Supreme Court of New South Wales

W D and H O Wills (Australia) Limited and Anor v The Consumer Claims Tribunal of New South Wales and Anor Matter No Ca 40703/95 [1998] NSWSC 311 (23 July 1998)

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W D & H O WILLS (AUSTRALIA) LIMITED & ANOR v THE CONSUMER CLAIMS TRIBUNAL OF NEW SOUTH WALES & ANOR

CA 40703/95; ALD 30082/94

23 July 1998

Mason P, Meagher JA, Stein JA

The Supreme Court of New South Wales Court of Appeal

NATURE OF JURISDICTION: SUPREME COURT OF NEW SOUTH WALES - ADMINISTRATIVE LAW DIVISION - IRELAND J

FILE NO/S: CA 40703/95; ALD 30082/94

DELIVERED: 23 July 1998

HEARING DATE/S: 12 March 1998

PARTIES: W D & H O WILLS (AUSTRALIA) LIMITED & ANOR v THE CONSUMER CLAIMS TRIBUNAL OF NEW SOUTH WALES & ANOR

JUDGMENT OF: MASON P, MEAGHER JA, STEIN JA

COUNSEL:

Appellants: B Walker SC/S J Gageler

Respondent 2: N Francey/E Pike

Intervener for Minister: J Basten QC/M A Gilmour

SOLICITORS:

Appellants: Mallesons Stephen Jaques

Respondent 1: Crown Solicitor (submitting)

Respondent 2: n/a

CATCHWORDS:

CONSUMER CLAIM - *Consumer Claims Tribunal Act 1987* s 3(1) - the term `supplier' may include reference to manufacturer or distributor - the term `specified sum" is not limited to a claim for liquidated damages

EXTEMPORE/ RESERVED: RESERVED

ALLOWED/DISMISSED: DISMISSED

NO OF PAGES: 13

W D & H O WILLS (AUSTRALIA) LIMITED & ANOR v THE CONSUMER CLAIMS TRIBUNAL OF NEW SOUTH WALES & ANOR

On 11 August 1994, the second respondent, a medical practitioner, filed a consumer claim, in the Consumer Claims Tribunal of New South Wales against the appellants,

W D & H O Wills and The Benson and Hedges Company claiming damages and costs incurred in overcoming her addiction to smoking. She sought a money order for $1,000 for the cost of a stop smoking programme, compensation for mental and physical distress in overcoming her nicotine dependence and for other expenses.

At the commencement of the hearing, the appellants sought a ruling from the Tribunal that it had no jurisdiction to determine the claim. The Tribunal ruled it was satisfied it had jurisdiction and Ireland J, in the Supreme Court of New South Wales, dismissed a summons seeking a review of that decision. The appellants appeal the decision of Ireland J.

On appeal, the appellants contend:

1. that as, respectively, the manufacturers and distributors of the goods, they are

not the `suppliers' of the goods within the meaning of s 3(1) of the *Consumer*

Claims Tribunals Act 1987 (the Act);

2. that the claim is statute barred as the supply took place more than three years before the claim was lodged.

3. that the claim, in relation to distress and unspecified expenses, does not fall within the meaning of `specified sum' in s 30(1) of the Act.

Held:

1. There is no reason in principle or policy to find that `supplier' may not extend to include the manufacturer or distributor.

Fairey Australasia Pty Ltd v Joyce & Anor **[198] 2 NSWLR 314 considered.**

2. The trial judge correctly dismissed the submission that the claim was statute-barred as premature on the basis that s 19 of the Act confers wide powers on the Tribunal to amend the claim at any time before the hearing is complete. The claim is not statute barred as the second respondent's affidavit contains evidence of a supply of goods within the relevant time period.

3. The term `specified' is used in s 30(1) of the Act in a number of different ways, not all of which refer to liquidated damages. There is no reason to confine the phrase `specified sum' to liquidated claims and to exclude claims for general damages.

ORDER

Appeal dismissed with costs

W D & H O WILLS (AUSTRALIA) LIMITED & ANOR v

THE CONSUMER CLAIMS TRIBUNAL OF NEW SOUTH WALES & ANOR

JUDGMENT

MASON P: I agree with Stein JA.

