on the merits but ordered the two companies to pay the person's costs of proceedings in the Tribunal - where relevant Act provides '...parties pay their own costs unless the interests of justice require otherwise' - whether order for costs made by District Court judge was in the interests of justice

Procedure – Inferior Courts – District Court – Civil Jurisdiction – Practice - Costs - where appeal from Commercial and Consumer Tribunal lies to District Court - where relevant Act provides that '...appellant must pay the costs of the appeal, including the costs of any transcript' - where District Court judge made costs order in favour of appellants - whether District Court judge had discretion to award costs to appellants - whether that discretion was exercised correctly

Appeal & new trial – Appeal – Practice & Procedure – Queensland – Time for Appeal – Extension of Time – When Granted - where two companies failed to file notices of appeal and applications for leave to appeal in time - where affidavit showed this was due to confusion on part of their solicitors - whether delay caused any prejudice to respondent

***Legislation :*** *Commercial and Consumer Tribunal Act* 2003 (Qld), s 70, s 71, s 73, s 100
*District Court Act* 1967 (Qld), s 118
*Queensland Building Tribunal Act* 2000 (Qld), s 61
*Uniform Civil Procedure Rules* 1999 (Qld), r 766, r 784, r 785

***Cases cited*** *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, cited
*Forest Pty Ltd (Receivers and Managers Appointed) v Keen Bay Pty Ltd & Ors* (1991) 4 ACSR 107, cited
*Kimtran Pty Ltd v Downie* [2003] QCA 424; [2004] 1 Qd R 651, considered
*Knight v FP Special Assets Ltd* (1992) 174 CLR 178, cited

**JUDGMENT : Willeams JJA; Keane JJA; Philippides J.** Court of Appeal. Supreme Court of Queensland. Brisbane. 15th April 2005

[1] **WILLIAMS JA:** All issues relevant to the determination of the applications and appeals in this matter are fully set out in the reasons for judgment of Keane JA. There is little I can add to what he has said for concluding that the orders he has proposed should be made.

[2] The critical questions for determination are the meaning to be attributed to and the scope of operation of s 70 and s 71 of the *Commercial and Consumer Tribunal Act* 2003 (Qld). In seeking to uphold the reasoning of the learned District Court judge counsel for the respondent submitted that s 70 should be treated as analogous to a preamble to a statute. Relying on common law principles of statutory construction he then submitted that the meaning of s 71 was clear and free from doubt and in consequence the words of s 70, the preamble, could not be resorted to to qualify or cut down the meaning or the scope of operation of s 71. The submission is fallacious. Section 70, although it expresses the purposes of the division, cannot be equated with a preamble. It is part of the statute and has the same force and effect as s 71. It is made clear by s 70 that the starting point is that each party should *"pay their own costs unless the interests of justice require otherwise*". Then s 71 deals with the considerations relevant to deciding whether some order for costs should be made and the situation where the Tribunal has determined that the interests of justice require that some order for costs be made. The sections can, and should, be read together as indicated by Keane JA in his reasons.

[3] The orders should be as proposed by Keane JA.

[4] **KEANE JA:** These two applications for leave to appeal were heard together. The respondent, Ms Paans, was successful in proceedings which she brought against the applicants, Tamawood Limited ("Tamawood") and Phil Martyn Constructions Pty Ltd ("Martyn") before the Commercial and Consumer Tribunal ("the Tribunal") which ordered each of them to pay Ms Paans $10,000 by way of damages for loss suffered by her by reason of the default of Tamawood and Martyn in relation to the construction of a house on land owned by Ms Paans at the Sunshine Coast. In a separate decision the Tribunal declined to make any order for costs in her favour.

[5] All of the parties to the proceedings before the Tribunal sought leave from the District Court to appeal against the Tribunal's decisions. Tamawood and Martyn sought to be relieved of their respective liabilities to pay damages, while Ms Paans sought an order in respect of her costs of the proceedings before the Tribunal.

[6] The District Court refused the application by Tamawood and Martyn, granted leave to Ms Paans to appeal, allowed her appeal, set aside the Tribunal's decision in relation to costs and ordered in lieu thereof that Tamawood and Martyn pay Ms Paans' costs of the proceeding in the Tribunal to be assessed on the District Court Scale applicable where the amount recovered is less than $50,000. The District Court also ordered that Ms Paans pay Tamawood and Martyn their costs of her appeal fixed in the sum of $100.

