Civil and Administrative Tribunal

New South Wales

Case Name:	Slaven v Bryant
Medium Neutral Citation:	[2020] NSWCATAP 168
Hearing Date(s):	29 June 2020
Date of Orders:	7 August 2020
Decision Date:	7 August 2020
Jurisdiction:	Appeal Panel
Before:	K Rosser, Principal Member G Curtin SC, Senior Member
Decision:	The appeal is dismissed.
Catchwords:	APPEALS – from findings of fact – credibility of witnesses – limitation on appeal where findings of fact based on demeanour of witnesses – procedural fairness – bias or apprehension of bias – prior professional association as members of the same chambers – insufficient of its own – requirements to be satisfied BUILDING AND CONSTRUCTION – Home Building Act 1989 (NSW) – definition of dwelling - for use as a residence or for use in conjunction with a dwelling – time for assessment – quantum meruit – benefit when not the owner of the land
Legislation Cited:	Home Building Act 1989 (NSW), Sch 1 cl 3
Cases Cited:	ABB Power Generation Ltd v Chapple [2001] WASCA 412; (2001) 25 WAR 158 Bakarich v Commonwealth Bank of Australia [2010] NSWCA 43 Brenner v First Artists Management Pty Ltd [1993] 2 VR 221

	Ebner v Official Trustee in Bankruptcy (2000) HCA 63; (2000) 205 CLR 337 Fox v Percy [2003] HCA 22; (2003) 214 CLR 118 GLMC Properties 2 Pty Ltd v Hassarati & Co Pty Ltd [2016] NSWSC 1642 Lee v Lee [2019] HCA 28; (2019) 266 CLR 129 Lumbers v W Cook Builders Pty Ltd (in liq) [2008] HCA 27; (2008) 232 CLR 635 Mann v Paterson Constructions Pty Ltd [2019] HCA 32 R L & D Investments Pty Ltd v Bisby [2002] NSWSC 1082 R J Baker Nominees Pty Ltd v Parsons Management Group Pty Ltd [2009] WASC 206 Wesiak v D & R Constructions (Aust) Pty Ltd [2016] NSWCA 353
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Darrell James Slaven (Appellant) Emma Louise Bryant (First Respondent) Todd James Bryant (Second Respondent)
Representation:	Solicitors: Appellant (Self Represented) WMB Lawyers Pty Ltd (Respondents)
File Number(s):	AP 20/07929
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	24 January 2020
Before:	L Wilson, Senior Member
File Number(s):	HB 18/39732 and HB 18/47788

REASONS FOR DECISION

1 The appellant's parents owned land near Cootamundra, NSW. The appellant desired to build a house, and later a shed, on that land. There is no issue in the proceedings that the appellant's parents consented to the construction of the house and shed.

2 In 2017 the appellant approached the respondents to build the house, and in 2018 approached them to build the shed. The respondents, who operate as a partnership conducting a building business, agreed to build both.

3 In July 2017 some earthmoving work was done in preparation for the construction of the house, but that was the only work done in relation to the house.

4 In late 2017 the appellant started discussing the construction of the shed with the first respondent.

5 The appellant alleged that there arose an oral contract between he and the respondents to the effect that the respondents would construct a shed for the appellant on the appellant's parents' land for the price of $24,000. The Tribunal rejected that allegation and accepted the respondents' evidence that in April 2018 the respondents orally agreed to build the shed just mentioned but on a "do and charge" or "costs plus" basis rather than for the price of $24,000.

6 The appellant submitted a development application for the shed to the local council, and that application was approved on 4 May 2018.

7 Between May and August 2018, the respondents carried out construction work on the shed. The respondents rendered invoices for their work to the appellant from time to time.

8 Disputes arose between the parties in August 2018.

9 The respondents undertook construction work on the shed up until 3 August 2018. The appellant terminated the agreement between the parties by email dated 24 August 2018.

10 By that date the appellant had paid invoices issued by the respondents totalling $32,617, with further invoices totalling $42,913.47 having been issued but which remained unpaid.

