SUPREME COURT OF QUEENSLAND

CITATION:	*W & T Enterprises (Q) P/L v K O Taylor, Referee, Small Claims Tribunal & Ors* [2005] QSC 360
PARTIES:	**W & T ENTERPRISES (QLD) PTY LTD** **ACN 062 169 751** (applicant) **v** **K O TAYLOR, REFEREE, SMALL CLAIMS TRIBUNAL** (first respondent) **VIETER KURT BERNAU** (second respondent) **VIVIENNE COPELAND** (third respondent) **MARY BARBOUR** (fourth respondent) **ERROL BRIAN WAY & ANNE MAREE BEMI** (fifth respondents) **KIM MUSGROVE** (sixth respondent) **ALBERT WATSON AND BARBARA WATSON** (seventh respondents)
FILE NO/S:	BS7569 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2005
JUDGE:	Byrne J
ORDER:	**Application dismissed.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – MISTAKE – where an error in a reprint caused an obvious mistake in an amending act – whether with the aid of extrinsic materials the Court can correct a drafting error ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DISTINCTION BETWEEN ADMINISTRATIVE AND

JUDICIAL FUNCTIONS – whether a decision of a Small Claims Tribunal was a decision of an administrative character

Acts Interpretation Act 1954, s 14A(1), s 14B(1)(a)
Courts Reform Amendment Act 1997
Judicial Review Act 1991, s 18, s 41(1), s 41(2), s 43, Part 5, Schedule 1
Mobile Homes Act 1989, s 9(1), s 10, Schedule 1
Reprints Act 1992, s 48
Small Claims Tribunals Act 1973, s 4(1), s 5, s 14(1), s 18(1), s 19, s 32(3), s 33(3)
Statute Law (Miscellaneous Provisions) Act 2000

A Raptis & Sons Holdings Pty Ltd v Commissioner of Stamp Duties (No 1) [1999] 1 Qd R 458, considered
Attorney-General of the Commonwealth v Oates (1999) 198 CLR 162, considered
Bohac v Department of Agriculture 239 F 3d 1334 (Fed Cir 2001), considered
Branford House Inc v Michetti 623 NE 2d 11 (NY 1993), considered
Bull v Commissioner of Inland Revenue [1999] FJFC 5, considered
Chickasaw Nation v United States 534 US 84 (2001), considered
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297, considered
Envy Trading v State of Queensland [1998] 1 Qd R 413, considered
Gualter, Dykes, & Co v Begg (1910) 30 NZLR 99, considered
Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586, considered
Love v Attorney-General (NSW) (1990) 169 CLR 307, considered
Precision Data Holdings Ltd v Wills (1991) 173 CLR 167, considered
Newcastle City Council v GIO General Limited (1997) 191 CLR 85, considered
Penfold v Penfold (1980) 144 CLR 311, considered
Re Bolton; Ex parte Beane (1987) 162 CLR 514, considered
Regina (Confederation of Passenger Transport UK) v Humber Bridge Board & Anor [2004] QB 310, considered
Securities Commission v Midavia Rail Investments BVBA & Ors [2005] NZCA 45, considered
Stevenson v Wenck (1994) 85 LGERA 161, considered
United States v Colon-Ortiz, 866 F 2d 6 (1st Cir 1989), considered
WACB v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 79 ALJR 94, considered

COUNSEL:	S S W Couper QC with L J Nevison for the applicant D O'Brien for the second, third, fourth, fifth, sixth and seventh respondents
SOLICITORS:	Quinn & Scattini Lawyers for the applicant Brian Bartley & Associates for the second, third, fourth, fifth, sixth and seventh respondents

Operation of Small Claims Tribunals

[1] When the first Small Claims Tribunal was established in Queensland more than 30 years ago, it consisted of one referee, who was responsible for disposing of all Small Claims in the State. Over the years, the jurisdiction of these tribunals has gradually been enlarged. As the volume of claims increased, the legislation was amended[1] to appoint all magistrates as referees.

[2] By the 1990s, the work of the tribunals ranged over claims for payment, and relief from payment, of money "not exceeding the prescribed amount",[2] as well as contests involving motor vehicle property damage, dividing fences, and rental bonds. In 1994, all residential tenancies disputes[3] came within their jurisdiction – an initiative that resulted in a rapid increase in workload. In 1999, the Brisbane Tribunal alone processed more than 7,000 claims.[4]

[3] The popularity of the tribunals, with government and the community, is influenced by the informality of the proceedings and the finality of outcomes.

[4] Small Claims Tribunals function without the usual formalities of a court, are not bound by the rules of evidence,[5] and before a lawyer may be heard, all parties must agree.[6]

[5] Finality is an important characteristic of orders of the tribunals. Several legislative provisions combine to restrict the scope for challenges to determinations of referees: no official record of evidence is kept;[7] "no appeal shall lie in respect" of a settlement or order;[8] and, most significantly for present purposes, by s 19 of the *Small Claims Tribunals Act* 1973 ("*SCTA*"):

> "No writ of certiorari, or prohibition, or other prerogative writ shall issue, and no declaratory judgment shall be given in respect of a proceeding taken or to be taken by or before a small claims tribunal or in respect of any order made therein save where the court before which such writ or judgment is sought is satisfied that the tribunal had or has no jurisdiction conferred by this Act to take the

---

1 *Small Claims Tribunals Act* 1973 ("*SCTA*"), s 5; amended by the *Small Claims Tribunals Act Amendment Act* 1987, which commenced 1 January 1988.
2 *SCTA*, s 4(1) definition of small claim. The figure is now $7,500.
3 *Residential Tenancies Act* 1994.
4 See Report of Queensland Magistracy dated 18 March 2002 at p 26; www.courts.qld.gov.au/publications/annual/annual01mc.pdf.
5 *SCTA*, s 33(3).
6 *SCTA*, s 32(3).
7 *SCTA*, s 14(1).
8 *SCTA*, s 18(1).

> proceeding or that there has occurred therein a denial of natural justice to any party to the proceeding."

[6] Almost two decades after the Small Claims Tribunals began operation, Part 5 of the *Judicial Review Act* 1991 ("*JRA*") abolished recourse to mandamus, prohibition and certiorari.[9] This change was about form, not substance: Part 5 substituted for those prerogative writs "relief or remedy"[10] to the same effect, to be obtained from the Supreme Court on an "application for review".[11]

[7] More to the point, the *JRA* retained the legislative regime sustaining the finality of orders of the tribunals, except to the limited extent permitted by s 19 of the *SCTA*. By s 18(2) of the *JRA*, that Act was "not" to "affect the operation of a provision mentioned in Schedule 1".[12] That Schedule included:

> "6. *Small Claims Tribunal Act 1973*, section 19".

[8] On the applicant's case, however, this careful preservation of established constraints on judicial review was cast aside by the *Statute Law (Miscellaneous Provisions) Act* 2000 ("the 2000 statute"). It is said to have removed the reference to s 19 of the *SCTA* in Schedule 1 of the *JRA*, exposing all determinations of Small Claims Tribunals to judicial review despite the absence of any repeal of s 19.[13]

[9] The history of Schedule 1 of the *JRA* matters to an analysis of the contention about the effect of the 2000 statute.

Legislative history

[10] When first enacted, that Schedule provided:

> "**STATUTORY PROVISIONS THAT CONTINUE TO PROVIDE FOR NON-REVIEW OF DECISIONS**
> 1. *Casino Control Act 1982*, sections 28(3), 31(23), 32(7), 38(3) and 44(4)
> 2. *Family Security Friendly Society (Distribution of Moneys) Act 1991*, section 25
> 3. *Industrial Relations Act 1990*, sections 3.7 and 8.5
> 4. *Queensland Building Services Authority Act 1991*, section 100
> 5. *Retail Shop Leases Act 1984*, section 50
> 6. *Small Claims Tribunal Act 1973*, section 19
> 7. *Workplace Health and Safety Act 1989*, section 108".

[11] The *Workplace Health and Safety Act* 1989 was repealed in 1995.[14] In 1997, the *Industrial Relations Act* 1990 was also repealed.[15] Consistently with those changes,

---

9 *JRA*, s 41(1).
10 *JRA*, s 41(2).
11 *JRA*, s 43.
12 Section 18(2) of the *JRA* now says: "However, this Act does not — (a) affect the operation of an enactment mentioned in schedule 1, part 1 …".
13 Cf *Stevenson v Wenck* (1994) 85 LGERA 161, 166-167.
14 By s 206 of the *Workplace Health and Safety Act* 1995, which commenced 1 July 1995.
15 By s 494(1)(a) of the *Workplace Relations Act* 1997, which commenced 27 March 1997.

the *Courts Reform Amendment Act* 1997 ("*CRA*") amended the *JRA* by substituting a new Schedule 1, Part 1 (the "new schedule"):[16]

> "1. *Casino Control Act 1982*, sections 28(3), 31(23), 32(7), 38(3) and 44(4)
> 2. *District Courts Act 1967*, section 28
> 3. *Family Security Friendly Society (Distribution of Moneys) Act* 1991, section 25
> 4. *Magistrates Courts Act 1921*, sections 43, 48(1) and 50
> 5. *Queensland Building Services Authority Act 1991*, section 100
> 6. *Retail Shop Leases Act 1994*, section 88
> 7. *Small Claims Tribunals Act 1973*, section 19
> 8. *Workplace Relations Act 1997*, sections 259 and 353."

[12] This rearrangement resulted from the inclusion of provisions of the *District Courts Act* 1967 and *Magistrates Courts Act* 1921, and the deletion of the references to the repealed *Workplace Health and Safety Act* 1989 and *Industrial Relations Act* 1990. Provisions of the new *Workplace Relations Act* 1997 were added to the list. The scheme of listing the included statutes in descending alphabetical order was maintained. So s 19 of the *SCTA*, which had been item 6, became 7. This seemingly inconsequential renumbering later assumed significance.

[13] Promulgation of the *CRA* prompted another reprint of the *JRA*: Reprint 3C. In this reprint, the schedule was in these terms:

> "1. …
> 7. *Workplace Health and Safety Act 1989*, section 108
> 8. *Workplace Relations Act 1997*, sections 259 and 353"

[14] Obviously, 7 should have referred to s 19 of the *SCTA*, not the repealed "*Workplace Health and Safety Act* 1989, section 108", which had been removed from the new Schedule by the *CRA*. This blunder would not have mattered had things been left there. By s 48 of the *Reprints Act* 1992, evidence showing such an error is admissible to contradict the text of a statutory reprint as a correct statement of the legislation in question. Unfortunately, however, the mistake had another consequence.

[15] In 1999, the *Workplace Relations Act* 1997 was repealed by the *Industrial Relations Act* 1999. Section 349 of that Act corresponded in effect to the provisions in the 1997 Act referred to in item 8 of the 1997 new schedule. The new schedule was not immediately amended to reflect that repeal. That was done three years later, by the 2000 statute, which relevantly stipulated for these amendments to the *JRA*:

> "4. Schedule 1, part 1, items 7 and 8—
> *omit.*
>
> 5. Schedule 1, part 1—
> *insert—*
> '3A. *Industrial Relations Act 1999*, section 349'.

---

16 Section 55(1).

> 6. Schedule 1, part 1, items 3A to 6 and 9—
> *renumber* as schedule 1, part 1, items 4 to 8."

[16] The critical provision is 4, which deletes "items 7 and 8". As has been said, in reprint 3C, these were:

> **"**7. *Workplace Health and Safety Act 1989*, section 108
> 8. *Workplace Relations Act 1997*, sections 259 and 353"

and omitting them from the new schedule would have been sensible enough as both had been repealed.[17]

[17] But reprint 3C was wrong: the *CRA* had already removed s 108 of the *Workplace Health and Safety Act* 1989, which had previously been listed as 7, replacing it with: "7. *Small Claims Tribunals Act 1973*, section 19" – a provision which was still in force.

