Williams v CEO Housing [2013] NTSC 28

PARTIES:	WILLIAMS, Vanessa v CEO HOUSING
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No. LA4 of 2013 (21236346)
DELIVERED:	6 June 2013
HEARING DATES:	29 May 2013
JUDGMENT OF:	HILEY J
APPEAL FROM:	DR LOWNDES SM

CATCHWORDS:

LANDLORD AND TENANT – application under s 100(1) *Residential Tenancies Act* (NT) for orders terminating a tenancy and for possession – whether court has discretion once satisfied of threshold requirements – remedies available to landlords

COURTS – Local Court - jurisdiction under s 100(1) *Residential Tenancies Act* (NT) – discretion to terminate a tenancy and make order for possession

STATUTORY INTERPRETATION – words and phrases – "may" – whether power conferred is discretionary – whether mandatory

Local Court Act (NT) s 19

Residential Tenancies Act (NT) s 3, s 82, s 96A, s 96B, s 97, s 99A, s 100, s 100A, s 101, s 103, s 104, s 105, s 122, s 150(7)

Commissioner for Social Housing in the ACT v Canham (Residential Tenancies) [2012] ACAT 41; *Crook v Consumer, Trader and Tenancy Tribunal NSW* (2003) 59 NSWLR 300; *Eastman v Commissioner for Housing in the ACT* [2006] 200 FLR 272; *NSW Land and Housing Corporation v Bullman* [2006] NSWSC 733, applied.

CEO Housing v Coonan [2010] NTMC 30; *CEO Housing v Steiner* [2008] NTMC 9, approved.

Lugg v Wright [1941] SASR 106; *Mason and Anor v NT Housing* (1996) 6 NTLR 152; *Owens v Australian Building Construction Employees' and Builders Labourers' Federation* (1991) 46 FLR 16, distinguished.

REPRESENTATION:

Counsel:

Appellant:	N Aughterson
Respondent:	C Smyth

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID Number:	Hil1303
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Williams v CEO Housing [2013] NTSC 28
No. LA4 of 2013 (21236346)

BETWEEN:

WILLIAMS, Vanessa
Appellant

AND:

CEO - Housing
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 6 June 2013)

Introduction

[1] This is an appeal against a decision by the Local Court on 6 March 2013 to terminate the appellant's tenancy at unit 14/10 Parap Road, Parap (the "premises") and to order possession of the premises.

[2] On 28 September 2012 the respondent sought orders for the termination of the tenancy and possession of the premises, under s 100(1) of the *Residential Tenancies Act*. The premises have been leased by the appellant since 8 July 2002. The tenancy agreement is currently fixed to expire on 1

September 2013. The respondent relied upon the grounds set out in s 100(1)(b) and (c) of the *Residential Tenancies Act* .

[3] Section 100(1) of the *Residential Tenancies Act* provides as follows:

> (1) A court may, on the application of the landlord or an interested person, terminate a tenancy and make an order for possession of the premises if satisfied the tenant has:
>
> (a) used the premises, or caused or permitted the premises to be used, for an illegal purpose; or
>
> (b) repeatedly caused a nuisance on or from the premises or repeatedly permitted a nuisance to be caused on or from the premises; or
>
> (c) repeatedly caused or repeatedly permitted an interference with the reasonable peace or privacy of a person residing in the immediate vicinity of the premises.

[4] Incidents of noise, nuisance and anti-social behaviour had been alleged against the appellant. Warning notices were issued by Territory Housing on 11 July, 10 August and 14 September 2012. Underlying the application was Territory Housing's "Three Strikes Policy" (Territory Housing Operational Policy).

[5] On 6 March 2013, His Honour Dr Lowndes SM held that he was satisfied that one or more of the grounds set out in s 100(1)(b) and (c) of the *Residential Tenancies Act* had been made out. His Honour also held that the word "may" in the first line of s 100(1) of the *Residential Tenancies Act* did not allow the court a discretion. His Honour stated: "the court has no discretion under [s] 100 - once it is satisfied about a relevant ground, then it

must then proceed to terminate a tenancy or make an order for possession". On that basis, his Honour ordered termination and possession of the property. He then suspended the order for 2 months pursuant to s 105 of the *Residential Tenancies Act*. The parties agreed to a further stay of the court's orders pending the outcome of this appeal.

