SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2018 0012

COLIBAN HEIGHTS PTY LTD
(ACN 123 150 738) — Applicant

v

CITISOLAR VIC PTY LTD
(ACN 143 558 061) — Respondent

JUDGES:	TATE, KYROU and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	18 May 2018
DATE OF JUDGMENT:	7 August 2018
MEDIUM NEUTRAL CITATION:	[2018] VSCA 191
JUDGMENT APPEALED FROM:	[2017] VSC 751 (John Dixon J)

CONTRACTS – Australian Consumer Law – Contract for supply of services – Right to terminate contract for 'major failure' pursuant to Australian Consumer Law, s 267(3)(a) – Whether right to terminate contract exercised – Goods connected with services deemed rejected on termination of contract pursuant to Australian Consumer Law, s 270(1)(c) – Acceptance of goods connected with services inconsistent with termination of contract – Australian Consumer Law, ss 267, 269, 270; *Australian Consumer Law and Fair Trading Act 2012*, s 8.

JUDICIAL REVIEW – Appeal on question of law – Question of law founds jurisdiction of Court to hear appeal – No question of law articulated in originating process – Notice of appeal requires setting out of questions of law – *Victorian Civil and Administrative Tribunal Act 1998*, s 148; *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008*, r 4.06(1)(b)(v).

APPEARANCES:	Counsel	Solicitors
For the Applicant	Dr KP Hanscombe QC with Mr TJD Chalke	Marshalls & Dent & Wilmoth
For the Respondent	Mr S Buchanan	Anderssen Lawyers

TATE JA
KYROU JA
McLEISH JA:

1 This appeal concerns the operation of the Australian Consumer Law ('the ACL').[1] In particular, it concerns the question whether a consumer can terminate a contract for services under the ACL while accepting goods that were connected with the services in question. The applicant contends that, in finding that there had been no termination in the present case, the trial judge was in error in relying on the fact that the goods were retained by the consumer after the point of alleged termination.

2 For the reasons that follow, the trial judge did not misconstrue the relevant provisions of the ACL and a consumer's acceptance of goods connected with a contract for services may show that the consumer has chosen not to terminate that contract. Accordingly, the appeal must be dismissed.

Background and Tribunal decision

3 On 10 June 2011, the applicant entered into four contracts by which the respondent would supply and install photovoltaic electrical systems at each of four locations for a total contract price of $72,600. The purpose of installing the systems was to generate electricity for use at those locations, with the surplus generated to be fed into the electricity grid, to which the systems were to be connected. The applicant paid a deposit of $7,260 and the installations were completed in August 2011.

4 An independent inspector certified in August or September 2011 that the installations were compliant with applicable standards. The applicant did not accept this certification. However, it did not have evidence to show that the services failed to meet relevant standards. The applicant took no issue with the quality of the goods supplied.

5 The applicant had intended to benefit from an energy scheme called the

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1 *Competition and Consumer Act 2010* (Cth) sch 2: see [25] below.

'Premium Feed-In Tariff'. However, in November 2011, the applicant discovered that this scheme was not available to it. The applicant sought to terminate the contracts on that basis.

6 The respondent did not accept the applicant's purported termination and demanded that the applicant pay the balance of the contract price. On 30 June 2012, the respondent applied to the Victorian Civil and Administrative Tribunal ('the Tribunal') for an order for payment of the balance of the contract price. The applicant filed a counterclaim seeking damages for breach of contract.

7 On 16 November 2012, the applicant received a report from IT Power (Australia) Pty Ltd ('ITP') which identified various defects in the installation of the systems. In December 2012, the respondent obtained a report from Global Sustainable Energy Solutions ('GSES') which to a large extent confirmed the matters identified in the ITP report.

8 By its amended defence and counterclaim dated 19 July 2013, the applicant alleged breaches of the ACL and an entitlement pursuant to s 267(3)(a) to terminate the contracts. By its pleading, the applicant purported to exercise that right of termination and claimed a refund for the deposit it had paid.