Drafting error

[18] Apparently, the author of the instruction to omit "items 7 and 8" had reference to the Schedule as it appeared in Reprint 3C rather than to the terms in which the new Schedule had been enacted by the *CRA*. In any event, there can be no doubt that that instruction, to the extent it concerned 7, was just a drafting slip. The fact and nature of that error are conclusively established by two considerations.

[19] First, the amendment to omit item 7 was effected by a Miscellaneous Provisions statute, which tells strongly against any intention to detract from the finality of the determinations of Small Claims Tribunals by, in effect, abrogating so important a provision as s 19 of the *SCTA*.

[20] The *Queensland Legislation Handbook* was issued by the Legislative Assembly in January 2000 – a few months before the Bill for the 2000 statute reached the House. The *Handbook* records:[18]

> "Statute Law (Miscellaneous Provisions) Bills are useful for minor amendments of a house-keeping nature across the Statute Book as a whole … Matters are suitable for inclusion in a Statute Law (Miscellaneous Provisions) Bill only if they are concise, minor and non-controversial."

[21] Conformably with that idea, the 2000 statute consists of scores of amendments of little or no apparent significance affecting more than 60 statutes. It is scarcely to be supposed that the Parliament thereby set about exposing the many thousands of determinations made annually by Small Claims Tribunals to Supreme Court review.

[22] Secondly, the explanatory notes that accompany[19] the text of the 2000 statute record that "Amendment 4" – the amendment that includes the direction to omit item 7 – "omits references to repealed Acts". The change can only do so if it does not comprehend s 19 of *SCTA*, which had not been repealed.

---

17 7 in 1995; 8 in 1999.

18 At [2.6].

19 The note "is not part of the Act": s 4 of the 2000 statute.

Resort to extrinsic material

[23] W & T contends that the legislative history, the *Handbook* and the enlightening explanatory note cannot be taken into account in interpreting "… 7 … *omit*". That expression is said to be unambiguous. And, at common law, "the courts resort to extrinsic materials in order to interpret statutes only[20] in cases of ambiguity (*Re Bolton; Ex parte Beane (*1987) 162 CLR 514). If the text is clear, the text must prevail."[21]

[24] But the interpretation of the critical statutory provision need not turn on the application of general law canons of construction. By s 14B(1)(a) of the *Acts Interpretation Act* 1954 ("*AIA*"),

> "… consideration may be given to extrinsic material capable of assisting in the interpretation" of a provision of an Act "if the provision is ambiguous or obscure – to provide an interpretation of it."

[25] More importantly, the words that matter are of doubtful import.

[26] The text to be construed is not "… s 19 of the [*SCTA*] …. *omit*". The material words are: "Schedule 1 … 7 … *omit*". This instruction is susceptible of as many possible meanings as there are different Items 7 in the various instruments that answer the description "Schedule 1" of the *JRA*. And when the 2000 statute was enacted, there were two such Schedules: one in the *CRA*; the other in the authorized consolidation in Reprint 3C. Either might have been intended to be incorporated by the reference.

[27] In this confounding state of affairs, s 14B(1)(a) justifies recourse to the history[22] and extrinsic material mentioned. That done, to construe "7 … *omit*" to refer to 7 in the *CRA* rather than the 7 in Reprint 3C would be to produce a result demonstrably at odds with the drafter's intention.

[28] The legislative history and the extrinsic material reveal that the intended reference was to the Schedule as it mistakenly appears in Reprint 3C.

Purposive construction

[29] Section 14A(1) of the *AIA* provides:

> "In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation."

---

20 The proposition may be subject to exceptions that need not be examined: for example, independently of s 14B of the *AIA*, regard may be had to an explanatory note to ascertain the purpose of a direction like "7… omit": *Newcastle City Council v GIO General Limited* (1997) 191 CLR 85, 99, 112-113; *Attorney-General of the Commonwealth v Oates* (1999) 198 CLR 162, 175. And, in England, such a note can "help decide both whether any words were omitted" (or, presumably, included) through a legislative drafting mistake "and, if so, what those words were": *Regina (Confederation of Passenger Transport UK) v Humber Bridge Board & Anor* [2004] QB 310, 325.

21 *Bull v Commissioner of Inland Revenue* [1999] FJFC 5, at 6, per Lord Cooke of Thorndon and Sir Anthony Mason, sitting in the Supreme Court of Fiji.

22 *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297, 305-306, 310.

[30] In the circumstances, that legislative command requires the judicial correction of the direction to omit "7", by disregarding it.[23]

Drafting errors judicially corrected formerly

There is nothing novel in such an approach. Before the enactment of s 14A(1) in 1991,[24] the courts declined to allow obvious, mere drafting errors to frustrate a plain legislative intent.

[31] In *WACB v Minister for Immigration and Multicultural and Indigenous Affairs*[25] Gleeson CJ, McHugh, Gummow and Heydon JJ, citing an observation of Sir Harry Gibbs in 1981,[26] said:

> "… the canons of construction should not be treated so rigidly as to prevent the implementation of a realistic solution in the case of a drafting mistake"

giving this illustration: [27]

> "In *R v Wilcock* (1845) … the *Payment of Workmen's Wages Act 1818* … repealed several Acts described by their titles and dates, including an Act said to have been passed in 13 Geo III. However, the title of the Act described did not agree with any title enacted in that period, but did agree with a title enacted in 17 Geo III. Recognising that a drafting error had been made, Lord Denman CJ said … : 'A mistake has been committed by the Legislature; but, having regard to the subject matter, and looking to the mere contents of the Act itself, we cannot doubt that the intention was to repeal the 17 G 3, and that the incorrect year must be rejected.'"

[32] There are many examples, in Australia[28] and overseas,[29] of the curial correction of drafting slips in legislation involving clearly mistaken reference to other statutory provisions.

---

23 Cf *Envy Trading v State of Queensland* [1998] 1 Qd R 413, 417; and, generally, *A Raptis & Sons Holdings Pty Ltd v Commissioner of Stamp Duties (No 1)* [1999] 1 Qd R 458, 460-461. This makes it unnecessary to deal with s 14B(1)(b) of the *AIA*, by which extrinsic material may be considered to provide an interpretation that avoids a manifestly absurd or unreasonable result.

24 *Acts Interpretation Amendment Act* 1991, s 11.

25 (2004) 79 ALJR 94, 101 at [39].

26 *Cooper Brookes (Wollongong)* at 304.

27 Fn 32 at 101-102.

28 D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, 5th ed (2001), 38 at [2.24].

29 In New Zealand, see *Gualter, Dykes, & Co v Begg* (1910) 30 NZLR 99; *Securities Commission v Midavia Rail Investments BVBA & Ors* [2005] NZCA 45 at [55] (Correction of "an obvious drafting error … is mandated by the purposive approach to interpretation"); in the United States, *Chickasaw Nation v United States* 534 US 84, 91 (2001), where the Court ignored words that were "simply a drafting mistake"; *Bohac v Department of Agriculture* 239 F 3d 1334, 1338 (Fed Cir 2001), holding it "well-established" that a court may interpret statutes to "correct … obvious drafting mistakes", citing *United States v Colon-Ortiz*, 866 F 2d 6, 10 (1st Cir 1989) ("extra language was 'an inadvertent drafting error, and should be stricken from the statute' "); and in the United Kingdom, FAR Bennion, *Statutory Interpretation: A Code*, 4th ed (2002), 750-759.

[33] In *Inco Europe Ltd v First Choice Distribution*,[30] Lord Nicholls of Birkenhead, with whom the other members of the House of Lords agreed, described the contemporary British approach under the general law in this way:[31]

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. … Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the bill been noticed."