[6] Section 19(1) of the *Local Court Act* permits a party to a proceeding to appeal to the Supreme Court on a question of law from a final order of the Local Court. In the present context, the right of appeal is preserved by s 150(7) of the *Residential Tenancies Act*.

[7] The question of law in the present case is whether under section 100(1) of the *Residential Tenancies Act* the court has a discretion as to whether or not the tenancy should be terminated once it is satisfied that the matters in clauses 100(1)(b) or (c) of the Act have been established.

Consideration

[8] In short the issue is whether the word "may" confers a discretion upon the court, or whether it really means "shall", as a result of which the court was bound to terminate the tenancy and order possession once satisfied of one or more of the elements in clauses 100(1)(a), (b) or (c).

[9] The starting point is the well established presumption that permissive or facultative expressions operate according to their ordinary natural meaning and confer a discretion.[1]

[10] This is particularly so in relation to provisions which empower courts to grant relief of a specified kind. In both *Newmarch v Atkinson*[2] and *Lamb v Moss*[3], it was held that, while the courts in question had to exercise jurisdiction and to consider the applications before them, they had a discretion to decline to grant the remedies that the legislation empowered them to issue. In *Re Sarina*[4] the court said that the power was facultative even though the number of occasions on which it would not be exercised would be rare.[5]

[11] However such a presumption may be displaced if the real intention of the legislation is otherwise.[6] This requires the relevant provision to be construed according to its context.[7]

The *Residential Tenancies Act*

[12] Part 11 of the *Residential Tenancies Act* (ss 82 to 109) deals with termination of tenancy agreements. The term "may" is used in each of the

---

1 Cf Pearce & Geddes, Statutory Interpretation in Australia, 7th edition [11.5] and *Ward v Williams* (1955) 92 CLR 496 at 505.
2 *Newmarch v Atkinson* (1918) 25 CLR 381.
3 *Lamb v Moss* (1983) 76 FLR 296 at 311.
4 *Re Sarina; ex parte Wollondilly Shire Council* (1980) 32 ALR 596.
5 Pearce & Geddes, Statutory Interpretation in Australia, 7th edition [11.11].
6 See for example *Ward v Williams* (1955) 92 CLR 496 at 505, and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 490.
7 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 and *AB v Western Australia* (2011) 244 CLR 390 at [10].

sections (ss 97-100A) in Division 4 of Part 11, which Division deals with termination by the court or Commissioner. It is reasonable to assume that the term is used consistently within that Division.

[13] Each of those provisions use the word “may” to confer jurisdiction on the court to terminate a tenancy and order possession of premises “if satisfied that” particular circumstances exist or have existed.

[14] One can readily imagine particular circumstances of the kind identified, for example in s 100(1)(a), (b) or (c), that might be so trivial or historic, that would not justify the drastic step of terminating the tenancy, particularly one as lengthy as the appellant’s. Unless the court has a discretion to decline to terminate a tenancy, a tenant would always be at risk of having his or her tenancy terminated at the whim of the landlord or “an interested person” (ie a third party) for minor transgressions, notwithstanding that they were trivial, may have occurred many years ago, and even where the tenant has taken steps to ensure that there will be no repetition of the conduct complained of. For example, the purpose for which the premises are used might no longer be illegal, or the source of a nuisance (e.g. a noisy visitor) may have been removed.

[15] The broad scope of the potential grounds for termination suggests that the term “may”, consistent with its ordinary meaning, is intended to be permissive.

[16] Allowing no discretion could lead to draconian results. As noted in *Crook v Consumer, Trader and Tenancy Tribunal NSW*[8], depriving a tenant of their home is a "serious and important matter". The terms "repeatedly", "nuisance", "peace" and "privacy" are not defined in the *Residential Tenancies Act*. Accordingly, once it is established that a tenant has caused, or permitted, a relatively minor nuisance or disturbance of the peace on three or more occasions the court would have no option other than to terminate the tenancy. And that would be regardless of any positive history of the tenant over a number of years.