9 The parties subsequently entered into written terms of settlement dated 18 October 2013. By those terms, the respondent agreed to perform rectification works and the applicant agreed to pay the respondent $37,500. Following entry into the terms of settlement, the applicant paid the respondent $14,000 and the respondent performed rectification works and provided written notice of the completion of those works to the applicant. The terms then called for the applicant to engage ITP to inspect and certify the satisfactory completion of the works. Thereafter, the respondent was required to obtain and provide to the applicant paperwork necessary in order to operate the systems and obtain the applicable feed-in tariff.

10 The applicant considered that the works undertaken remained unsatisfactory

and that the systems were still not safe. However, the applicant did not arrange for ITP to inspect the rectification works as the terms of settlement contemplated. As a result, no certification as to the completion of the works was provided on behalf of the applicant.

11 In July 2015, each party sought reinstatement of the proceeding in the Tribunal. On 8 October 2015, the Tribunal reinstated the proceeding and held that the parties were to resume the proceeding 'as if there had never been any Terms of Settlement'.[2]

12 On 18 January 2016, the applicant obtained a report from EnergySpec Electrical Pty Ltd ('ESE') which identified a number of unresolved issues and concluded that three of the four installations were unsafe.

13 On 9 March 2016, the applicant obtained a further report from GSES identifying a number of defects which remained unrectified. The GSES inspector shut down the installations at two of the properties for safety reasons.

14 In October 2016, the respondent obtained from Mr Michael Muscat, a licensed electrical inspector, a report on the defects identified in the most recent GSES report. Mr Muscat confirmed that some defects had not been rectified as required by the terms of settlement and estimated that the cost of rectification was $847.80.

15 A different expert, Mr Riddiford of ESE, engaged by the applicant, gave evidence in the Tribunal that rectification should be to current Australian Standards, and that the cost would be $22,000.

16 As at January 2017, when the proceeding was heard in the Tribunal, the outstanding debt owed by the applicant to the respondent under the contracts was $51,340. The Tribunal found that the systems had major faults that rendered them unsafe.[3] The outstanding faults and defects were all capable of rectification. The

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2 *Coliban Heights Pty Ltd v Citisolar Vic Pty Ltd* [2015] VCAT 1579 [21].

3 *Citisolar Vic Pty Ltd v Coliban Heights Pty Ltd* [2017] VCAT 137 [72].

Tribunal held that the applicant was entitled to rectification and compensation as a result. It held that the respondent was liable to pay for the cost of rectification at the point when the ITP report in November 2012 contradicted the previous certification which had stated that the work met applicable standards. The Tribunal assessed the cost of that rectification work at $2,200.

17 In the course of determining that figure, the Tribunal found that, to the extent that Australian Standards had become more stringent since November 2012, the applicant had been responsible for most of the delay that resulted in the works not being completed before that happened. As a result, it was not the responsibility of the respondent to bring the installations as a whole to the subsequently imposed standards (the cost of which accounted for much of Mr Riddiford's $22,000 estimate). However, the respondent had also been responsible for some delay and the rectification figure reflected the respondent's duty to bring the identified defects to the later standards.

18 The Tribunal assessed the compensation to which the applicant was entitled for the poor quality installation of the four systems and the failure of the respondent to rectify the works within a reasonable time after November 2012 in the amount of $2,000. This assessment has not been challenged.

19 The Tribunal made further assessments in respect of costs and expenses that have also not been challenged, in the total amounts of $2,475 in favour of the applicant and $275 in favour of the respondent.

20 The Tribunal concluded that the sum due to the respondent was $44,465. No issue was taken by the parties in respect of the Tribunal's arithmetic.[4]

21 The applicant sought leave to appeal pursuant to s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (the 'VCAT Act') to a judge in the Trial Division. It contended that the Tribunal had made three specific errors of law. It was first

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4 The final sum of $44,465 includes an arithmetical error of $475 in favour of the applicant.

alleged that the Tribunal had failed to fulfil its statutory obligation under s 117 of the VCAT Act to provide reasons. Secondly, it was alleged that the Tribunal had erred in law in finding that the cost of rectification work was $2,200, when there was no evidence before it to support that finding. The third alleged error of law was that the Tribunal had failed to apply the terms of the ACL; the applicant contended that it was entitled to terminate the contracts and recover any money paid for the services of the respondent following upon the findings of the Tribunal that there were 'major faults' with the services performed by the respondent.