11 The appellant commenced proceedings (HB 18/39732) against the respondents in the Tribunal making a claim for alleged defective building work and alleging that the shed had been constructed in the wrong location. He sought an order that he did not have to pay the respondents for their outstanding invoices and that they pay him $71,000 in compensation for various matters.

12 The respondents commenced proceedings (HB 18/47788) against the appellant in the Tribunal soon thereafter making a claim for payment of their unpaid invoices on a quantum meruit basis.

13 Both proceedings were heard together, with evidence in one being evidence in the other.

14 The Tribunal held that:

(1) the claims by both parties were "building claims";
(2) the work was "residential building work"; and
(3) the shed was a "dwelling",

within the meaning of those terms in the *Home Building Act 1989* (NSW) (the "HBA"), and accordingly the Tribunal had jurisdiction to hear and determine the parties' claims.

15 In detailed reasons extending to 18 pages and 73 paragraphs the Tribunal rejected the appellant's claims and accepted the claims of the respondents. The Tribunal ordered the appellant to pay the respondents the sum of $42,913.47.

16 The appellant appeals from that order.

17 The appellant, in substance, raises five areas of complaint for consideration. Some contain more than one ground of appeal, but to assist the parties' understanding of these reasons we will address any ground of appeal within each of the five complaints raised by the appellant.

18 As each complaint is relatively discreet it is appropriate to consider each separately below, mentioning such facts as are relevant when each complaint is addressed. The written grounds of appeal ranged a little further than what is set out below, but the appellant confirmed during the hearing of the appeal that what is set out below were the matters he was pursuing.

19 We should also note that the appellant included some of the basal facts in more than one complaint, but we have only referred to those facts in relation to the complaints to which they are relevant.

20 Having considered each of the appellant's complaints it is our opinion that none of the grounds of appeal succeed and the appeal should be dismissed.

Ground 1

21 The appellant contends that the Tribunal erred in:

(1) finding that the contract between the parties was on a "do and charge" or "costs plus" basis rather than for a fixed price of $24,000;

(2) the Tribunal had no jurisdiction to determine the claim in relation to the shed because the shed was not a "dwelling" and so the HBA did not apply;

(3) he received no benefit from the work performed by the respondents and so no amounts ought to have been awarded to the respondents by way of quantum meruit.

Do and Charge / Costs Plus or Fixed Price Contract

22 No submissions were advanced, either orally or in writing, as to why the factual finding made by the Tribunal that the agreement between the parties was that the respondents be paid on a "do and charge" or "costs plus" basis rather than for a fixed price of $24,000 was erroneous.

23 In making that factual finding the Tribunal, correctly with respect, limited its reliance as far as possible on the appearances of the witnesses and reasoned to its conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events [see the plurality in *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118].

24 Insofar as reliance on the appearance of the witnesses was involved, the Tribunal gave detailed reasons for accepting the respondents' witnesses' evidence and rejecting as unreliable the evidence given by the appellant. It is

apparent from the Tribunal's reasons that part of the Tribunal's decision-making process in making various findings of fact involved an assessment of the demeanour of the witnesses when giving evidence.

25 Given this finding under challenge did rely, to a degree, on the reliability of the witnesses based partly upon their demeanour, the appellant would need to persuade us that the Tribunal's finding was contradicted by incontrovertible evidence, was glaringly improbable or contrary to compelling inferences - *Fox v Percy* at [29].

26 Subsequent to *Fox v Percy* the High Court said a little more about appellate restraint and in particular referred to findings of secondary facts. In *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129, the plurality said at [55] (footnotes omitted):

> "A court of appeal is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's findings unless they are 'glaringly improbable' or 'contrary to compelling inferences' is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter, 'in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge'."

27 In this case the Tribunal's findings of fact were, it expressly said, affected by impressions about the credibility and reliability of witnesses formed as a result of seeing and hearing the witnesses give their evidence. Therefore, appellate restraint from interference with those findings is required unless the appellant persuades us that the findings he wishes to challenge were contradicted by incontrovertible evidence, were glaringly improbable or contrary to compelling inferences.