[7] Tamawood and Martyn now seek leave to appeal to this Court from the orders made by the District Court in relation to the costs of the proceedings in the Tribunal and the costs of Ms Paan's appeal in the District Court. Tamawood and Martyn apply for leave pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld); leave being required because the decision of the District Court was made in its appellate jurisdiction. Tamawood and Martyn also seek an extension of time for the filing of their notice of appeal and for filing their applications for leave to appeal. The applications for an extension of time are opposed. It is convenient to deal with that application at the outset.

**Extension of time**

[8] It is apparent from the affidavit filed on behalf of Tamawood and Martyn that their failure to observe the time limit was due to confusion on the part of their solicitors about the procedures to be followed in order to apply for leave to appeal. Ms Paans' solicitors were informed before the expiration of the time limit for the applications for leave to appeal of the intention of Tamawood and Martyn to appeal. The delay resulting from the confusion on the part of the solicitors acting for Tamawood and Martyn was very short. It was not apt to, and plainly did not, cause any prejudice to Ms Paans. In my opinion, this Court should grant any extension of time necessary to enable the applications for leave to appeal to be dealt with on their merits.

**Leave to appeal**

[9] Tamawood and Martyn contend that the decision of the District Court was erroneous in that it proceeded from an erroneous construction of s 70 and s 71 of the *Commercial and Consumer Tribunal Act* 2003 (Qld) ("the Act"). On behalf of Ms Paans it is submitted that leave to appeal should be refused on the footing that, whether or not the learned District Court judge misconstrued s 70 and s 71 of the Act, his decision may nevertheless be sustained on other grounds. In any event, it is submitted on behalf of Ms Paans that the decision of the learned primary judge is not attended by sufficient doubt to warrant the grant of leave.

[10] A proper understanding of these arguments requires more detailed reference to the statutory provisions in question and the reasons of the Tribunal and of the learned District Court judge. The arguments in relation to the proper construction of the Act are substantial and the issues are of general importance. For these reasons, the Court reserved its decision on the question of leave and heard argument from the parties in relation to the merits of the appeal.

**The Act**

[11] Sections 70 and 71 of the Act are contained in Part 5, Division 7 of the Act. They deal in a general way with the awarding of costs by the Tribunal. They are in the following terms:

> ***"70 Purposes of div 7***
> *The main purpose of this division is to have parties pay their own costs unless the interests of justice require otherwise.*
>
> ***71 Costs***
> ***(1)*** *In a proceeding, the tribunal may award the costs it considers appropriate on—*
> *(a) the application of a party to the proceeding; or*
> *(b) its own initiative.*
> ***(2)*** *The costs the tribunal may award may be awarded at any stage of the proceeding or after the proceeding has ended.*
> ***(3)*** *If the tribunal awards costs during a proceeding, the tribunal may order that the costs not be assessed until the proceeding ends.*
> ***(4)*** *In deciding whether to award costs, and the amount of the costs, the tribunal may have regard to the following—*
> *(a) the outcome of the proceeding;*
> *(b) the conduct of the parties to the proceeding before and during the proceeding;*
> *(c) the nature and complexity of the proceeding;*
> *(d) the relative strengths of the claims made by each of the parties to the proceeding;*
> *(e) any contravention of an Act by a party to the proceeding;*
> *(f) for a proceeding to which a State agency is a party, whether the other party to the proceeding was afforded natural justice by the State agency;*
> *(g) anything else the tribunal considers relevant.*
>
> *Examples of paragraph (g) - The tribunal may consider whether a party to a proceeding is acting in a way that unreasonably disadvantages another party to the proceeding. The tribunal may consider whether the proceeding, or a part of the proceeding, has been frivolous or vexatious.*
>
> ***(5)*** *A party to a proceeding is not entitled to costs merely because—*
> *(a) the party was the beneficiary of an order of the tribunal; or*
> *(b) the party was legally represented at the proceeding.*

***(6)*** *The power of the tribunal to award costs under this section is in addition to the tribunal's power to award costs under another provision of this or another Act.*

***(7)*** *The tribunal may direct that costs be assessed—*
*(a) in the way decided by a presiding case manager; or*
*(b) by a person appointed by the tribunal."*

**The reasons of the Tribunal**

[12] The Tribunal expressed the view that the effect of s 70 of the Act is that *"the parties are to pay their own costs unless the interests of justice require otherwise"* and that s 71(5) of the Act makes it clear that a party is not entitled to its costs merely because it was successful in the proceedings or because it was legally represented in those proceedings.

