



CONSUMER, TRADER & TENANCY TRIBUNAL BULLETIN

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CASES

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www.lawlink.nsw.gov.au/caselaw/caselaw.nsf/pages/sc

1. Dennison Investments Pty Ltd v CTTT & Ors [2003] NSWSC 259

Appeal by Dennison Investments Pty Ltd from a decision of the Consumer, Trader and Tenancy Tribunal to the Supreme Court of New South Wales. The Tribunal determined that the plaintiff was obliged to sub-let the residence to the executor of the former residents estate. Cripps AJ, states at paragraph 25 “To fall within the definition of “owner” it is necessary to establish that a person was a “resident” or a “formal occupant”. The executors of the estate...are neither.

Section 129(2)(e) of the *Retirement Villages Act 1999* specifically provides:

“a residence contract relating to premises other than premises owned by the resident (and the residence right under the contract) terminates:

(e) on the death of the last surviving resident under the contract.”

The Supreme Court set aside the Tribunal order and declared the plaintiff was not obliged to consent to the sub-lease.

2. Fair Trading Administration Corporation v Tebbutt & Anor [2003] NSWSC 340

In *FTAC v Owners of Strata Plan 54421*, Palmer J had commented obiter that the Tribunal did not have jurisdiction to hear a particular appeal from an FTAC decision. In *Tebbutt*, Member J Smith considered that these comments were incorrect, and declined to follow them; he stated his reasons at some length. Palmer J reconsidered his earlier obiter remarks, and concluded that he had been incorrect. Thus he agreed with the reasons of J Smith. He then went forward and considered the precise provisions of the old BSC scheme. His Honour held that the scheme only extended to liabilities actually incurred, rather than to contingent liabilities. As the owner had not entered into a contract under which he was liable to pay money, he was not entitled to an award.

3. Appeals against Tribunal decisions to refuse rehearing applications.

I. Jabbour v CTTT & Anor [2003] NSWSC 187

In this matter, notices of hearing were sent to Mr Jabbour at his registered business address. He did

not attend the hearing, and orders were made against him. He then made an application for rehearing under s.68 of the Act and stated that he had not received the notices. In his rehearing application, Mr Jabbour, stated that he had ceased to trade at the registered address some 4 to 6 weeks beforehand. His application for rehearing was refused and he appealed the decision to the Supreme Court.

The Master addressed the issue of procedural fairness and referred to High Court decision of *Kioa v West (1985) 159 CLR 550*, where Mason J at 584-585 stated:

“whether there is a denial of procedural fairness depends on the circumstances in each case”.

The Master said that he was entitled to a rehearing, as his original entitlement was to a hearing. Whilst the Member was entitled to proceed at the original hearing, the rehearing application ought to have been granted, as there was nothing to suggest that notice of hearing had been received.

II. Ross v CTTT & 2 Ors [2003] NSWSC 218

An appeal was lodged to the Supreme Court concerning the Consumer, Trader and Tenancy Tribunal (CTTT) dealing with a matter ex parte, that is, in the absence of one of the parties. It was also raised that the CTTT denied the plaintiff an opportunity to be heard contrary to section 35 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (the Act). Further, the plaintiff argued that the power conferred on the Chairperson under section 68 (rehearing) cannot be delegated.

Section 25 of the Act specifically states that:

“...the Registrar must cause notice of the time and place that is fixed for the hearing to be given to each party in the proceedings”.

Master Harrison found that where a party does not attend a hearing, the Tribunal is entitled to hear a matter ex parte, if it is satisfied that the notice of the hearing was served on the party. Mr Ross gave evidence that he did not receive the notice of hearing, but the Supreme Court concluded that Mr Ross was not a credible witness and did not accept his explanation. The Supreme Court found that the decision of the Tribunal in relation to the hearing and rehearing were correct.

The Supreme Court also found that section 35 is not relevant to ex parte proceedings.

Turning to the question of the delegation of powers under section 68 of the Act, the Supreme Court confirmed that the Chairperson may delegate the power to determine rehearing applications to Tribunal members.

The appeal to the Court was dismissed and the Tribunal's decision was reaffirmed.

III. Blair & Anor v Lawton & CTTT [2003] NSWSC 380

This was a case where the Plaintiffs in the Supreme Court alleged that they had not received notice of the hearing. The Plaintiff (Blair) lodged a rehearing application. The application was refused as the amount in dispute was in excess of \$25,000.

The Master heard evidence and was not satisfied that the hearing notice had not been received. She rejected an argument that the Tribunal had failed to give notice, where the file showed that a notice had been sent as required to the last known address. The Master also rejected an argument that a rehearing should have been granted by the Tribunal on the basis that the failure to receive the notice amounted to such an irregularity that there had been no real hearing. She found that s.68 (13) (a) in effect directed that the rehearing application be dismissed.