28 He has not done so.

29 Nor is there any error apparent to us by reason of, for example, a lack of evidence or a misunderstanding of the case. An alleged wrong finding of fact is not an error of law unless there is no evidence to support it, or it reveals such a

fundamental misunderstanding of the case brought by the party as to amount to a constructive failure to exercise jurisdiction - *R L & D Investments Pty Ltd v Bisby* [2002] NSWSC 1082 at [13], cited with approval in *GLMC Properties 2 Pty Ltd v Hassarati & Co Pty Ltd* [2016] NSWSC 1642 at [28]. Neither of those circumstances exist in this case.

30 Where an ultimate finding of fact is based upon primary facts which are capable of supporting the ultimate finding, and there is evidence to prove those primary facts, no error of law arises - *Wesiak v D & R Constructions (Aust) Pty Ltd* [2016] NSWCA 353 at [62]. The Tribunal's finding was based on primary facts which were capable of supporting it (and those facts were not contradicted by incontrovertible evidence, were glaringly improbable or contrary to compelling inferences) and thus no error of law arises.

31 Therefore, we can discern no error in the Tribunal's finding that the contract was on a "do and charge" or "costs plus" basis rather than for a fixed price of $24,000.

Jurisdiction - Dwelling

32 The Tribunal's jurisdiction in this case depended on (amongst other things) the shed being a dwelling. That is because the Tribunal must have before it a "building claim", which is a claim that arises from a "supply of building goods or services". "Building goods or services" (in this case) means goods or services supplied for or in connection with the carrying out of "residential building work", and "residential building work" means (in this case) any work involved in, or involved in co-ordinating or supervising any work involved in the construction of a dwelling.

33 Clause 3 of Schedule 1 of the HBA defines "dwelling" as follows:

> **3 Definition of "dwelling"**
>
> (1) In this Act, dwelling means a building or portion of a building that is designed, constructed or adapted for use as a residence (such as a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat).
>
> (2) Each of the following structures or improvements is included in the definition of dwelling if it is constructed for use in conjunction with a dwelling –
>
> …

> (i) detached workshops, sheds and other outbuildings (but not jetties, slipways, pontoons or boat ramps and any structures ancillary to these exceptions),

34 The Tribunal found that the shed was a "dwelling" within the meaning of that term in the HBA. The Tribunal found that when the oral building contract was entered into, and construction work began, the shed was being constructed for use in conjunction with a house that was already on the property Alternatively, the Tribunal found that the shed was designed, constructed or adapted for use as a residence because the appellant wanted to live in the shed and at the time of the hearing the appellant lived in the shed (at least some of the time, if not the majority of the time). The shed was constructed with, amongst other things, a bathroom, toilet, walk-in robe, and with space available for a washing-machine and wash tub.

35 The appellant submits that the shed is not a dwelling that was built on his parents' property nor is there a house or dwelling on the property. Even if the Tribunal erred in finding that a house was already on the property, that submission does not address the Tribunal's finding that the shed was also a dwelling because the appellant resided there, and so met the definition of dwelling in cl 3(1). The factual finding that he resided in the shed was based on the appellant's own evidence, and the objective facts that the shed contained a bathroom, toilet, walk-in robe, and with space available for a washing-machine and wash tub, although not relied on by the Tribunal, would have satisfied the definition of a dwelling being a building "designed, *constructed or adapted for use* as a residence" whether it was used for that purpose or not. In these circumstances, it does not matter if there was no house already on the property, or if construction of the house that the appellant proposed to have the respondents build for him did not proceed to completion. It is clear that the shed was being constructed *in conjunction with* the proposed house the appellant agrees he had asked the respondents to build for him on that same property. It is also clear that the shed otherwise meets the definition of a dwelling for the purposes of cl (3(1). We do not accept the submission that the shed is not a dwelling because the proposed house was not completed.

No Benefit

36 As Gageler said in Mann v Paterson Constructions Pty Ltd [2019] HCA 32 at [95], quantum meruit refers to "compensation for benefit received and enjoyed".