[17] Such a result would also conflict with the objectives set out in s 3(a) and (d) of the *Residential Tenancies Act.* Section 3(a) provides that one objective of the Act is "to fairly balance the rights and duties of tenants and landlords", and s 3(d) provides that another objective is to ensure that tenants "enjoy appropriate security of tenure".

[18] The absence of any discretion would also remove any ability for a court to consider the psychological, social and legal consequences arising from a tenant's eviction. In relation to analogous ACT legislation, in *Commissioner for Social Housing in the ACT & Canham (Residential Tenancies)*[9], the ACT Civil and Administrative Tribunal said, at [70]:

> If section 51 does not involve a discretion, then there is no scope for consideration of the psychological, social and legal consequences arising from evictions from social housing. If there is no discretion, then a family in social

[8] *Crook v Consumer, Trader and Tenancy Tribunal NSW* (2003) 59 NSWLR 300 at [20].
[9] *Commissioner for Social Housing in the ACT & Canham (Residential Tenancies)* [2012] ACAT 41.

> housing may be evicted based on a single incident that involved a serious interference with the quiet enjoyment of a neighbour. That inference would not necessarily involve violence and may involve a one off incident. It may, for example, involve noise or bad behaviour by a teenage child of the tenant. The family would be homeless and the children would probably be taken into care. The unfolding consequences for the family could be out of all proportion to the gravity of the breach.

[19] A refusal by the court to exercise its discretion in favour of the landlord does not leave the landlord without remedies. In most circumstances, including the most usual case where a tenant fails to pay rent, the landlord has far more expeditious and simpler remedies than those available under Division 4 of Part 11 (ss 97 to 100). See for example Division 3A (ss 96A to 96C) and s 100A. See too Divisions 1, 2 and 3 (ss 82 to 96) coupled with Division 6 (in particular ss 101, 103, 104 & 105).

[20] If there is a further transgression that can only be dealt with under Division 4, the landlord could bring a fresh application for termination and possession relying upon that further transgression as well as the original conduct as a basis for persuading the court to exercise its discretion in its favour.

[21] A landlord can also seek and be awarded compensation for loss or damage, including for failure to comply with the tenancy agreement or an obligation under the Act. See s 122.

[22] I understand that there have been very few occasions where the provisions in Division 4 of Part 11 have been utilised. This is probably because most breaches are more easily dealt with elsewhere in the *Residential Tenancies*

Act, as noted above. Those other provisions, particularly those in Divisions 2, 3 and 3A, effectively provide summary remedies which would not ordinarily require any kind of judicial intervention such as is the case with Division 4.

[23] My attention has been drawn to two decisions of the Local Court, where the provisions in Division 4 have been used. Both of those decisions involved the court having and exercising a discretion. In *CEO Housing v Steiner*[10] Little SM held that s 100 of the *Residential Tenancies Act* gives the court a discretion as to whether a termination order is made. In *CEO Housing v Coonan*[11], which involved an application under s 97(2) of the *Residential Tenancies Act*, it was held that the term "may" gave rise to a discretion on the part of the magistrate.

[24] An analogous provision was considered in *NSW Land and Housing Corporation v Bullman.*[12] There, s 68(1) of the *Consumer, Trader and Tenancy Act 2001 (NSW)* provided:

> The Tribunal may on application by a landlord under a residential tenancy agreement, make an order terminating the agreement if it is satisfied that the tenant has intentionally or recklessly caused or permitted or is likely intentionally or recklessly to cause or permit:
> (a) serious damage to the residential premises, or
> (b) injury to the landlord, the landlord's agent or any person in occupation of or permitted on adjoining or adjacent premises.