22 The applicant submitted that it was entitled as of right to the relief it sought, namely termination of the contracts, damages and a refund to the extent that the services had not been consumed by it prior to termination.

23 The judge in the Trial Division refused the applicant leave to appeal from the decision of the Tribunal. The applicant now seeks leave to appeal from that refusal.

24 Before turning to the judge's reasons and the proposed grounds of appeal it is convenient to refer to the relevant provisions of the ACL.

Provisions of the ACL

25 By virtue of s 8 of the *Australian Consumer Law and Fair Trading Act 2012*, the text of the ACL found in sch 2 to the *Competition and Consumer Act 2010* (Cth) applies as a law of Victoria (subject to matters to which it is not necessary to refer). By virtue of s 224 of the *Australian Consumer Law and Fair Trading Act 2012*, the Tribunal may hear and determine a cause of action arising under any provision of the ACL in Victoria.

26 Sections 60–63 of the ACL (comprising sub-div B of div 1 of pt 3–2) contain statutory guarantees relating to the supply of services. In particular, there is a guarantee under s 60 that services supplied to a consumer in trade or commerce 'will be rendered with due care and skill'. There is a guarantee under s 61 that services will be reasonably fit for a purpose which the consumer has made known to the

supplier is a particular purpose for which the services are being acquired by the consumer.

27 Sub-division B of div 1 of pt 5-4 of the ACL provides for remedies relating to the above guarantees. In particular, s 267 makes provision for action to be taken by the consumer for a failure to comply with a guarantee, making a distinction between those failures which are 'major' and those which are not. It provides as follows:

> **267 Action against suppliers of services**
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> (1) A consumer may take action under this section if:
>
> (a) a person (the ***supplier***) supplies, in trade or commerce, services to the consumer; and
>
> (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with; and
>
> (c) unless the guarantee is the guarantee under section 60—the failure to comply with the guarantee did not occur only because of:
>
> (i) an act, default or omission of, or a representation made by, any person other than the supplier, or an agent or employee of the supplier; or
>
> (ii) a cause independent of human control that occurred after the services were supplied.
>
> (2) If the failure to comply with the guarantee can be remedied and is not a major failure:
>
> (a) the consumer may require the supplier to remedy the failure within a reasonable time; or
>
> (b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time—the consumer may:
>
> (i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or
>
> (ii) terminate the contract for the supply of the services.
>
> (3) If the failure to comply with the guarantee cannot be remedied

or is a major failure, the consumer may:

(a) terminate the contract for the supply of the services; or

(b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.

(4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

(5) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

28 The concept of a 'major failure' is defined in s 268. Section 268(e) states as follows:

268 When a failure to comply with a guarantee is a major failure

A failure to comply with a guarantee referred to in section 267(1)(b) that applies to a supply of services is a ***major failure*** if:

...

(e) the supply of the services creates an unsafe situation.

29 Sections 269 and 270 then provide for the consequences of termination of contracts for the supply of services. They provide as follows:

269 Termination of contracts for the supply of services

(1) This section applies if, under section 267, a consumer terminates a contract for the supply of services.

(2) The termination takes effect:

(a) at the time the termination is made known to the supplier of the services (whether by words or by conduct indicating the consumer's intention to terminate the contract); or

(b) if it is not reasonably practicable to communicate with the supplier of the services—at the time the consumer indicates, by means which are reasonable in the circumstances, his or her intention to terminate the contract.

(3) The consumer is entitled to recover, by action against the supplier of the services, a refund of:

(a) any money paid by the consumer for the services; and

(b) an amount that is equal to the value of any other consideration provided by the consumer for the services;

to the extent that the consumer has not already consumed the services at the time the termination takes effect.

270 Termination of contracts for the supply of goods that are connected with terminated services

(1) If:

(a) under section 267, a consumer terminates a contract for the supply of services; and

(b) a person (the ***supplier***) has supplied, in trade or commerce, goods to the consumer that are connected with the services;

then:

(c) the consumer is taken to have rejected the goods at the time the termination of the contract takes effect; and

(d) the consumer must return the goods to the supplier of the goods unless:

(i) the goods have already been returned to, or retrieved by, the supplier; or

(ii) the goods cannot be returned, removed or transported without significant cost to the consumer because of the nature of the failure to comply with the guarantee to which the rejection relates, or because of the size or height, or method of attachment, of the goods; and

(e) the supplier must refund:

(i) any money paid by the consumer for the goods; and

(ii) an amount that is equal to the value of any other consideration provided by the consumer for the goods.

(2) If subsection (1)(d)(ii) applies, the supplier must collect the goods at the supplier's expense.

30 It is not in question here that the respondent was a supplier of services and a supplier of goods connected with the services, and that the applicant was a

consumer, within the meaning of the above provisions. It was also accepted that, because the relevant installations were unsafe, the respondent had failed to comply with one or more consumer guarantees and that these were 'major failures' as defined. As a result, the applicant was entitled under s 267(3) to terminate the contracts or to take action against the respondent to recover compensation for any reduction in the value of the services below the price paid for those services.

Reasons of the primary judge

31 As mentioned earlier, three errors of law were alleged before the primary judge. They concerned, in broad terms: the adequacy of the Tribunal's reasons; the finding as to the cost of rectification; and the failure of the Tribunal to grant relief by way of termination of the contracts. Only the first and third of those matters was sought to be raised in this Court.

32 The judge first addressed the question of termination. He referred to two occasions when the applicant had communicated its intention to terminate the contracts to the respondent. The first was in November 2011 when the applicant learnt that the tariff scheme was not available in respect of any of the four installations. The second was the statement in its counterclaim in July 2013 to the effect that it terminated the agreement (comprising the four contracts). The judge held that the relevant time of termination as identified by the Tribunal was July 2013, because the earlier statement was not based on there having been a 'major failure' under s 267(3)(a) of the ACL. The Tribunal had concluded that the applicant was not entitled to terminate the contracts at that time.[5] That aspect of the decision is not now challenged.

33 The judge held that communication of an intention to terminate, without more, did not constitute termination under the ACL.[6] Because the contracts included the supply of goods that were connected with the services, the applicant would, if it

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5 *Coliban Heights Pty Ltd v Citisolar Vic Pty Ltd* [2017] VSC 751 [71] ('Reasons').

6 Reasons [69].

had terminated the contracts, have been taken to have rejected the goods and been obliged to return them to the respondent, by virtue of s 270(1). This had not happened. The judge found that the applicant's contention before the Tribunal that it should be entitled to retain the installed systems was itself inconsistent with termination.[7]

34 The judge also held that the right of termination under the ACL was required to be exercised within a reasonable time of its accrual, on discovery of a major failure in compliance with a guarantee. This had not happened.[8] The judge held that the right to terminate was intended to operate so as to restore the supplier and the consumer to the positions they were in before the contract was entered into, and that the supplier was entitled to return of the goods when the services were rejected, not at some later time.[9]

35 The judge further held that the applicant's acceptance of further rectification work after the alleged termination of the contracts was relevant. He held that, by failing to return the rejected goods and by accepting further rectification work, the applicant must be taken to have elected to keep the goods and seek compensation under s 267(3)(b), rather than to have terminated the contracts under s 267(3)(a).

36 In relation to the challenge to the adequacy of the Tribunal's reasons, the judge held that, although desirable, it was not necessary for the Tribunal to explain its reasons for refusing to conclude that the contracts had been terminated.[10] In short, the judge found that the Tribunal's findings of fact did not permit the conclusion that there had been termination in the manner required by the ACL.[11] The Tribunal had therefore proceeded to evaluate the alternative case based on compensation. The judge held that, because termination had not been ordered, the

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7 Reasons [72].