[13] The Tribunal then proceeded to consider the factors identified in s 71(4) in order to determine whether to award costs and the amount of any such award. In that regard:

(a) the Tribunal did not regard anything in the conduct of the parties before and during the proceeding as a particular ground for making an award of costs;

(b) the Tribunal accepted that the proceedings were complex and, in particular, "that the complexity of the proceedings was such that each party was justified in engaging the services of legal representatives to assist them in the conduct and defence of the claim";

(c) the Tribunal took the view that there was nothing in the relative strengths of the claims made by the parties to assist "one way or the other in the consideration of whether to award costs";

(d) the Tribunal regarded the fact that Ms Paans had been found to be an honest witness as irrelevant to the exercise of the discretion as to costs;

(e) the Tribunal went on to state that it was also irrelevant that Ms Paans had suffered financial hardship as a result of having to fund her claim in circumstances where the Maroochy Shire Council would not commence rectification works connected with the construction of the house until the Council was paid $12,000. In this regard the Tribunal said:

*"19 While it is the case that if the first respondent's representative had addressed the applicant's concerns when she first brought the problem to the attention of the first respondent during the course of construction by checking the set-out and excavation, it is more likely than not that none of the events which followed would have occurred, it can equally be said that if the applicant had given the $12 [$12,000] or $13,000 to the Council to carry out the works to alleviate the problem caused by the first respondent she could have avoided years of worry and expense. In my view hindsight is not a useful factor in deciding whether to award costs.*

*20 The fact that the applicant spent about the same amount as she claimed in prosecuting these proceedings is no reason to make an order for costs in her favour. All litigants in this tribunal understand (or should understand) that in this tribunal the usual rule in respect to costs does not apply, with the consequence that any money spent in prosecuting the claim is spent absent any certainty of a costs order in the event the party succeeds. Parties with limited funds should give careful consideration to how best they might spend their funds. ...*

*29 For the respondents it was submitted that the applicant's submissions were an argument as to why each party should bear its own costs. It was submitted that the statutory position encourages parties to be commercial in their approach to settlement, rather than spend money on litigation. It was submitted that the applicant's submissions could only carry weight and justify an exception to the general rule in circumstances where a successful party had made a Calderbank offer, which was not the case here.*

*30 I prefer the submissions of the respondents. In my view it is a relevant consideration that, based on the evidence, there is no doubt that the applicant's concerns about inundation could have been addressed by work to be undertaken by the Maroochy Shire Council at a cost in the order of $12,000. While the applicant can spend her money as she sees fit and is at liberty to spend $12,000 and more on the costs of the proceeding rather than pay the money to the Council to relieve the problem, the respondents should not suffer as a consequence."*

[14] The Tribunal concluded that it was *"not persuaded that the interests of justice in this case require the making of an award of costs in favour of the applicant".*

[15] I should also mention here that the Tribunal did not consider that any award of costs should have been assessed by reference to the District Court Scale on the footing that that Scale applied to claims in excess of the claim made and the amount awarded in the proceedings before the Tribunal. The Tribunal's view was that *"If there were to be any assessment of costs in these proceedings, then it should be by reference to the Magistrates Court Scale with an allowance by reference to the District Court Scale for work undertaken in the Tribunal which is not contemplated in the Magistrates Court Scale".*

**The District Court's reasons**

[16] The learned District Court judge summarized the interpretation of s 70 of the Act adopted by the Tribunal as being that "ordinarily no order for costs would be made in proceedings before the Tribunal". One can understand why his Honour would say that, having regard to the manner in which the Tribunal applied its interpretation of the

Act to the facts before it, but to be fair to the Tribunal, it was, in my respectful opinion, expressing its understanding of a legislative intention that under the Act the parties before it should bear their own costs unless one side is able to show good reason, in terms of the interests of justice in the particular circumstances of the case, why there should be a positive exercise of the discretion in that party's favour. Generally speaking, that approach to the exercise of a discretion is not unorthodox, in that a party who seeks the exercise in his or her favour of a discretion to grant relief must satisfy the court that grounds exist for doing so.[1] In my view, the Tribunal's understanding of s 70 and s 71 of the Act accords with the express language of s 70 and s 71(5)(a). To say that there is no prima facie position that costs should follow the event is to say no more than the words of s 70 and s 71(5)(a). That conclusion is, it seems to me, inescapable. Whether it will "ordinarily" be the position that no order as to costs is made by the Tribunal will depend on whether the facts of the particular cases which come before the Tribunal "ordinarily" exhibit features suggesting that the interests of justice require that a party have a costs order made in their favour. The Tribunal cannot be criticized for acknowledging that s 71(5) identifies two factual circumstances which will not suffice for that purpose.