[34] As it happens, those conditions[32] would be satisfied here.

Challenge to Referee's decision

[35] The next question concerns the present significance of my conclusion that s 19 remains in Schedule 1, Part 1 of the *JRA*.

[36] The applicant ("W & T") seeks, pursuant to Part 5 of the *JRA*, orders requiring the first respondent ("the Referee") to reconsider his decision to refuse its application to the Small Claims Tribunal for an order permitting W & T to determine agreements concluded with the other respondents ("the Occupants").

[37] In 1998, W & T acquired land at Alexandra Headlands. It has used the property as a tourist park. The Occupants have their mobile homes there. Their rights to possession of the home sites were conferred by agreements the Occupants entered into with W & T's predecessor in title. W & T wishes to terminate the agreements. Absent consensus, by s 9(1) of the *Mobile Homes Act* 1989 ("*MHA*"), that may only be done pursuant to an order of a Small Claims Tribunal granting permission to do so.[33]

[38] Section 10 of the *MHA* provides:

> "(1) Jurisdiction is … conferred on every Small Claims Tribunal to hear and determine all applications made to it pursuant to or for the purposes of this Act.
> …
> (2) A Small Claims Tribunal shall not make an order that permits an

---

30 [2000] 1 WLR 586.

31 At 592.

32 Cf the position on the other side of the Atlantic: "a court may apply a statute by disregarding a clerical error in legislation so as to make the corrected statute conform to the Legislature's true intent, if it is established unquestionably that (1) the true legislative intent is contrary to the statutory language, and (2) the mistake is due to inadvertence or clerical error": *Branford House Inc v Michetti* 623 NE 2d 11, 13 (NY 1993).

33 The application was made before the *Manufactured Homes (Residential Parks) Act* 2003 commenced.

owner of a site to terminate a relevant agreement unless –

(a) the tribunal is satisfied that the ground on which application for the order is based has been made out; and
(b) the tribunal is satisfied that the making of the order is reasonable and just in the circumstances."

[39] It is common ground that each of W & T's arrangements with an occupant was a "relevant agreement" that contained this implied[34] term:

> "The owner is entitled to apply to a Small Claims Tribunal for an order that permits termination of the agreement and, subject to the order being made, is entitled to terminate the agreement on any of the following grounds –
>
> …
>
> (f) the relevant local government has granted its approval of the use of the site for a purpose other than as a site."[35]

[40] In his reasons, the Referee held that W & T had made out ground (f). He then turned to consider whether it was "reasonable and just in the circumstances" to permit termination. He decided that W & T had not established that second pre-condition to such an order. W & T alleges that it was denied procedural fairness on that question. It is necessary to set the context to explain the complaint.[36]

[41] W & T anticipated that the Occupants would resist a finding that termination was "just and reasonable …" on the basis that no satisfactory sites were available for their relocation. At the initial hearing, on 3 March 2004, W & T placed written material before the Referee to demonstrate that six sites for mobile homes were available at the Palmwoods Caravan Park.

[42] The hearing was adjourned for three months. On its resumption, the suitability of other mobile home sites again assumed significance. One of the Occupants, Mr Way, told the Referee that his enquiries indicated that there were no available sites comparable to those at W & T's Park. W & T's director, Mr Hooke, addressed the Referee on the topic, commending the Palmwoods alternative. Other information on the issue was supplied.

[43] A few hours after the hearing finished, the Referee gave his reasons for refusing the application. In discussing the "just and reasonable ..." issue, he said that the pertinent "circumstances" included the impact of relocation on the Occupants. He spoke of the careful search by the particular Occupants who were the respondents to the application for a suitable living environment for their retirement. W & T's Park met their requirements because of its close proximity to medical services,[37] other

---

34 Imposed by Schedule 1, s 4 of the *MHA*.

35 "Site" is defined (by s 3) to mean "land made available for positioning of mobile homes under relevant agreements …".

36 Another error was assigned: that the Referee considered that, in a phrase, exceptional circumstances were required before it could be found "just and reasonable …" to permit termination, thereby impermissibly fettering his consideration: cf *Penfold v Penfold* (1980) 144 CLR 311, 315. W & T accepts, however, that any such error is within jurisdiction, and, therefore, not amenable to Part 5 relief if s 19 of the *SCTA* remains in Schedule 1 of the *JRA*.

37 The reasons recite that the particular Occupants suffered from chronic ailments.

amenities and infrastructure. Alternatives canvassed during the hearing were discussed. The respondents had enquired about other mobile home sites as far north as Bundaberg. None on the Sunshine Coast were as near to the coastline. "There are sites available at Palmwoods," said the Referee. But he regarded that Park as being situated "far from the coast", with "limited public transport, infrastructure and medical services".

Procedural fairness contested

[44] Two, related complaints are made about the procedural fairness of the Referee's hearing and determination of the "just and reasonable …" issue.

[45] According to the written outline, once the Tribunal determined that the central issue in the decision-making process was the comparability of available sites at other parks, W & T ought to have been given the opportunity to present further evidence addressing that issue. In oral argument, the case was expressed somewhat differently: that once the Referee had formed the view that "subjective comparability was determinative" of the outcome of the application, W & T should have been given the chance to show that, on any reasonable view, available relocation "options were comparable". By "subjective comparability was determinative", W & T suggests that the Referee considered that, unless the Occupants were satisfied that an alternative venue was as good as what they had at W & T's Park, there ought not to be a termination.

[46] Both contentions misdescribe the Referee's approach.

[47] The Referee did not treat the comparability of alternative sites as "the central issue". Appropriately enough, he saw that as but one, important factor. His reasons make this explicit. After reciting his findings about the respondents' circumstances and concerning the comparability of the Palmwoods Park – the only alternative W & T proposed – the Referee said:

> "Those are the respondents' circumstances, which must be weighed against [W & T's] circumstances in considering what is reasonable and just. What is reasonable and just must give due weight to the needs of, and the effect of an order upon, all parties."

[48] Nor is there any merit in the "subjective comparability was determinative" characterization. The Referee's assessment of the Palmwoods Park proposition reveals that he did not proceed on the footing that W & T's application had to fail if a respondent thought that Palmwoods was not as good a place to live.[38]

[49] W & T appreciated that it needed to address the availability of suitable, alternative sites. It actually set about doing so: in writing before the initial hearing; and in Mr Hooke's oral presentation three months later. That its case was fairly treated procedurally is supported by the absence of a request at either hearing for another opportunity to produce additional evidence on the point.

[50] There was no denial of procedural fairness. So the claim for Part 5 relief fails.

---

[38] Had the Referee treated subjective view as decisive, information indicating that, assessed objectively, the Occupant ought to have held a different opinion would have been irrelevant. As the Referee did not adopt such an approach, the ramifications of that logical difficulty need not be explored.

Decision of an administrative character?

[51] W & T also seeks a statutory order of review pursuant to Part 3 of the *JRA*. The refusal of permission to terminate is said to be "a decision of an administrative character …"[39]

[52] The character of the Referee's decision was judicial, not administrative.

[53] After an adjudicative process that required procedural fairness to be accorded, the rejection of W & T's case was a determination necessarily based on the application of the law – the grounds stated in s 10 of the *MHA* – to the pertinent facts as they were found to be. The fact-finding involved an evaluation of the rival contentions as the controversy was developed in evidence and argument. Policy played no part in the decision. The decision was not made in the implementation of some executive governmental power or function. And the exercise in which the Referee engaged related to the determination of existing rights.[40]

Disposition

[54] The application is dismissed.

---

39 See s 4(a) definition of "decision to which this Act applies".

40 Cf *Love v Attorney-General (NSW)* (1990) 169 CLR 307, 319; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 189-190.