37 The appellant submits that he has not received a benefit because he does not own the land on which the shed was constructed. However, the law says otherwise.

38 In *R J Baker Nominees Pty Ltd v Parsons Management Group Pty Ltd* [2009] WASC 206 Beech J said, in relation to quantum meruit:

> [153] In my opinion, as a general rule, and subject to exceptions, if party A requests party B to provide services in circumstances where, objectively, B expects to be paid for the services, then A will be obliged to pay a reasonable remuneration to B for the services. …

39 His Honour rejected the submission that the general rule set out in the quote above does not apply to a request by A to B for B to perform works which will benefit a third party (C), for example, by performing work on land owned by C. His Honour did so in reliance upon the plurality's judgment in Lumbers v W Cook Builders Pty Ltd (in liq) [2008] HCA 27; (2008) 232 CLR 635 and because of the holdings in Brenner v First Artists Management Pty Ltd [1993] 2 VR 221 at 257–259 and ABB Power Generation Ltd v Chapple [2001] WASCA 412; (2001) 25 WAR 158 at [20] to the effect that a claim for quantum meruit can arise in respect of services which do not have any end product of economic value (sometimes termed "pure services") to the recipient of the services.

40 As the appellant does not own the land, and the shed is a fixture upon it, he does not own the shed (although he may have rights in equity against the owners of the land for his expenditure). In that sense he did not receive economic value. The Tribunal found that the appellant derived a benefit as he resides in the shed. Whether that finding is sufficient to support a claim for quantum meruit may be open to doubt but, as Beech J held, and as is the case here, quantum meruit can still arise because it was the appellant who requested the respondents' services in circumstances where both parties contemplated the respondents would be paid for those services. In those

circumstances the appellant was obliged to pay the respondents for those services.

41 Therefore, we do not accept the submission that the respondents are not entitled to restitution because the appellant did not own the land on which the shed was constructed.

Ground 2

42 The appellant contends that the appeal should be upheld because the sound recording of the hearing before the Tribunal has been "withdrawn and concealed for biased reasons not in his favour". He submitted that the hearing was not sound recorded, and this clearly showed the Tribunal was biased against him. He submitted that the absence of the sound recording is sufficient evidence that there has been a significant miscarriage of justice. He queries how the Tribunal could "directly quot(e) a question" without a sound recording.

43 There is no substance to these submissions.

44 The hearing was sound recorded in the sense that the relevant equipment was used in an attempt to record what was said, but, due to technical problems, one of the two days of hearing was not actually recorded. Such is a regrettable, but rare, occurrence in the Tribunal.

45 The malfunctioning of the equipment is not evidence of bias (we deal with bias later below) and is not evidence of a miscarriage of justice. The Tribunal was able to refer to oral evidence given at the hearing because Tribunal Members conducting hearings routinely make contemporaneous written notes of the oral evidence during the hearing.

Conflict of Interest / Bias

46 The appellant contends that the Member conducting the hearing had a conflict of interest which resulted "in bias and false decisions" against him.

47 The conflict/bias allegedly arose, according to the appellant, for a number of reasons. First, because the Member had previously been a member of the same chambers as counsel who represented the respondents at the hearing. Second, the appellant complains that he was given less notice than the respondents of the change in venue. Third, that he had to cross-examine Mr

Bryant after another witness was interposed (because the witness had to leave early). Fourth, that counsel for the respondents provided "sections" to the Tribunal "to Doctor (sic) evidence" in the Tribunal's findings and, fifth, that some of his evidence was not admitted into evidence.

48 The main thrust of the submission rested on the contention that the Member conducting the hearing should have disqualified herself from hearing the matter because of her earlier professional association with counsel for the respondents, and thus there arose a reasonable apprehension of bias, and that she was actually biased against him.

49 These submissions have no substance.

50 A previous professional association between a judge and a barrister representing a party in a case being heard by that judge is not, without more, grounds for disqualification.