[17] The learned District Court judge went on to say:

*"[43] Apart from s 70 however the costs provisions in s 71 are entirely unexceptional. The basic provision of subsection (1) is that 'In a proceeding, the tribunal may award the costs it considers appropriate ...' This is a familiar approach to the conferring of a power to deal with the question of costs, which may be dated back to r 47 of the rules of procedure in the schedule of the Supreme Court of Judicature Act 1873: '... the costs of and incident to all proceedings in the High Court shall be in the discretion of the court ...' (See the discussion of this and other provisions in similar terms in* ***Oshlack v Richmond River Council*** *(1998) 193 CLR 72 at 84-6 per Gaudron and Gummow JJ.) Such formulations give the relevant body, here the Tribunal, a broad general discretion which, although absolute and unfettered, is to be exercised judicially, 'that is to say, not by reference to irrelevant or extraneous considerations, but upon facts connected with or leading up to the litigation.' (****Latoudis v Casey*** *(1990) 170 CLR 534 at 557 per Dawson J.)*

*[44] It came to be recognised in time that, in circumstances where a discretion as to costs was conferred on a court or tribunal in such terms, 'a successful party in the absence of special circumstances had a reasonable expectation of obtaining an order for costs in its favour unless for some reason connected with the case a different order was specially warranted. Any departure from this expectation would require that there should be material upon which the adverse discretion could be properly exercised. It could not be exercised by reference to idiosyncratic notions or to facts and circumstances irrelevant to the case.' (****Oshlack*** *(supra) at 120-1, per Kirby J. Hence the modern formulation in UCPR r 689(1) that costs 'follow the event, unless the court considers another order is more appropriate.') On the face of it therefore s 71(1) does not implement a purpose that the starting point of the discretion is that parties pay their own costs. Rather it implements a purpose that the Tribunal has a discretion in the awarding of costs to give effect in the interests of justice."*

[18] Later, his Honour said:

*"[51] If s 71 had appeared alone, there would have been nothing to indicate that the approach to costs in proceedings before the Tribunal would be any different from the approach to costs in any court or tribunal which has a discretion of the kind derived from the Judicature Act rules. The only question then is what modification to that general discretion is required by the terms of s 70. But there is nothing in that section which actually says that leaving the parties to pay their own costs is to be the ordinary or usual outcome, and that some sort of special or exceptional circumstances are to be required before any order for costs will be made. (Contrast Integrated Planning Act 1997 s 4.1.23(1), which goes even further. There were special reasons for that provision:* ***Mudie v Gainriver Pty Ltd*** *[2002] QCA 546 at [34].) Rather, it speaks of the situation where parties pay their own costs as a default position, one which applies 'unless the interests of justice require otherwise.' It is difficult to see how that requires a different approach from one where the jurisdiction to award costs is expressed as a discretion to make such order for costs as the interests of justice require. Commonly the interests of justice will require some order for costs, but that is not universally the case, and situations do arise from time to time where it is consistent with the interests of justice for the costs to be left to lie where they fall. But that is not in any way inconsistent with the general principles as to the exercise of a discretion as to costs which have been established over the centuries.*

*[52] Properly understood, in my opinion s 70 is not a qualified prohibition on the making of orders for costs; rather it is a statement that the legislative purpose, in enacting a broad general discretion as to costs in s 71, was to permit the Tribunal to make such orders as to costs as the interests of justice required, while recognising that there would be times when the interests of justice would not require any order as to costs. Read in this way, the terms of s 70 are unexceptionable, just and reasonable, and entirely consistent with the terms of s 71. In my opinion that is the correct approach. It is consistent with s 14A of the Acts Interpretation Act 1954. It is in my opinion consistent with the object stated in s 4(1)(b) 'to have the Tribunal deal with matters in a way that is just, fair, informal, cost efficient and speedy.' I will not quote the more detailed provisions in subsection (2), but it appears to me that it is entirely consistent with those provisions, particularly (in the context of the circumstances of this matter) the legislative endorsement of the proposition that it is fair that litigants have an equal opportunity regardless of resources to assert or defend their legal rights: s 4(2)(b)(i).*

[1] See ***Main v Main*** (1949) 78 CLR 636 at 643, ***Brisbane South Regional Health Authority v Taylor*** (1996) 186 CLR 541 at 547.