W D & H O WILLS (AUSTRALIA) LIMITED & THE BENSON & HEDGES COMPANY

PTY LIMITED v THE CONSUMER CLAIMS TRIBUNAL OF NEW SOUTH WALES & Sarah Rosemary HODSON & THE MINISTER FOR CONSUMER AFFAIRS

JUDGMENT

MEAGHER JA: I agree with the judgment of Stein JA, which I have had the benefit of reading, and with the orders he proposes. It is unnecessary, I hope, to point out that this appeal goes only to jurisdiction and not to the merits of the dispute between the parties.

W D & H O WILLS (AUSTRALIA) LIMITED & ANOR v

THE CONSUMER CLAIMS TRIBUNAL OF NEW SOUTH WALES

& ANOR

JUDGMENT

STEIN JA: This is an appeal from a decision of Ireland J dismissing a summons seeking review of a ruling of the first respondent, the Consumer Claims Tribunal of New South Wales (the Tribunal) that it had jurisdiction to determine a consumer claim brought by Dr **Hodson** (the second respondent). The Minister for Consumer Affairs intervened in the appeal pursuant to s 44 of the *Consumer Claims Tribunals Act 1987* . Mr Basten QC, who appeared for the Minister, generally supported the submissions made on behalf of Dr **Hodson**.

THE FACTS

On 11 August 1994 Dr **Hodson** filed a consumer claim in the Tribunal against the appellants, WD & HO Wills (Australia) Limited and The Benson and Hedges Company Pty Limited. In her claim she sought a money order for $1000. She completed the printed form of claim by detailing the purchase of a packet of cigarettes on 2 August 1994 at Rose Bay. Under `Details of Claim' she wrote:

I wish to claim for the damages and costs incurred by myself in overcoming my addiction to Benson and Hedges cigarettes which are manufactured by WD and HO Wills and are distributed by the Benson and Hedges Company. WD and HO Wills Ltd failed to warn me of the extent to which cigarettes are addictive by reason of the chemical constituent nicotine.

I am therefore claiming:

1. the cost of a stop smoking programme, the cost being $150.

2. compensation for the mental and physical distress I have suffered in

overcoming my nicotine dependence.

3. any other expenses incurred. (AB 9)

In an affidavit read to the Tribunal when it considered the appellants' challenge to jurisdiction, Dr **Hodson**, a medical practitioner, deposed a history of smoking that began in 1975 while she was a schoolgirl. She smoked continuously for almost twenty years and, during that time, made a number of attempts to stop. For the majority of the time she smoked the appellants' cigarettes.

On 24 July 1994 Dr **Hodson** made a further decision to quit smoking. She started to experience withdrawal symptoms which she set forth in paragraph 25 of the affidavit (AB 14). Within a few days she became aware of the possibility of making a claim for reimbursement of the costs associated with her decision to quit. She obtained legal advice in relation to making such a claim. Before obtaining advice she had in fact purchased a further packet of Benson and Hedges cigarettes on the 2 August 1994 and, that evening, smoked 3 cigarettes. Dr **Hodson** says that she resolved to obtain assistance, incur the cost of doing so and then to make a claim on the appellants as manufacturer and distributor of the cigarettes which she had smoked almost exclusively. She did not smoke the remaining cigarettes and some days later threw the packet away.

THE STATUTORY PROVISIONS

Section 10(1) of the *Consumer Claims Tribunal Act 1987* (the Act) confers upon the Tribunal jurisdiction to hear and determine 'consumer claims'. A 'consumer claim' is defined in s3(1) to mean:

a claim by a consumer for the payment of a specified sum of money, ...

that arises from a supply of goods or services by a supplier to the consumer, whether under a contract or not, or that arises under a contract that is collateral to a contract for the supply of goods or services.

The terms `supplier' and `supply' are defined in s3(1) in the following way:

supplier means a person who, in the course of carrying on, or purporting to carry on, a business, supplies goods or services.

and `supply':

(a) in relation to goods, includes supply goods by way of a contract for

the sale, exchange, lease, hire or hire-purchase of goods or an alleged contract for the sale, exchange, lease, hire or hire-purchase of goods, ...

Under s 3(2)(a):

a reference to supply in relation to goods includes a reference to resupply

After hearing the objection to jurisdiction the Tribunal expressed itself as satisfied that it had jurisdiction to determine the claim. It based its ruling on the following elements:

* this claim concerns a supply of goods by the supplier;

* such supply being last made within three years of this claim being lodged;

* the only remedy sought by the claimant is a money order for $1000 and

this satisfies the requirement for a consumer claim to be one (inter alia)

for the payment of a specified sum of money. (AB 20)

Pursuant to s12(2) of the Act, the appellants commenced proceedings in the Supreme Court contending that the Tribunal's ruling on jurisdiction was erroneous in respect of each of the elements referred to above. Ireland J dismissed the appellants' summons.

SUPPLY OF GOODS BY A SUPPLIER

As I have said, the appellants, WD & HO Wills and The Benson and Hedges Company are, respectively, the manufacturer and distributor of the goods supplied. It is not disputed that the immediate supplier of the goods was the shopkeeper in Rose Bay. The appellants submit that they do not come within the meaning of `supplier' in s 3(1) of the Act and, accordingly, are not proper parties to the proceedings.

The appellants place reliance on the definitions of the terms `supply', `supplier' and `manufactured' in the *Trade Practices Act 1974* (Cth) (the TPA) arguing that the distinct provision relating to manufacturers would be largely otiose if `supply' were to include `manufacture'. Part V, Division 2A of the TPA suggests otherwise. Section 74B, for example, expressly refers to the circumstance where a corporation, which manufacturers goods, supplies those goods to another person who acquires them for resupply.

Ireland J found that there was no reason in principle or policy to find that `supply' should exclude manufacture (AB 37N - 39P). The judge based his reasoning on the judgment of Yeldham J in *Fairey Australasia Pty Ltd v Joyce and Anor,*[1] which was followed by the Full Court of the Supreme Court of Queensland in *R v Registrar and Referees of Small Claims Tribunals & Roberts ex parte Consolidated Rutile Ltd*[2]. In *Fairey* (which bears some similarities to the issue raised here) Yeldham J was of the opinion that:

no reason in principle exists for confining claims which may be determined by a tribunal to those which are made by one party to a contract against the other contracting party. The words "arising out of contract" are of considerable width....Plainly if the legislature had intended that the only claims in respect of which a tribunal might have jurisdiction were those when one contracting party sues another, it could, and no doubt would have said so in express words. It is, of course, plain that the person against whom an order is made must be one who has a legal liability to the consumer. [3]

Yeldham J was of the view that, as long as the claim was one `arising out of' a contract, it was irrelevant whether liability arose in contract, tort or under the *Sale of Goods*

Act.[4]

The Act was amended in 1987 to expressly remove the requirement that the claim `arise out of contract'. In my opinion, the changes to the legislation make it even clearer that the intention of Parliament was that a consumer claim may be brought, not only against the immediate supplier of the goods or services, but also against other parties involved in the supply of the goods. Indeed, s3(2) of the Act expressly states that a reference to supply in relation to goods includes a reference to resupply. The reference to re-supply may apply to a distributor of the relevant goods. If a consumer claim can arise against the distributor, there appears to be no good reason, in principle or policy, to exclude the manufacturer from liability.

IS THE CLAIM STATUTE BARRED?

The second issue arising on the appeal is whether the supply of goods to the second respondent was made within three years of the claim being lodged (s 10(3) of the Act). In the claim form, Dr **Hodson** specified the purchase of a single packet of cigarettes on 2 August 1994. The affidavit, which was read before the Tribunal, described a history of smoking over almost twenty years. Subsequently, in a series of letters between the parties, the claim of the second respondent was confined to a twelve month period from 1993 to mid-1994.

Ireland J appeared to accept the statement of Mr Francey, Counsel for the second respondent, that the claim was confined to the period between 1993 and mid-1994. He dismissed the submission that the claim was statute barred as irrelevant. In his opinion s19 of the Act conferred wide powers on the Tribunal to amend the claim at any time before it has finally completed its hearing. He regarded the submission as premature. I agree. It may nevertheless be useful to consider the basis of the consumer claim.

Correspondence from Counsel for the second respondent to the appellants, dated 10 May 1995 and 7 June 1995, stated the intention of Dr **Hodson** to rely upon the purchase of cigarettes in the 12 month period prior to the lodging of the claim. However, this correspondence was not before the Tribunal when the ruling on jurisdiction was made under s26 of the Act. Indeed, the correspondence post-dated its decision. Section s12(2) of the Act empowers the court to grant relief in respect of a consumer claim where a tribunal has made a ruling under s26. Consequently, the court is confined to considering the material, (ie. the claim form and the affidavit) that was before the Tribunal when it made its ruling with regard to jurisdiction.