51 In *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 43 Campbell JA declined to disqualify himself from hearing a case because his Honour, when a barrister, had been for a time a member of the same chambers as the judge who decided the case at first instance, and the senior counsel who had appeared for the bank at first instance.

52 His Honour said:

> "[13] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 stated the test by reference to which a judge decides whether to disqualify himself or herself. The joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ stated, at [6]:
>
> > 'Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver … or necessity … a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide: *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *Re Lusink; Ex parte Shaw* (1980) 55 ALJR 12; 32 ALR 47; *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Re JRL; Ex parte CJL* (1986) 161 CLR 342; *Vakauta v Kelly* (1989) 167 CLR 568; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* (2000) 201 CLR 488. That principle gives effect to the requirement that justice should both be done and be seen to be done (*R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259, per Lord Hewart CJ), a requirement which reflects the fundamental

> importance of the principle that the tribunal be independent and impartial.'

[14] Their Honours identified, at [8], the manner in which that principle is to be applied:

> 'First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.'

[15] Application of this principle requires one to decide what amount of relevant knowledge is to be attributed to the "fair-minded lay observer".

[16] The fair-minded observer can have attributed to him or her "knowledge of the actual circumstances of the case": *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 87 per Mason CJ and Brennan J (with whom Gaudron and McHugh JJ agreed, subject to some matters that appear not presently relevant: 98). Some cases have considered, in particular, what knowledge concerning the operation of the legal system can be attributed to the fair-minded lay observer.

[17] In *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd* (1986) 6 NSWLR 272 this Court approved the refusal of Powell J to decline to hear litigation brought against two prominent firms of Sydney solicitors. Priestley JA (with whom Hope and Glass JJA agreed) set out and approved, at 275, a statement of principle by Powell J that included:

> 'I do not believe that any right-minded person who knows of the manner in which the legal profession in this State is organised, and who knows of the fact that, traditionally, the judges in this State have been appointed from the ranks of the practising members of the legal profession (as to the relevance of existing practices, see Re The Queen and His Honour Judge Leckie; Ex parte Felman (1977) 52 ALJR 155, 158 per Gibbs J, as he then was) could reasonably suspect that a judge who, on occasion, over a reasonably long time as a practising member of the Bar, which period, in any event, expired over nine years ago, was retained, and instructed by, a member or members of a particular firm of solicitors on behalf of clients of that firm, was, by virtue of that fact alone, incapable of bringing an impartial and unprejudiced mind to the resolution of the issues in a proceeding to which that firm of solicitors, or a party of that firm of solicitors, may be a party.'

[18] …

[19] Priestley JA commented, at 276, on Powell J's observations about the effect of the method of appointment of judges on the operation of the apprehension of bias principle:

> 'That method of appointment means that built into the legal system is public knowledge and long acceptance of the fact that judges will often

> know to a greater or less degree the counsel and solicitors who appear before them. Also when, as not infrequently happens, members of the legal profession are parties to litigation, it is inevitable that their cases will be decided by other members of the legal profession. It has long been accepted that a judge should not sit on a case involving a person with whom he has a connection which might in fact or in appearance affect his impartiality; when the judge's connection is less than that there is no reason why he should not sit." referred to the "double might" test set by the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.'"

53 And referring to his Honour's own circumstances:

> "[26] The 'actual circumstances of the case' concerning the circumstances in which barristers share chambers is that, while it provides the opportunity for the sort of friendly relations to develop that are usual between professional colleagues, those colleagues can also be one's competitors. Sharing chambers also provides a means whereby the overhead expenses of a barrister's practice can be shared, but that in itself produces no more closeness of relations than arises from people who share a home unit building sharing some of the overheads of that building. I had no financial or social association with Mr Sackar or Nicholas J, beyond that which is inherent in barristers sharing chambers."