4. Pacific Sports Marine Pty Ltd v Mike Kristen & CTTT [2003] NSWSC 388

The Supreme Court Plaintiff, who had been the Respondent before the Tribunal, had not appeared before the Tribunal. Notice of the hearing was sent on 31 May, fixing the hearing for 12 June. On 7 June, a letter from the Respondent was sent seeking an adjournment of the hearing. There was a long weekend intervening. It appeared that the letter was not received prior to the hearing.

The Master noted that the hearing notice advised that parties who sought an adjournment should not assume that an adjournment would be granted. As she says, the notice says that unless notice is given that the adjournment has been granted, the parties must proceed on the basis that it has not. She therefore found that the proceedings on 12 June did not amount to a denial of natural justice.

There had been a rehearing application. That for the first time referred to an illness of the representative of the Respondent on the hearing date. The medical certificate was apparently postdated, and the Master found that the refusal of the s.68 was not a denial of natural justice. She did however consider that the Plaintiff should make a further s.68, and proffer an explanation for the dating of the certificate.

5. Eather & Anor v Rawson Homes & CTTT [2003] NSWSC 439

In this matter, which was an appeal from the former FTT, the Master refers to the need to provide proper reasons for reaching conclusions and making findings. He found that there had not been proper reasons and that this failure constituted an error of law. It seems to be a decision which largely turns on its own facts, and from which it is difficult to draw any general statement of principle other than that stated above.

6. Cohen-Hallaleh v Cyril Rosenbaum Synagogue [2003] NSWSC A395

The Supreme Court plaintiff had been the Respondent in CTTT proceedings which sought possession of premises. His case was that the Tribunal lacked jurisdiction as he was not a tenant. He said that his occupation of a house adjacent to the Montefiore Homes had been part of his employment at the homes; he had used the study in the house for some of his work. It was essential that he live in the house for his employment as an orthodox rabbi at the Homes, as it enabled him to attend to religious duties in the Homes on the Sabbath by walking through a garden gate, and not drive.

There were arguments that the agreement to live in the house was not a residential tenancy agreement; that if it were, it was excluded by virtue of the *Residential Tenancies Act* s.6(2); that it was excluded by virtue of Clause 21 of the Regulation; and that the subject matter of the proceedings was that of proceedings in the Industrial Relations Commission, and thus that the CTTT lacked jurisdiction on this basis as well. There was a final argument that there should have been a referral of a question of law to the Supreme Court under s.66.

Barrett J analysed the matters and concluded that the facts before the Tribunal supported the findings made by the Member. He considered what constituted a tenancy, and confirmed that the law in NSW is still the exclusive possession test set out in *Radaich v*

Smith (1959) 101 CLR 209. He noted that what was necessary for the Tribunal's jurisdiction is not a tenancy as such, but rather a residential tenancy agreement as defined in the Act. In this case, as found by the Member, there was such an agreement and therefore there was jurisdiction to that extent. His Honour then turned to consider s.6 (2). On the facts before the Tribunal, the Member had applied the proper tests and concluded that the house did not constitute part of the Homes. This was a decision with which his Honour agreed, therefore there had been no error of law and thus no ground for his intervention.

As far as the 3rd ground is concerned, His Honour found "These findings by the CTTT were clear and unambiguous. The evidence is amply capable of supporting the findings". Thus this ground failed also. The Plaintiff had not sought re-instatement in the Industrial Relations Commission proceedings. His Honour found that even were the Plaintiff to be successful in those proceedings, there would not have been any order placing him back into the house - none was sought. Again, His Honour agreed with the Member's reasons and conclusion. The final point is the referral to the Supreme Court on a point of law. His Honour found that there was no duty to refer and therefore there could have been no error in failing to refer.

7. Doiho Pty Ltd v Waycity Pty Ltd & CTTT [2003] NSWSC 578

This matter was decided by Master Harrison, and the decision of Members Deamer and Montgomery was upheld. The Master agreed with the Tribunal finding that a real estate agent had both actual and ostensible authority to bind the principal to a lease of commercial property consisting of some shops at Newport. The master expressly agreed with the conclusion of the Tribunal in these terms:

We have set out in detail above the series of events which are evidenced by the "document trail" referred to by the Applicant. In our view, these events demonstrate a course of conduct on the part of the Respondent which in effect represented to the Applicant that Bridge had the authority to both negotiate and conclude the terms of a new lease. The respondent allowed Bridge "to act in a position from which it can be inferred that [its] actual representation of authority in [it]self is in fact correct."

It follows, in our view, that Bridge had the 'apparent' or 'ostensible' authority to agree the terms of a new lease with the Applicant."

Accordingly, the decision was upheld.

8. Giblin & Anor v Jammal & CTTT [2003] NSWSC 604

There were numerous points of the appeal, but the only one argued before Master Malpass related to the Member's finding in relation to the contract itself. The Tribunal Member had found that in effect the contract was a sham, being devised to allow the owners to obtain finance. The Master in his reserved decision found that the Member had breached the parol evidence rule in reaching the conclusions as to what the contract was.

Unfortunately, the only relevant passage on the parol evidence rule is as follows:

"There are well-established principles concerning the construction of documents and the use of evidence. The court has been referred to a number of decided cases. These may be found in the written submissions. For present purposes, it is unnecessary to refer to any of them. The relevant principles are not in dispute."

"There have been clear and obvious errors which fall within the ambit of s 67 of the Act. The errors justify the disturbing of the findings made as to the contract."

9. Ahlumalia & Ors v Robinson [2003] NSWCA 175

This matter in the Court of Appeal arose from a decision of the District Court in a personal damages action. A licensee of the tenant had slipped on a wet bathroom floor, and fallen through the glass shower screen.

The primary judge, in the District Court, found that the glass used in the shower screen was not safety glass but annealed glass, a product available in Australia between about 1930 and 1972; that the house was built prior to 1970; that there was no requirement that a shower stall be glazed with safety glass until after 1 July 1972; and that the shower

screen in the house had probably been installed prior to that date.

There had been a series of complaints concerning other services, particularly electrical items. There had been no complaint about the shower screen. There was no statutory duty on the landlord to replace the glass because an obligation to use safety glass only arose when the glass was replaced.

The argument of the Plaintiff at trial was that given this series of complaints, the landlord ought to have had a comprehensive inspection of the property carried out by a building consultant and that this inspection would have revealed that the shower screen was of plain glass, not safety glass.

This argument did not find favour with the Court of Appeal. The relevant passage from the decision of Hodgson JA is as follows:

23 “In my opinion, Jones v. Bartlett makes it clear that, in the absence of a contract supportive of a higher duty, the duty of a landlord in relation to the safety of premises does not in general require a landlord to commission experts to inspect premises to look for latent defects, nor is it a duty to make premises as safe as reasonable care can make them. In general terms, the duty of the landlord is to be determined by reference to foreseeable risk of harm and what a reasonable person would do in response to that risk.”

24 “In this case, the only basis on which the primary judge found there was a foreseeable risk of harm from the shower screen was through a finding that a reasonable person would have commissioned an expert to inspect the premises generally. Apart from that consideration, there was no suggestion and no finding that the appellants were aware or should have been aware of any danger associated with the shower screen itself.”

This decision is of utility in considering claims for compensation in residential tenancy matters.

ISSUES & GUIDELINES

1. Building Legislation Amendment (Quality of Construction) Act 2002

The *Building Legislation Amendment (Quality of Construction) Act 2002* commenced on 1 July 2003. The legislation has made specific amendments to the *Home Building Act 1989* (the Act) that relate to the handling of building disputes in the CTTT pursuant to the amended section 48 of the Act. Amendments to Division 2 of the Act include:

48(c): Any person may notify the Director-General of a dispute with the holder of a contractor licence with respect to residential building work or specialist work done by the contractor or the supply of a kit home by the contractor.

48(d): The Director-General may appoint a member of staff to investigate the building dispute. After completion of the investigation, the investigator must prepare a written report on the results of the investigation.

48(e): The Inspector may make rectification orders. A rectification order;

(a) may specify conditions (including conditions with respect to the payment of money) to be complied with by the complainant before the requirements of the order must be complied with, and

(b) must specify a date by which the requirements of the order must be complied with, subject to the complainant's compliance with any condition referred to in paragraph (a), and

(c) must indicate that the order will cease to have effect if the matter giving rise to the order becomes the subject of a building claim before the date specified in accordance with paragraph (b).

48(f): A rectification order does not give rise to any rights or obligations and will cease to have effect if a building claim is lodged.

48(i): A building claim may be withdrawn by the claimant at any time. However, if the claimant was subject to the requirements of a rectification order, the building claim may not be withdrawn without leave of the Tribunal.

48(j): Certain applications to be rejected.

The Registrar of the Tribunal must reject any application to the Tribunal for the determination of a building claim unless:

- (a) the Registrar is satisfied that the subject-matter of the building claim has been investigated under Division 2, or*
- (b) the Chairperson of the Tribunal directs that the building claim be accepted without such an investigation having been made.*

The Chairperson has issued further directions in relation to the handling of building matters. These can be viewed on the Tribunal's website under 'Chairperson Directions' and 'Acceptance of Building Claims' or obtained from registries of the Consumer, Trader and Tenancy Tribunal. Chairperson's Directions are reviewed and updated regularly. The CTTT's website is located at www.cttt.nsw.gov.au and provides information about the location of registries, fees, hearings and the conciliation process.

2. Fair Trading Amendment Bill 2003

An Act to amend the Fair Trading Act 1987 to make provision with respect to direct commerce practices, product recall orders, express consumer trade warranties, enforcement provisions and other miscellaneous matters; to repeal the Door-to-Door Sales Act 1967 and the Mock Auctions Act 1973; and for other purposes.

The Act is yet to be assented to.

3. Consumer Credit Administration Amendment (Finance Brokers) Act 2003

The Act amends the *Consumer, Trader and Tenancy Tribunal Act 2001*, the *Consumer Credit Administration Act 1995* and to repeal the *Credit (Finance Brokers) Act 1984*.

The Act was assented to on 23 June 2003, but is yet to commence.

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