8 Reasons [73].

9 Reasons [74].

10 Reasons [86].

11 Reasons [98]–[99].

Tribunal 'by implication, must have concluded' that the applicant was not entitled to terminate the contracts.[12] The judge concluded that the Tribunal's reasons explained its process of reasoning in sufficient detail to enable the court to see that its conclusion, in this case, did not involve any error of law.[13]

Jurisdiction — s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*

37 Before proceeding to the present appeal, an unusual feature of the proceeding before the primary judge must be noted. As mentioned, the applicant advanced three suggested errors of law before the judge. These were identified in its further amended originating motion as grounds upon which leave to appeal was sought.

38 Section 148 of the VCAT Act permits a party to a proceeding in the Tribunal to appeal 'on a question of law' from an order of the Tribunal, with the leave of the Court. The 'question of law' to which s 148 refers founds the jurisdiction of the Court and constitutes the subject matter of the appeal itself.[14] For that reason, questions of law must be clearly stated and not simply ascertained by reference to grounds of appeal.[15] In the present case, the originating process identified no questions of law at all. We were told that no other document identified such questions. Although no point was taken by the respondent, it is necessary for the Court to examine the position to ensure that it has jurisdiction.

39 Despite their jurisdictional significance, fairness requires that the Court will not read a notice of appeal or other originating process narrowly and will address questions of law that are identified in the document stating grounds of appeal and perhaps also from surrounding circumstances.[16] Even where a notice of appeal or originating process fails altogether to state questions of law, it is therefore still

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12 Reasons [103].

13 Reasons [85], [101]–[103], citing *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 505 [65].

14 *Fraser v Sperling* [2017] VSCA 53 [55]; *McSteen v Architects Registration Board of Victoria* [2018] VSCA 96 [6] ('*McSteen*').

15 Ibid.

16 *Fraser v Sperling* [2017] VSCA 53 [56]; *McSteen* [2018] VSCA 96 [32]–[34].

necessary to decide whether questions of law are none the less articulated by reference to the document as a whole.[17]

40 It is tolerably clear from the concise manner in which the grounds were stated in the originating process that each entailed a question of law. On that basis, the Court has jurisdiction in the proposed appeal.

41 However, it is highly undesirable that questions of law going to the Court's jurisdiction should have to be divined in this manner. The Rules require the notice of appeal under s 148 to set out the question of law upon which the appeal is brought.[18] The real risk in not properly stating questions of law is that jurisdictional questions will arise, which may in turn have consequences as to costs.

Proposed grounds of appeal

42 In this Court, the applicant sought to establish its claim of termination in respect of three contracts only, being those in respect of which rectification works remained outstanding by the time of the Tribunal hearing. The fourth system was then working satisfactorily. The applicant advanced three proposed grounds of appeal:

1. The primary Judge erred in construing s 269 and s 270 of the ACL. His Honour should have applied s 269, not s 270, to determine whether the contracts for the supply of services were terminated.

2. The primary Judge erred in failing to consider whether the applicant terminated three contracts at the 2017 Tribunal hearing.

3. The primary Judge erred in holding (at [85] of the Reasons) that the Tribunal's reasons were adequate and explained its path of reasoning.

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17 *McSteen* [2018] VSCA 96 [38].

18 *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* (the 'Rules'), r 4.06(1)(b)(v) (with effect from 1 May 2018). At the time the present proceeding was commenced, r 4.11(1)(b)(iv) made similar provision in relation to the notice of appeal required to be filed after leave was granted. Since the application for leave and the appeal were heard together in the present case, there was no requirement under the Rules for a notice of appeal to be filed. Rule 4.07(3)(c) required the affidavit in support of the application for leave to appeal to exhibit a proposed notice of appeal; if this happened in the present case, it was not provided to the Court on the appeal.

Construction of ss 269 and 270 of the ACL — proposed ground 1

43 The applicant submitted that the judge had erred in his approach to the legislation by treating the return of goods as a necessary element of the act of termination. It was submitted that termination is effected by communicating the consumer's intention to terminate, by virtue of s 269, and that return of the goods under s 270 is a necessary consequence of a completed act of termination rather than an ingredient of that act.