*[53] That objective is clearly assisted in circumstances where a private individual homeowner of perhaps modest means receives the benefit of an order for costs if a successful claim is brought in the Tribunal. It would plainly be unfair and unjust for a person who had a good claim to be unable to pursue it in the Tribunal, or for it not to be worthwhile for such a person to pursue it in the Tribunal, because the costs of pursuing the claim would be greater than the amount recovered, or would so diminish the amount recovered as not to make the hazard of litigation worthwhile. It seems to me that s 4(2)(b)(i) is a clear indication of a legislative intent that successful applicants of modest means should not ordinarily be denied their costs of proceedings in the Tribunal. To read s 70 in the way contended for by Tamawood and Martyn, and adopted by the member of the Tribunal in the present case, would in my opinion be to frustrate and deny the objects of the Act set out in s 4."*

[19] His Honour referred to paragraph [19] of the Tribunal's reasons, which has been set out above, and said:

*"[58] The two factors referred to in paragraph 19 are not commensurable at all. The first point, that the matter was drawn to the attention of Martyn's representative during the course of construction but not fixed then, seems to me to be a compelling reason why an order for costs should be made against Martyn and in favour [of] Ms Paans. On the other hand, the proposition that the problem could have been fixed by the applicant spending money on rectification work cannot rationally justify depriving Ms Paans of an order for costs. The problem here is that serious errors of law in relation to the assessment of damages have carried over and infected the decision in relation to the question of costs."*

[20] The learned District Court judge concluded that the Tribunal had misinterpreted s 70 and s 71; and that the exercise by the Tribunal of the discretion conferred upon it had miscarried as a result.

[21] His Honour proceeded to analyse the reasons given by the Tribunal for declining to conclude that the interests of justice required an award of costs in favour of Ms Paans and went on to say that, even if he was in error in respect of his interpretation of s 70 and s 71 of the Act, the Tribunal's exercise of the discretion as to costs had miscarried so as to entitle him to exercise that discretion afresh. He concluded in this regard:

*"[72] In my opinion the important considerations here are that the applicant was successful, and there is no material to indicate that there was some unreasonable attitude on the part of the applicant either in the way the claim was pursued or in failing to engage in proper negotiations. The applicant has pointed out the problem at an early stage, when it could easily have been remedied, but it was not. The respondents raised false issues, which made the matter more complicated than it otherwise needed to be. There is nothing to suggest that the applicant had unduly prolonged the hearing, or was conducting the proceedings unreasonably. If an order for costs were not made, it would in effect deprive the applicant of the compensation she is entitled to receive. In circumstances where the basis of the assessment of damages was wrong, it is not appropriate to have too much regard to the actual amount of damages awarded. In the circumstances I intend to accept the member's assessment that the matter was complex, although as I say to some extent the complexity arose because of the attitude of the respondents.*

*[73] In all the circumstances in my opinion this is a clear case justifying an order for costs in favour of the applicant, and they ought to be on the District Court Scale where the amount recovered is less than $50,000. I will order that, in the event of the parties failing to agree on the costs, the costs be assessed by a deputy registrar of the District Court. I will hear the parties in relation to the costs of the appeal."*

[22] At this point, I should say that, in my respectful opinion, the learned District Court judge erred in his interpretation of s 70 and s 71 of the Act. I am also of opinion that, although his Honour was in error in his interpretation of the Act, there was nevertheless, as his Honour said, a separate and sufficient basis for setting aside the Tribunal's decision and for the substitution of his own view as to the proper disposition of the costs of the proceeding before the Tribunal. I proceed now to explain the reasons which have led me to these conclusions.

**Sections 70 and 71 of the Act**

[23] As I have already said, in my view, the language of s 70 and s 71(5)(a) is sufficiently clear to negate the proposition that costs should, prima facie, follow the event unless the Tribunal considers that another order is more appropriate. In this regard, it is clear that the power of a court or tribunal to award costs to a party is now the creature of statute.[2] The nature and extent of that power can only be discerned by close consideration of the terms of the statute which creates the power and prescribes the occasions for, and conditions of, its exercise. In the performance of this task, observations of the courts in relation to the operation of other statutory regimes relating to costs may afford general assistance but they cannot be allowed to distract attention from the terms of the particular statute in question.