[25] The court held that first "there is a gateway provision to be decided"; that is, that the tenant has caused or permitted the damage. Then: "If the gateway

[10] *CEO Housing v Steiner* [2008] NTMC 9 at [71].
[11] *CEO Housing v Coonan* [2010] NTMC 30.
[12] *NSW Land and Housing Corporation v Bullman* [2006] NSWSC 733.

provision is satisfied, the Tribunal then exercises its discretion as to whether the tenancy agreement should be terminated". See also at [16], where, in referring to the discretionary nature of the Tribunal's power, the court referred to some of the factors that might be considered (relevant to the facts of that case) in the exercise of the discretion. See too *Crook v Consumer, Trader and Tenancy Tribunal NSW*.[13]

[26] The same construction has been applied in relation to analogous ACT legislation: see *Eastman v Commissioner for Housing in the ACT*[14]; *Commissioner for Social Housing in the ACT v Norman*[15]; and *Commissioner for Social Housing in the ACT & Canham (Residential Tenancies).*[16]

Respondent's contentions

[27] The respondent, and His Honour, relied heavily on s 105 of the *Residential Tenancies Act*, contending that s 105 would have no function if a discretion existed under s 100. However, this provision is of a different kind to s 100, and the other provisions in Division 4, which enable the court to make the orders for termination and possession in the first place.

[28] Moreover, s 105, and the other provisions in Division 6 of Part 11 of which s 105 is a part, relate to possession, not to termination. Section 105 only applies after the tenancy has been terminated and after the landlord is entitled to possession, whether pursuant to orders made under Division 4 or

[13] *Crook v Consumer, Trader and Tenancy Tribunal NSW* (2003) 59 NSWLR 300 at [19].
[14] *Eastman v Commissioner for Housing in the ACT* [2006] 200 FLR 272, see 283 – 285, [24] – [35].
[15] *Commissioner for Social Housing in the ACT v Norman* [2008] ACTRTT 20.
[16] *Commissioner for Social Housing in the ACT & Canham* [2012] ACAT 41.

following the operation of one or other of the summary provisions referred to above, namely those in Divisions 1, 2, 3 and 3A of Part 11.

[29] Clearly s 105 has a function extending far beyond orders made under s 100 or other provisions of Division 4. Irrespective of the basis upon which the tenancy has been terminated and upon which the landlord is entitled to possession, s 105 enables the court to suspend (in effect to stay) the operation of the order for possession (for up to 90 days).

[30] Further, s 105 only applies in limited circumstances (where the Commissioner or a court is satisfied that "an order for immediate possession … would cause severe hardship to the tenant"), further constrained by s 105(2), and can only result in a suspension of the order for possession for up to 90 days. Section 105 is analogous to a stay of execution upon a judgement or order already made.

[31] In considering whether a discretion existed, the learned magistrate (and the respondent) also questioned why there is specific reference to the matters that are to be taken into account in the exercise of the discretion under s 105 but no such reference under s 100. However, such an approach fails to recognise the difference between the discretions conferred under the respective sections. In respect of the discretions conferred by s 100 (and the other provisions in Division 4 of Part 11 conferring jurisdiction on the court to order termination and possession) the legislature has left it to the court to decide how to exercise its discretion, thus allowing the court to "fairly

balance the rights and duties of tenants and landlords" (s 3(a) *Residential Tenancies Act*). However, once the court has exercised that discretion in favour of the landlord (by ordering termination and possession) its powers to derogate from that decision by temporarily suspending the order for possession are expressly limited (by the "severe hardship" condition in s 105(1) and by s 105(2) of the *Residential Tenancies Act*). This is consistent with the requirement in s 3(c) of the *Residential Tenancies Act* for there to be suitable mechanisms for the landlord to enforce its rights once it has obtained the benefit of orders for termination and possession.

[32] The respondent also referred to the *Tenancy Act 1979 (NT)* which was repealed and replaced by the *Residential Tenancies Act*. The respondent referred to and relied upon the decision of *Mason and Anor v NT Housing*[17], where Bailey J held that s 48 of the *Tenancy Act* did not confer a discretion on the court to refuse to issue a warrant of possession upon the application of a landlord who had given the tenant a valid notice to quit. His Honour said, at 159:

> If the legislature had intended there should be discretion to mitigate the effects of a valid notice to quit in other circumstances, this could – and I am satisfied would – have been provided for expressly. Section 48(2) does provide the Local Court with power to postpone the date upon which a warrant of possession is to take effect… Accordingly, the Local Court has a wide discretion to take account of the effect of a warrant of possession on the lessee and alleviate the practical consequence of the lessee's eviction.

[17] *Mason and Anor v NT Housing* (1996) 6 NTLR 152.

[33] However, there are several differences which make the decision inapplicable to the present circumstances:

(a) Firstly, there was no provision such as appears in the opening lines of s 100(1), namely that a court "may" terminate the tenancy etc. It was the absence of any express grant of a power to make the order, "accompanied by clear guidance as to the circumstances when it is to be, or may be, exercised", that appears to have been the main reason for his Honour's conclusion.[18]

(b) Secondly, s 48 of the *Tenancy Act* only enabled the court to issue a warrant of possession (in circumstances where a valid notice to quit had already been given). It did not also enable it to terminate a tenancy, which of course would be a precursor to an order for possession.

(c) Thirdly, the general scheme of that part of the *Tenancy Act*, was quite different to that set out in Part 11 of the *Residential Tenancies Act.*

(d) Fourthly, the provision most closely analogous to s 48 of the *Tenancy Act* is s 104 of the *Residential Tenancies Act*, not s 100, s 104 being the provision that enables the Commissioner or the court to make an order for possession, in circumstances where a landlord has given a notice of termination of the kind referred to in s 101. But even there, unlike s 48 of the *Tenancy Act*, s 104 expressly states that the Commissioner or the court "may make an order for possession of the premises".

[18] Page 156.7.

(e) Fifthly, Bailey J also relied upon the court's "wide discretion [under s 48(2) of the *Tenancy Act*] to take account of the effect of a warrant of possession on the lessee and alleviate the practical consequence of the lessee's eviction". As already noted, the learned magistrate in the present matter also relied upon the discretion conferred under s 105 of the *Residential Tenancies Act* in support of his conclusion that the court did not have any discretion under s 101. However, unlike s 105, which severely limits the scope of that discretion and which enables a maximum suspension of 90 days, and unlike the earlier version of s 48 of the *Tenancy Act* which had also provided for a maximum suspension of 90 days, the provision which Bailey J was using and relying on had no such limitations.

[34] The respondent also submitted that:

> the legislation clearly intended that the benefit of the relief [sic] sought to flow automatically once the court had determined that the relevant facts were established.[19] The enabling word "may" in s 100 of the *Residential Tenancies Act* should be treated as mandatory where [sic] they are words to effectuate a legal right.[20] It is submitted that such an interpretation is consistent with the purposes of the Act, namely to "fairly balance the rights and duties of tenants and landlords"[21] and "to ensure that landlords and tenants are provided with suitable mechanisms for enforcing their rights under tenancy agreements"[22] in the context of "streamlined and easily accessible dispute resolution process" and providing an "accessible and speedy mechanism for

[19] *Lugg v Wright* [1941] SASR 106; *Owens v Australian Building Construction Employees' and Builders Labourers' Federation* (1978) 46 FLR 16 and Pearce and Geddes, *Statutory Interpretation in Australia*, 7th edition. at page 353.
[20] *Julius v Bishop of Oxford* (1880) 5 App Cas 214 at 225, *Ward v Williams* (1955) 92 CLR 496 at 505-506, *Finance Facilities Pty Ltd v FC of T* (1971) 127 CLR 106.
[21] s 3(a) *Residential Tenancies Act*.
[22] s 3(c) *Residential Tenancies Act*.

obtaining a decision on such things as evictions".[23] In circumstances where a landlord is faced with a tenant who has repeatedly caused a substantial degree of interference (ie. repeated nuisance) not only is the landlord required to commence court proceedings, which itself may be onerous, but must also prove, to the requisite civil standard, that the relevant statutory factors were satisfied. That process will no doubt call for significant evidence over a potentially lengthy court hearing. A landlord, who has discharged the statutory criteria and has done what the *Residential Tenancies Act* requires, could be faced with the further burden of addressing, disproving, discrediting or rebutting an unknown number of factual matters in the exercise Court's discretionary powers.[24] To do so would unnecessarily delay and prolong a process which in itself is already sufficiently complex in the circumstances.[25] It is submitted, it would be "contrary to the purpose of the Act.

[35] In my opinion, unlike the situations in *Lugg v Wright*[26] and *Owens v Australian Building Construction Employees' and Builders Labourers' Federation*[27] where "the legislation clearly intended the benefit of the relief sought to flow automatically once the court had determined that the relevant facts were established",[28] s 100 is not intended to confer an absolute right on the landlord in circumstances where the making of the orders would be grossly unfair to the tenant.

[36] Further, in circumstances where detailed evidence has already been led, and possibly challenged, in order to meet the threshold requirements of section

---

[23] *Residential Tenancies Bill 1999*, second reading speech, Hansard 19/8/1999.
[24] Which could be for example the seriousness of the breaches, the length of time over which they occurred, matters going to questions relating to the relationship between landlord and tenant, factors personal the tenant and his/her family, the impact on surrounding properties – all which may be disputed and contested.
[25] See for example the 92 paragraph judgment in *CEO Housing v Steiner* [2008] NTMC 9 or the present matter at first instance where six witnesses gave evidence over two days in respect to the substantive issue, without necessarily going to any substantive evidence relating to the exercise of the discretion.
[26] *Lugg v Wright* [1941] SASR 106.
[27] *Owens v Australian Building Construction Employees' and Builders Labourers' Federation* (1978) 46 FLR 16.
[28] Pearce & Geddes, Statutory Interpretation in Australia, 7th edition [11.11].

100(1), it would seem unlikely that much if any additional evidence would need to be adduced in relation to the discretion part of the exercise. Indeed, additional evidence of that kind might need to be provided in support of an application for suspension of an order for possession under section 105. In any event I do not consider that these possible additional "burdens" have any bearing on the way in which s 100(1) is to be construed.

[37] The comments in the Second Reading Speech regarding more expeditious processes have been reflected in the other provisions of Part 11 including those to which I have already referred, such as Divisions 1, 2, 3, 3A, 5 and 6. See too Part 14 in relation to dispute resolution.

[38] The respondent also referred to the discretions identified in sub-section (3) of s 99A, which section relates to breaches of "acceptable behaviour agreements". But s 99A(3) only relates to one of the threshold requirements, namely that in s 99A(2)(c), and not to the main powers conferred by s 99A, namely the powers to terminate the tenancy and make an order for possession.

[39] The respondent also submitted that:

> had there been an intention to provide the Court with a broad discretion, it would have been be a relatively simple matter, given the manner in which s 105 of the *Residential Tenancies Act* is expressed, for the legislature to have provided express factors to be considered in the exercise of the discretion, or at the very least, to have provided additional words indicating the presence of a discretion, such as: "that the conduct is in the circumstances of the case such as to justify termination of the tenancy", "having considered the circumstances of

> the case, it is appropriate to do so" or "the Court may refuse to make orders if it is satisfied that the lessee has remedied the breach".

[40] I do not consider that would have been necessary. In my view the use of the word "may" in the context is sufficient to confer the discretion on the court, without more.

[41] The respondent also submitted that:

> the factors which the Court is required to take into account in s 105 would be very similar if not the same as those called upon in the exercise of the broad discretion. For example, during the term of the entire tenancy whether the tenant has caused a nuisance, other incidents relating to the tenancy, the seriousness of the breaches and any unacceptable risks which might be posed. If a broad discretion existed in s 100 of the *Residential Tenancies Act*, s 105 would have little or no work to do.

[42] As I have already explained, I consider that s 100 and s 105 have different functions, and s 105 has work to do independently of s 100.

[43] Needless to say different considerations may come into play when considering whether or not to terminate a tenancy under s 100 than those applicable when considering whether or not to suspend an order for possession (for up to a maximum of 90 days, and on the basis of severe hardship).

Conclusion and orders

[44] I conclude that the court does have a discretion when considering an application made under s 100(1) of the *Residential Tenancies Act* as to

whether or not it should order that the tenancy be terminated and possession ordered. His Honour erred in finding that he did not have such a discretion and thus in making the orders terminating the appellant's tenancy and giving possession to the respondent without first considering whether or not he should do so in the circumstances.

[45] Accordingly, I make the following orders:

1. The appeal is allowed.

2. The orders made by the Local Court 6 March 2013 terminating the tenancy and ordering possession are set aside.

3. The application of the respondent CEO – Housing is remitted to the Local Court for further hearing and determination according to law.

[46] I will hear counsel as to costs, but indicate that I am inclined to order that the respondent pay the appellant's costs of this appeal.