44 The applicant relied in particular on the judge's observation that 'retention of the goods and consumption of the services was conduct inconsistent with termination'.[19] The judge found that the applicant 'neither rejected the goods nor returned them' to the respondent.[20] Later, he stated that the applicant 'never exercised [the right to termination] in the manner required by s 270 of the ACL'.[21] The applicant submitted that this showed that the judge had wrongly applied s 270, rather than s 269, to decide whether the contracts had been terminated.

45 The respondent submitted that the judge was correct to find that the applicant's retention of the goods was inconsistent with it terminating the contracts. It submitted that, upon a consumer terminating a contract for services under s 267, the consumer is simultaneously taken to have rejected the goods connected with the terminated services, by virtue of s 270(1)(c). Where the evidence shows that the consumer has not rejected the goods, this indicates a decision not to terminate the contract for services.

46 In our opinion, the respondent's submissions should be accepted. It is true, as the applicant submitted, that termination of a contract for services takes effect upon the termination being made known to the supplier of the services. That is the effect of s 269(2)(a). It is also true that the consumer is then required to return the goods

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19 Reasons [49].

20 Reasons [72].

21 Reasons [99].

connected with the services to the supplier of the goods, by virtue of s 270(1)(d). But it does not follow that a mere statement of termination will, in every case, operate to terminate a contract for the supply of services. The ACL does not require such a result. There are no express words to that effect; the relevant words of s 269 go only to the time when termination takes effect. There is no reason why such a result should be read into the statute either. Rather, as at common law, termination may be expected to be a question of fact depending on all the circumstances of the case.[22]

47 The ACL therefore stipulates when termination takes effect, but not what is required to constitute termination. That is a question of fact in every case. A consumer faced with a major failure to comply with a guarantee in respect of a contract for the supply of services has a choice whether or not to terminate that contract. It is the same election a party to a contract has at common law in the face of a repudiatory breach of contract by the other party. In both cases, it becomes necessary to look at what the party alleging an act of termination said and did that bears on the question whether that party terminated the contract or elected to keep it on foot. But in the context of s 267, that inquiry must be conducted bearing in mind that the ACL treats the termination of a contract for services as entailing a simultaneous deemed rejection of goods connected with those services. The legislation proceeds on the basis that one does not happen without the other.

48 In cases where the contracted services are connected with goods, the fact that the party alleging that it has terminated the contract has not rejected those goods but has chosen instead to accept them will therefore tend to suggest, if not establish, that the party has chosen not to engage the termination provisions of the ACL. As the respondent submitted, to engage those provisions has the result not merely of terminating the contract for services but also, by force of the statute, of deeming the goods to be rejected. Where, as here, the party alleging termination seeks to retain the goods, this is at odds with the deemed rejection of the goods which accompanies

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22 See, eg, *J Kitchen & Sons Pty Ltd v Stewart's Cash and Carry Stores* (1942) 66 CLR 116, 126–7 (Latham CJ and McTiernan J).

every termination under s 267 of a contract for services with which goods are connected.

49 The contrary position, contended for by the applicant, finds some support from the phraseology of s 270(1), which first asks whether the consumer has terminated the contract and then sets out the consequences. However, the argument depends on too literal a reading of the provision. The purpose of s 270(1) is to create obligations regarding return of the goods and the payment of a refund to the consumer. It is predicated upon the deemed rejection of the goods, which emerges as a key feature of the statutory scheme for determining the consequences of a termination of a contract for services with which goods are connected. It would defy that scheme to treat a consumer as terminating a contract in circumstances where the consumer accepts, rather than rejects, the goods. The result would be perverse, in that the consumer would purport to accept the goods while simultaneously attracting an obligation to return them and a right to be paid a refund in respect of them.

50 The judge was therefore not in error in his construction of the relevant provisions of the ACL. However, strictly speaking, it was not the applicant's failure physically to return the goods that betokened an intention not to terminate the contracts under s 267. As the applicant submitted, the obligation to return the goods would have arisen only after the act of termination. The inconsistent conduct was the applicant's acceptance of the goods, in circumstances where termination of the contracts necessarily involved rejecting the goods. The applicant's acceptance of the goods, manifested in particular by its acceptance of rectification works, was simply inconsistent with it having terminated the contracts for services.

51 These conclusions suffice to sustain the judge's conclusion that the Tribunal was correct to reject the applicant's claim that it terminated the contracts either in November 2011 or by its pleading in the Tribunal in July 2013. At both times the applicant chose to accept, rather than reject, the goods connected with the services. It is therefore unnecessary to consider whether the judge was correct to hold that the

right of termination under s 267 must be exercised within a reasonable time. It is preferable to say nothing as to that matter until it properly arises for decision. It may be observed, however, that the facts said to give rise to a lapse of a reasonable time will often, as here, support an argument that the consumer has chosen not to terminate that contract but to accept the goods and continue with the contract.

52 While leave should be granted to raise the first proposed ground of appeal, the ground fails.

Termination at the Tribunal hearing — proposed ground 2

53 The second proposed ground raises the question whether there was a third attempted act of termination, in the course of the Tribunal hearing in January 2017. The applicant submitted that the trial judge had, it was said correctly, found as a fact that the applicant purported to terminate the contracts during the Tribunal hearing in January 2017. Reference was made in reply submissions to passages of the transcript said to reveal a rejection of the goods at that time. It was submitted that the judge had failed to apply the ACL, even if his construction of the relevant provisions were correct, to this third act of termination.

54 The submission that the judge made a finding that a third attempted act of termination took place cannot be sustained. In the passage in question, the judge stated that he was satisfied, despite the respondent's assertions to the contrary, that the applicant 'sought the remedy of termination before the Tribunal'.[23] The judge relied for that conclusion first on 'the pleadings before the Tribunal'. That suggests that his observation is to be read as referring to the applicant pressing for relief in the nature of termination, as pleaded, rather than as an account of a distinct and new event of termination. Nothing in the following paragraphs of the trial judge's reasons, which are directed to the challenge to the adequacy of the Tribunal's reasons, provides any support for the applicant's submission that the judge found as a fact that there was a third purported act of termination. The better view is that, as

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23 Reasons [88].

the respondent pointed out, the judge was merely rejecting an argument advanced by the respondent to the effect that the applicant had not raised termination before the Tribunal as an issue to be determined.[24]

55 The applicant sought to establish that, in any event, the course of argument in the Tribunal revealed that the applicant pressed for termination other than in accordance with its pleading. It suffices to say that none of the passages relied upon provided any support for that contention. The applicant plainly pressed for termination, consistently with the relief sought in its pleading, but did not pursue a separate argument that, by its very conduct of the proceeding, it was terminating the contract afresh. Nor do the passages to which we were taken, which indicate a desire by the applicant to have the systems left in place, clearly manifest a rejection of the goods connected with the services. On both counts, the applicant's argument fails.

56 It must be borne in mind that the hearing in the Tribunal does not clearly reveal the legal positions adopted by the parties, both of whom were represented by their principals. There is particular difficulty in ascertaining the position advanced by the applicant. But one must start with the assumption that the pleadings governed the matters in issue in the Tribunal, even making allowance for the relatively informal procedures which the Tribunal is able to adopt. Moreover, the onus lies on the applicant to establish the termination for which it contends. It has not been shown, in our opinion, that it sought to take the point further than the way in which it had been pleaded.

57 We would therefore refuse leave to advance the second proposed ground of appeal.

Adequacy of Tribunal's reasons — proposed ground 3

58 The applicant accepted that, if neither of the first two proposed grounds were

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[24] Reasons [27].

sustained, and no act of termination had been established, then no point was served in evaluating the reasons of the Tribunal and determining whether they met the legal standard for a decision-maker's reasons. In the circumstances, leave should be refused to raise the third proposed ground of appeal.

Conclusion

59 Leave to appeal should be granted in respect of the first proposed ground of appeal and otherwise refused. The appeal should be dismissed.