[24] The language of the provisions of the Act to which I have referred is sufficiently clear to negate the proposition that success in the proceedings is sufficient to establish a prima facie entitlement to the beneficial exercise of the discretion conferred by s 71(1) of the Act. The approach of the learned District Court judge seems to me, with respect, to deny the words of both s 70 and s 71(5) their ordinary meaning; it is not to the point that another form of words might have been used to make that position even clearer.

[25] The Explanatory Memorandum to the Bill for the Act said that one of the key principles underpinning the operation of the Tribunal was to be an "*emphasis on self-representation - provisions are made in the Bill for parties*

[2] ***Knight v FP Special Assets Ltd*** (1992) 174 CLR 178 at 193; ***Forest Pty Ltd (Receivers and Managers Appointed) v Keen Bay Pty Ltd & Ors*** (1991) 4 ACSR 107 at 111 - 113

*to represent themselves, thus ensuring that the [Tribunal] maintains informality*"[3] .It went on to provide[4] that: *"Clause 70 establishes beyond doubt that the purpose of this Division is that parties pay their own costs unless the interest [sic] of justice require otherwise. This provision is in keeping with the objective of the Bill to establish an informal and cost effective tribunal.*"[5]

[26] The approach taken by the learned District Court judge cannot be said to "best achieve the purpose" of the Act made evident by s 70.[6] Considerations of the legislative history of analogous provisions support this view. In this regard, the *Queensland Building Tribunal Act* 2000 (Qld), the Act establishing one of the Tribunal's predecessors, did not contain a provision equivalent to s 70. It did contain, at s 61, a provision equivalent to s 71 of the Act. To view s 70 in the same light as the learned District Court judge is effectively to leave the new provision with no real work to do. In this regard, Mr Logan of counsel, who appeared for Ms Paans, relied upon the decision of this Court in ***Kimtran Pty Ltd v Downie***[7] to support the proposition that s 70 added no relevant instruction to the Tribunal in relation to the exercise of the direction under s 71(1) of the Act. It is clear, however, that the Court in *Kimtran* was concerned with the issue of power to award costs against non-parties rather than the manner in which the discretion should be exercised by the Tribunal. In my view, neither the decision nor any dicta in the Court's reasons affords support for the proposition advanced on behalf of Ms Paans.

[27] On behalf of Ms Paans, reference was made to other provisions of the Act which expressly provide for the making of orders for costs. In this regard, attention was drawn to s 50(6) (order for costs to remedy prejudice or detriment); s 52(4)(b) (Tribunal may not extend time or waive compliance if prejudice could not be remedied by an order for costs or damages); s 58(b) (to compensate a party where vexatious or oppressive proceedings are commenced); s 60(2)(a) (requiring one party to compensate another for costs where it has caused the other disadvantage); s 64 (costs to be paid where a proceeding is withdrawn); s 67 and s 68 (detailed provisions for security for costs, the existence of which recognizes the prospect of an award of costs in the proceedings); s 69(2) (which contemplates adverse costs orders against a party); s 71(6) (which expressly adverts to the existence of other provisions under the Act or other Acts which may entitle the Tribunal to award costs); s 72(2) (which provides for a power to stay a fresh proceeding where an adverse costs order has not been met); s 79(1)(b) (which confers a broad discretion as to the making of a costs order against a party upon an adjournment); s 115(2)(c) (which confers an entitlement on an applicant to costs in the event of a decision by default); s 116 (which provides for a costs order upon setting aside a decision by default); s 125(3)(b) (which provides for an order for costs upon a summary decision application); s 142(2) (which provides for a costs order if a reasonable offer to settle is refused); and s 142(4)(b) (which contemplates costs orders being made in favour of a party after an offer to settle has been made).

[28] The existence of the provisions referred to in the preceding paragraph cannot alter the ordinary meaning of s 70 and s 71 of the Act. In any event, the existence of this extensive array of special provisions relating to orders for costs in particular circumstances tends, in my view, to confirm that s 70 and s 71(1) are intended to impose a general rule that good reason must be shown in terms of the interests of justice for making an award of costs in proceedings before the Tribunal.

**The application of the Act**

[29] As I have said, although I consider the Tribunal's interpretation of s 70 and s 71 of the Act was essentially correct, I agree with the learned District Court judge that the Tribunal erred in its application of the law as understood by it to the facts of this case. There are, broadly speaking, three reasons for my conclusion in this regard.

[30] First, the Tribunal found that each party was justified in engaging the services of legal representatives to assist them in the conduct and defence of what the Tribunal recognized to be complex proceedings. That finding alone could be, in my view, a sufficient basis to conclude that the interests of justice warranted the exercise of the discretion to award costs in favour of the successful party, at least in the absence of any countervailing consideration. The Tribunal erred in failing to appreciate the implication of this finding for an understanding of where the interests of justice lay in relation to the costs of the proceedings.

[31] There will inevitably be occasions when the aspirations of the legislature that parties before the Tribunal should not be legally represented cannot reasonably be met having regard to the nature of the issues involved. That this is so is recognized by the terms of s 73 which deals with the topic of representation. It provides:

> ***"73 Purposes of div 7***
>
> *The main purpose of this division is to have parties represent themselves and save legal costs unless the interests of justice require otherwise."*

[32] If orders for costs were not to be made in favour of successful parties in complex cases, then just claims might not be prosecuted by persons who are unable to manage complex litigation by themselves. Such a state of affairs would truly be contrary to the interests of justice; and an intention to sanction such a state of affairs cannot be attributed to the legislature which established the Tribunal.

3 See the Explanatory Memorandum at 3.
4 Explanatory Memorandum at 20
5 This objective is expressly identified in s 4(1)(b) of the Act.
6 *Acts Interpretation Act* 1954 (Qld) s 14A(1).
7 2003] QCA 424 esp at [18]; [2004] 1 Qd R 651 esp at 658 - 659

[33] To say this is not to ignore s 71(5)(b) of the Act. There is a clear distinction, in terms of the interest of achieving justice, between the mere fact of having representation and the fact of having reasonably obtained that representation because of the complexity of the case. In the absence of countervailing considerations, where a party has reasonably incurred the cost of legal representation, and has been successful before the Tribunal, it could not rationally be said to be in the interests of justice to allow that success to be eroded by requiring that party to bear the costs of the representation which was reasonably necessary to achieve that outcome. Finally in this regard, it should also be borne in mind that s 71(4)(a) of the Act expressly recognizes that *"the outcome of the proceeding"* is a consideration which is relevant to the exercise of the discretion conferred by s 71(1) of the Act.

[34] Secondly, the learned District Court judge was, in my respectful opinion, correct to conclude that the decision by Ms Paans to pursue her rights against Tamawood and Martyn, rather than to use her funds (assuming she had them available to her) to pay for the rectification of her problems by the Maroochy Shire Council, was not a consideration which could rationally lead to the exercise of the Tribunal's discretion against Ms Paans. Such a consideration is not expressly referred to as a relevant matter in s 71(4) of the Act. Indeed, the Tribunal's decision in favour of Ms Paans in the substantive proceeding was itself a clear recognition that Ms Paans had rights against Tamawood and Martyn. That she chose to pursue them, as the legislature no doubt intended she should, could not, on any rational view of the factors bearing upon the exercise of the discretion under s 71(1), be treated as a disqualifying factor.

[35] Thirdly, his Honour was, in my respectful opinion, correct to regard the conduct of Tamawood and Martyn prior to the commencement of proceedings by Ms Paans by reason of what was found to be their continuing default as a consideration tending to support an award of costs in her favour. It is, of course, a consideration made relevant by s 71(4)(b) of the Act. The Tribunal's evident failure to appreciate this point was an error of principle.

[36] For these reasons I am of the opinion that the learned District Court judge was correct in concluding that, even if the Tribunal had correctly interpreted s 70 and s 71 of the Act, the exercise of the discretion had miscarried and that he was entitled to exercise afresh the discretion to award costs. The orders which he then made were open to him as a proper reflection of the interests of justice having regard to the facts of the case as found by the Tribunal.

**The scale of costs**

[37] In my view, no basis is shown for interfering with the decision of the District Court in relation to the quantification of costs by reference to the District Court Scale. The effect of his Honour's order is not in doubt. The quantification of costs was quintessentially a matter for the discretion of the learned District Court judge. It is not shown that his Honour erred in fact or in law in the exercise of that discretion.

**The costs in the District Court**

[38] It is said that the quantum of the costs fixed by the District Court in favour of Tamawood and Martyn is "*patently unreasonable*". It is also said to be contrary to the provisions of s 100(8) of the Act which provides: *"The appellant must pay the costs of the appeal, including the costs of any transcript."*

[39] On one view, s 100(8) may be thought to be a curious provision, if for no other reason than that it would, if interpreted literally and in isolation from the context in which it appears, deny the power vested in the District Court by the combination of r 766(1) and r 785 of the *Uniform Civil Procedure Rules* 1999 (Qld) to award costs to an appellant who is ultimately successful in the appeal, and oblige that successful appellant to pay the legal costs of the unsuccessful respondent. That would be a particularly odd result. While it may be accepted that the Act is informed by a general policy of discouraging the incurring of legal costs, that policy would not be advanced by a result whereby the legally represented, but unsuccessful, respondent has its legal costs paid by a successful but unrepresented appellant. It is a result most unlikely to have been contemplated by the legislature.

[40] Further, the provisions of s 100 for appeals from the Tribunal to the District Court assume the existence and operation of the legislation which establishes the powers and procedures of the District Court. This legislation includes powers to make orders as to costs.[8] If the legislative intention was to abrogate these provisions in relation to appeals from the Tribunal, one would expect that it would be expressed in the clearest terms.

[41] When s 100(8) of the Act is considered in its context it can be seen, in my opinion, that it should properly be understood as concerned to make it clear that the appellant must bear the costs associated with the appeal concerned with the steps prescribed for the initiation of the appeal to the District Court, as distinct from legal costs, that is, the costs of legal representation of the hearing.[9]

[42] It is to be noted that s 100(3) provides for the time within which "*an appeal must be filed*". In speaking of *"an appeal"* as something to be filed, this provision is plainly concerned to speak of the initiating process. Similarly, s 100(4) provides for the documentation which must accompany *"an appeal"*. In addition, r 784 of the *Uniform Civil Procedure Rules* 1999 (Qld), with which these provisions of the Act are linked, prescribes steps necessary for the formal initiation of an appeal and in this context, the reference in s 100(8) to "*the costs of the appeal*" can sensibly be seen to refer to the costs involved in the formal processes required to initiate an appeal as distinct from the legal costs of representation. That understanding is also supported by the circumstance that s 100(8) expressly includes the "*costs of any transcript*" as part of "*the costs of the appeal*". For the sake of completeness, it

[8] *Uniform Civil Procedure Rules* 1999 (Qld) r 766(1) and r 785.

[9] Cf s 73 and s 115(2)(c) of the Act which clearly refer to "legal costs" as costs associated with legal representation as distinct from other "costs".

may be noted that the power to award costs vested in the Tribunal is at large in the sense that it is not limited to any species of costs.

[43] There was no suggestion that Ms Paans has not paid the costs associated with the appeal referred to in s 100.

[44] Once it is accepted that the District Court was not obliged to order that a successful appellant should pay all the costs of an unsuccessful respondent, and that his Honour has a discretion to award costs other than the costs referred to in s 100(8) of the Act and to fix the quantum of costs, it is necessary to consider whether that discretion has miscarried, that is, whether the sum so fixed is "patently unreasonable".

[45] In this case, there were, of course, two applications for leave to appeal before his Honour. His Honour's order in relation to costs no doubt reflected his Honour's view as to the level of success enjoyed by Ms Paans overall. That was, in my view, a consideration relevant to the exercise of his Honour's discretion. That his Honour's order gave effect to this consideration is no basis for arguing that the exercise of discretion was *"patently unreasonable*".

**Conclusion**

[46] For these reasons, I would make the following orders in each application:

(a) the application for an extension of time within which to file the notice of appeal and to apply for leave to appeal be granted;
(b) leave to appeal be granted;
(c) each appeal be dismissed;
(d) the appellants Tamawood and Martyn pay the respondent's costs of the application and appeal to be assessed on the standard basis.

[47] **PHILIPPIDES J:** I have had the benefit of reading the comprehensive reasons for judgment of Keane JA and the additional reasons for judgment of Williams JA. I agree with those reasons and the orders proposed.

R N Wensley QC, with A E Lyons, for the first and second applicants/appellants instructed by William Goodwin for the first and second applicants/appellants
D M Logan for the respondent instructed by McAlister & Cartmill (Coolum Beach) for the respondent