54 The fact that the Member and counsel for one of the parties at one point shared chambers is a circumstance that regularly (although not frequently) occurs and is not, of itself, sufficient to warrant disqualification. No other circumstances of an earlier association between the Member and counsel were raised by the appellant, and thus this submission fails for the same reasons it failed it *Bakarich.*

55 As for the other reasons advanced, they do not amount to a conflict of interest or bias. Whether the appellant was given less notice than the respondents of the change in venue is not evidence of bias or anything else. The appellant does not complain that the notice to him was insufficient to attend the hearing (he did attend) or otherwise placed him under any disadvantage.

56 The interposing of witnesses is a regular occurrence in courts and tribunals as they endeavour to reduce, as far as possible, the inconvenience to witnesses, particularly witnesses who are not parties to the proceedings. It is not evidence of bias.

57 The provision of copies of authorities or sections from statutes by counsel, solicitors or unrepresented parties is, again, a frequent occurrence in courts and tribunals. There is nothing remarkable in this, and it is no evidence of bias.

58 In relation to evidence, after some enquiry of the appellant by us during the hearing of the appeal, it became apparent that the evidence upon which he intended to rely was, in fact, before the Tribunal.

59 Further, the appellant has not identified, as he is required to identify, what it is said might have lead the Tribunal to decide the two cases other than on their legal and factual merits. Nor has he articulated the logical connection between the cases and the feared deviation from the course of deciding the cases on their merits – see *Ebner v Official Trustee in Bankruptcy* (2000) HCA 63; (2000) 205 CLR 337.

60 Therefore, we are not persuaded any of the matters identified by the appellant might give rise in the mind of the fair-minded lay observer a reasonable apprehension that the Member conducting the hearing might not decide the cases before her on their merits.

Disadvantage

61 The appellant contends that he was disadvantaged in conducting the proceedings on his own behalf.

62 He submits that he suffers from a number of medical conditions which made it difficult for him to represent himself. Whilst we sympathise with the appellant's plight, his difficulties, without more, do not give rise to a ground of appeal. There is nothing in the material before us which suggests the appellant was unable to put his case as best it could be put, or that he was under any disadvantage, or that a fair hearing did not take place because of his medical conditions.

63 The appellant did submit that the respondents and a lawyer allegedly breached the appellant's privacy in disclosing a compensation payment paid to him without his consent, and that this strongly affected the dispute as to costs the appellant had with a lawyer earlier retained by him. Even assuming the allegation is correct, that matter has nothing to do with the appeal and whether the appellant owes money to the respondents as reasonable compensation for work done at the appellant's request. This appeal is not an inquiry into all matters of dissatisfaction the appellant may have related to, but not part of, the matters the subject of the appeal.

Incorrect Positioning of the Shed

64 The appellant contends that the shed was incorrectly positioned on the land.

65 No ground of appeal, whether involving a question of law or otherwise, is apparent to us from the appellant's submissions. The appellant expresses his disagreement with the Tribunal's finding but does not express (nor can we discern) any error in the Tribunal's finding of fact that the shed was positioned where the appellant desired.

66 The Tribunal said it was not required to decide this issue because no monetary relief was claimed by the appellant even if the allegation was accepted. There is no appeal from that observation. Thus, even if the allegation were correct, the appellant did not prove any loss or damage resulting from the alleged incorrect position of the shed. As he has said, he does not own the land.

67 Be that as it may, the Tribunal went on to give some short reasons why it did not accept the allegation that the shed was incorrectly positioned. The Tribunal rejected the appellant's evidence and did not accept that he was a reliable witness. That finding was partly based on demeanour, and as such, appellate restraint in interfering with that finding is called for unless it is contradicted by incontrovertible evidence, was glaringly improbable or was contrary to compelling inferences. None of those matters exist in this case.

68 The Tribunal found that the appellant inspected the proposed site for the shed twice, once with Messrs Crick and Boyton (employees of the respondents and whose evidence the Tribunal accepted) and once with a local council inspector (who approved the position of the slab for the shed). The Tribunal noted that the appellant made no objection to the local council's approval of the shed in the position indicated.

69 Therefore, in our opinion, there was no error in the Tribunal's rejection of the allegation that the shed was built in the incorrect position.

Orders

(1) The appeal is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar