



CONSUMER, TRADER & TENANCY TRIBUNAL BULLETIN

Issue No: 3 of 2003

CONTENTS

CASES

1. **Ross v Consumer, Trader and Tenancy Tribunal & Anor [2003] NSWSC 444**
General Division
Key Words: denial of natural justice, refusal of adjournment and legal representation
2. **Constable v Anvic Holdings & Anor [2003] NSWSC 471**
Home Building Division
Key Words: defendant (who was not the builder) supplied unsuitable tiles for use in building work, not a building claim, costs
3. **Wolinski v HIA Insurance & Ors [2003] NSWSC 475**
Home Building Division
Key Words: definition of building work, insurance
4. **CJM Roof Services v O'Brien & Anor [2003] NSWSC 687**
Home Building Division
Key Words: procedural fairness, requirement to give reasons, sufficiency of reasons, reasons may be discerned by implication
5. **Diab v Consumer Trader and Tenancy Tribunal & Ors [2003] NSWSC 694**
Tenancy Division
Key Words: section 22 *Residential Tenancies Act 1987*, head lease for fixed term, sub-lease a periodic tenancy, eviction by police
6. **Anthony v Chris Savage Pty Ltd & Anor [2003] NSWSC 698**
Home Building Division
Key Words: whether order a self-executing order, power to extend time to avoid operation of such an order, error of law in failing to do so
7. **Owners Corp SP51652 v Consumer, Trader and Tenancy Tribunal & Anor [2003] NSWSC 739**
Home Building Division
Key Words: adjournment application
8. **Washington Gray v Johannes Toroian & Ors [2003] NSWSC 763**
Home Building Division
Key Words: appeal on question of costs, powers of tribunal to award costs
9. **Mills v Consumer, Trader and Tenancy Tribunal & Ors [2003] NSWSC 782**
Home Building Division
Key Words: refusal of adjournment, rehearing not granted, denial of procedural fairness, practice of seeking adjournments by facsimile and telephone, non-attendance at hearing
10. **Jonsson v Arkway Pty Ltd and Anor [2003] NSWSC 815**
Commercial Division
Key Words: whether purchase of house for parents is a 'personal' purpose, construction of the Consumer Credit Code

11. **Overmyer Industrial Brokers Pty Ltd v Campbells Cash & Carry Pty Ltd [2003] NSWCA 305**

Commercial Division

Key Words: trade practices, Estate Agent's commission, alleged promise by vendor not to take advantage of statute

ISSUES & GUIDELINES

1. Electronic Service Delivery

CASES

The full text of the judgments are available on the Internet at:
www.lawlink.nsw.gov.au/caselaw/caselaw.nsf/pages/sc

1. **Ross v Consumer, Trader and Tenancy Tribunal & Anor [2003] NSWSC 444**

Mr Ross was the respondent to a consumer claim in the amount of \$2,833.01. He did not appear at the hearing, and his solicitor made an adjournment application on the basis that the plaintiff had not received full notice and/or the paperwork relating to the claim. Master Malpass upheld the Tribunal's decision to refuse the adjournment request.

Mr Ross' solicitor also made an application for legal representation. The Supreme Court referred to the relevant provisions concerning representation, being section 36 of the *Consumer, Trader and Tenancy Tribunal Act 2001* (CTTT Act) and clauses 13 and 14 of the *Consumer, Trader and Tenancy Tribunal Regulation 2002* (CTTT Regulation). Master Malpass upheld the Tribunal's decision to refuse to allow legal representation.

The plaintiff in the Supreme Court proceedings referred to section 35 of the CTTT Act which provides that the Tribunal must ensure that each party in any proceedings is given a reasonable opportunity to present his or her case. The Supreme Court was of the view

that the plaintiff was given this opportunity, but failed to take advantage of it.

Appeal dismissed.

2. **Constable v Anvic Holdings & Anor [2003] NSWSC 471**

This case relates to the Tribunal's jurisdiction under the *Home Building Act 1989*. The jurisdictional question was whether the sale of tiles for use in renovations being carried out at the applicant's house was covered by the Act. The Tribunal found that because the supplier of the goods was not engaged in the laying of the tiles, the matter constituted a consumer claim with the jurisdictional limitation of \$25,000, and not a home building matter. This decision was confirmed by the Supreme Court.

The costs order made by the Tribunal was also disputed, but was also upheld by the Supreme Court.

Appeal dismissed.

3. **Wolinski v HIA Insurance & Ors [2003] NSWSC 475**

In this matter the plaintiff alleged that he and Royal & Sun Alliance Australia Limited (Royal) entered into an agreement whereby Royal was to provide the insurance required under the *Home Building Act 1989* in regard to residential building work which the plaintiff was to do for a consumer. In return, the plaintiff was to pay the relevant insurance premium. It was further alleged that Royal did not provide the insurance and as a result the plaintiff suffered loss and damage for which it was entitled to sue Royal in the Home Building Division of the Tribunal.

The Supreme Court referred to **Collings Homes Pty Ltd v Head** [2002] NSWSC 1219 and **Woolfe v Sussman** [2001] NSWSC 702. Master Harrison stated:

“A contract of insurance between a builder and an insurer does not fall within the definition of building work as being in pursuance of physical construction or alteration of a dwelling. The plaintiff's claim does not fall within the definition of ‘residential building work’. It follows that the claim is not one which can be defined as ‘building goods or services’.”

The Supreme Court also confirmed the Tribunal's decision that the insurance contract in issue was not collateral to the building contract.

It was also argued that once the Tribunal determined that there was no jurisdiction to hear the claim, it had no power to award costs. Master Harrison found that even though there was no jurisdiction to hear the substantive dispute, there was jurisdiction to award costs to the successful respondent.

Appeal dismissed.

4. CJM Roof Services v O'Brien & Anor [2003] NSWSC 687

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. The plaintiff at the Supreme Court argued that it had been denied procedural fairness. Master Malpass determined that the plaintiff failed to satisfy the court that it had been denied procedural fairness in relation to the hearing or determination of the matter. It was found that the plaintiff had a reasonable opportunity to be heard but failed to take advantage of the opportunity.

It was also argued that the Tribunal did not give reasons for the making of the order that the first defendant be relieved from payment of the balance of the contracted roofing works. Section 49 of the CTTT Act deals with notices of decisions and statements of reasons for decisions. Master Malpass considered that the reasoning was sufficiently disclosed:

“The cases demonstrate that what will be sufficient will vary from case to case. In the present circumstances, a Tribunal was deciding an ex parte application. The reasoning process need not be expressly disclosed. It can sufficiently appear by implication (see inter alia **Madden v NSW Insurance Ministerial Corporation** [1999] NSWSC 196).”

Master Malpass opined that the order made can be seen to flow from other material appearing in the reasons.

Appeal dismissed.

5. Diab v Consumer, Trader and Tenancy Tribunal & Ors [2003] NSWSC 694

The brief facts for this case are that the defendants were the lessees of residential premises for a fixed term expiring on 7 July 2001. In March 2001 the defendants permitted the plaintiff to share the premises with the defendant. On 7 July 2001 at 9.30am the police evicted the plaintiff from the premises.

Section 22 of the *Residential Tenancies Act 1987* provides that a tenant shall have quiet enjoyment of the residential premises and the landlord or agent shall not interfere, or cause or permit any interference, with the reasonable peace, comfort or privacy of the tenant in using the residential premises.

The Supreme Court determined that the Tribunal erred in concluding that the relationship of landlord and tenant between the plaintiff and the defendants no longer existed as at 9.30am on 7 July 2001. Cripps AJ stated:

“The fixed term did not expire until midnight on 7 July 2001. At that time the periodic tenancy, deriving from the title of the defendants, was still in existence.”

Accordingly, the plaintiff was still entitled at that time to the protection of section 22 of the *Residential Tenancies Act 1987*.

Appeal upheld.

6. Anthony v Chris Savage Pty Ltd & Anor [2003] NSWSC 698

On 28 November 2000, the Tribunal made orders for the performance of work. In addition, at order (11):

Leave is granted to all parties to ask the Registrar at any time prior to 31 March 2001 to relist this matter for further hearing if these orders are not complied with.

On 9 May 2001, the Tribunal extended the dates for performance of the work orders and also made the following orders:

2. The period of time provided for in Order No. 11 made on 28 November 2000 is extended to 31 August 2001.

3. If no request is made to the Registrar pursuant to Order No. 11 of 28 November 2000, the parties may make written submissions on the issue of costs only. Such

submissions are to be filed by 14 September 2001.

On 11 September 2001, 11 days out of time, the applicant requested that the proceedings be relisted. The matter came before the Tribunal again on 27 February 2002 when it determined that order 3 made on 9 May 2001 operated as a self-executing order and that the Tribunal had no power to vary the time for compliance with such an order.

The Supreme Court found that the Tribunal's determination of 27 February 2002 was erroneous in law. Sperling J stated:

“Order 3 made on 9 May 2001 was not a self-executing order, in that it did not provide that the proceedings would stand dismissed in the event that a request for relisting was not made by the specified date.”

In addition, the Supreme Court found that

“the Tribunal was not functus officio even if order 3 of 9 May 2001 was a self-executing order. It had power to vary retrospectively the time for a relisting request with the effect of avoiding the operation of such a self-executing order. The statutory provision giving the Tribunal power to extend the time was in materially identical terms to the court rule under consideration in **FAI General Insurance Company Limited v Southern Cross Exploration NL (1987-1998)** 165 CLR 268.”

Appeal allowed. Proceedings remitted to the Tribunal for redetermination.

7. Owners Corp SP51652 v Consumer, Trader and Tenancy Tribunal & Anor [2003] NSWSC 739

This is an appeal from the decision of the Tribunal to refuse an adjournment application and then proceed to hear the application. In determining whether the Tribunal should have exercised its discretionary decision to adjourn the proceedings, the Supreme Court referred to the principles in **House v The King** (1936) 55 CLR at 504-505.

The plaintiff argued that it had been denied natural justice. In relation to this argument, the

Supreme Court referred to **Kioa v West** (1985) 159 CLR 550 and **Kearns & Anor v Fair Trading Tribunal of NSW & Anor** [2001] NSWSC 951. Master Harrison opined that whether there is a denial of procedural fairness depends on the circumstances in each case.

The Supreme Court found that:

“where a matter has been listed for hearing and the parties have been given adequate notice of that hearing, a legal representative or client cannot expect that an adjournment will be granted as of right on the day of the hearing.”

The Supreme Court determined that this was not a case where it would interfere with the discretionary decision of the Tribunal Member.

Appeal dismissed.

8. Washington Gray v Johannes Toroian & Ors [2003] NSWSC 763

This was an appeal on the question of costs only. Section 53 of the CTTT Act is the statutory provision that deals with costs. Clause 20(4) of the CTTT Regulation applied to the proceedings as the amount claimed or in dispute was more than \$25,000. In these circumstances, the Tribunal may award costs in relation to the proceedings as it thinks fit. Master Malpass found that:

“The Tribunal was entitled to take the view that the proceedings had been protracted by the conduct of the plaintiff and that this conduct had brought about the incurring of the large costs and fees which the plaintiff is now liable to pay.”

Appeal dismissed.

9. Mills v Consumer, Trader and Tenancy Tribunal & Ors [2003] NSWSC 782

In this matter the plaintiff claimed that the Tribunal's refusal of an adjournment sought by facsimile amounted to a denial of procedural fairness. This argument was rejected by the Supreme Court. Master Malpass noted:

“There seems to be a fashionable trend to allege denial of procedural fairness

consequent upon a refusal of an adjournment application or a non-attendance. The trend is founded on misconception.”

Appeal dismissed.

10. Jonsson v Arkway Pty Ltd & Anor [2003] NSWSC 815

The issue in this matter was whether the CTTT had jurisdiction to hear and determine the plaintiff’s application under the Consumer Credit Code adopted into New South Wales law by the *Consumer Credit (New South Wales) Act 1995*.

The Supreme Court considered the construction of section 6 of the Code and the interpretation of its jurisdictional provision concerning credit provided for 'personal, domestic or household purposes'.

Shaw J determined that:

- the Consumer Credit Code should be construed beneficially, that is, in favour of a jurisdiction conferring rights of access to courts and tribunals;
- it is appropriate to consider what the money was used for in order to determine the purpose of the provision of the credit.
- where credit is obtained both for personal purposes and an investment purpose the Code will apply if more than half of the credit is used for personal purposes;
- the accommodation of one’s parents can reasonably be characterised as belonging to or within the sphere of personal matters, especially within the context of a statute which should be construed beneficially.

Decision and orders of the Tribunal set aside.

11. Overmyer Industrial Brokers Pty Ltd v Campbells Cash & Carry Pty Ltd [2003] NSWCA 305

This is an appeal from a District Court decision relating to section 42AA of the *Property Stock & Business Agents Act 1941*.

The facts of the case are that the respondent wished to sell its commercial property and appointed a number of agents and entered into the agreement prescribed by s 42AA with the appellant. The respondent, upon

changing its marketing policy, terminated all agency agreements. Representatives of the parties then spoke, but no new agreement in the prescribed form was entered into. The appellant was the cause of the sale. Section 42AA of the Act prohibits an agent receiving remuneration if the prescribed form of agreement was not used.

The appellant argued that it was unconscionable conduct under the *Trade Practices Act 1974* (Cth) or in Equity for a vendor to promise or represent to pay an agent notwithstanding that both parties appreciate that the *Property Stock & Business Agents Act 1941* prevents receipt of remuneration. The argument was that breach of duty under that Act led to damages and that breach of the equitable duty led again to equitable damages. In neither case did damages constitute ‘remuneration’ within the meaning of the Act.

It was held that the appellant’s argument was correct in law, but on the facts no such representation was made.

ISSUES & GUIDELINES

1. Electronic Service Delivery

On 21 October 2003 the Minister for Fair Trading, the Hon Reba Meagher MP, launched the Tribunal's online application service (ESD). Applicants in the Tenancy Division can now lodge an application with the Tribunal over the internet and receive their listing notice by return email.

The benefits of ESD are:

- saves time;
- 24/7 access;
- secure online payment;
- online notification of hearing date;
- ability to monitor your case progress online.

To access the service, go to www.cttt.nsw.gov.au and click on [Lodge a tenancy application online](#).

The Consumer, Trader and Tenancy Tribunal Bulletin is published by the Consumer, Trader and Tenancy Tribunal of New South Wales. Every effort is made to ensure that information in the Bulletin is accurate. The Consumer, Trader and Tenancy Tribunal Bulletin is intended to inform and it cannot be regarded as a substitute for legal advice. Copies are available on the website at www.cttt.nsw.gov.au and from the registries of the Consumer, Trader and Tenancy Tribunal.