In the claim form, as mentioned, Dr **Hodson** completed the date, place of purchase and cost of the packet of cigarettes purchased by her on the 2 August 1994. Under the heading `Details of the Claim' in the form, she stated that she was claiming for `damages and costs incurred by myself in overcoming my addiction to Benson and Hedges cigarettes'. The affidavit provides considerable detail of her twenty year history of smoking.

While the particulars in the claim form are not an essential requirement of a consumer

claim, there being no longer a requirement that a claim be `one arising out of a *contract* for the supply of goods or services', it is necessary to establish the legal basis of the claim to determine whether, as the appellants submit, it is statute barred. A claim is statute barred under the Act if the supply of goods took place more than three years before the claim was lodged.

The cigarettes purchased and smoked by Dr **Hodson** on 2 August 1994 followed a week during which she did not smoke. The evidence of paragraph 34 of Dr **Hodson**'s affidavit (AB 16-17), detailing the very short half-life of nicotine is relevant here. It would be difficult to assert, given that evidence, that Dr **Hodson**'s claim is based solely on that purchase.

However, other paragraphs in the affidavit, for example, 25, 26, 27 and 29 (AB 14 - 15) amplify the basis of her claim. These paragraphs detail the purchase of the appellants' cigarettes in the period leading up to her decision of 24 July 1994 to attempt to quit smoking. At the very least, these paragraphs provide sufficient evidence of a supply of goods within the relevant time period.

In my opinion the Tribunal, in considering whether it had jurisdiction, was entitled to consider the claimant's affidavit. It was open to the Tribunal to accept that the material in the affidavit was capable of providing particulars of the claim, which included repeated supply for up to 3 years prior to its lodgement. This was sufficient to provide the Tribunal with jurisdiction. It may be that there will be a factual dispute as to the supply of goods within the relevant period, or as to their causal impact but they are not matters for the court to be concerned with on this appeal. I also note that the Tribunal has power to amend a consumer claim under s 19 of the Act.

`PAYMENT OF A SPECIFIED SUM OF MONEY'

The remaining issue for consideration is whether the claim, insofar as it relates to distress and unspecified expenses, is a `consumer claim' within the meaning of the Act. Section 30(1)(a) of the Act empowers the Tribunal to make an order requiring a respondent to pay to the claimant a specified amount of money. At the time the claim was made the ceiling prescribed by the regulations was $10,000.

The money order sought by the second respondent in the claim form is for $1000 and is stated as having three bases:

1? the cost of a stop smoking program, the cost being $150;

2? compensation for the mental and physical distress I have suffered in overcoming

my nicotine dependence;

3? any other expenses incurred.

The appellants concede that the amount of $150 for the stop smoking programme is a

specified sum as required by the definition of consumer claim in s3(1) of the Act. They contend that the second and third components of the claim are not specified sums, but unliquidated damages which do not arise within the jurisdiction of the Tribunal. Ireland J was of the view that, where the total sum specified is within the prescribed jurisdictional limit, the question of whether damages may be awarded for mental and physical distress was not a jurisdictional issue for determination.

Does the term `specified sum' exclude claims for unliquidated amounts of a non-pecuniary nature?

The purpose of the Act is to allow consumers to make claims in the Tribunal in respect of defective goods and services. It is self-evident, in my opinion, that some claims will inevitably include the assessment of unliquidated damages. For example, when repair work is carried out on defective goods.[5]

The text of the statute also lends assistance. Section 30(1) empowers the Tribunal to make certain orders. They include an order that a respondent pay `a specified amount of money', `perform specified work', deliver goods of `a specified description' etc. `Specified' is used in a variety of contexts and is patently not intended to be confined solely to liquidated claims as that meaning would only have relevance to some of the subparagraphs of s 30(1).

The Act does not expressly require that a consumer claim be for liquidated damages and not unliquidated damages. It has to be for the payment of a specified sum of money. The requirement is satisfied if a sum of money is specified in the claim and is within the jurisdictional limit of the Tribunal. I can see no reason in public policy to confine the phrase `specified sum' to liquidated claims and exclude a claim for general damages.

In my opinion, the appeal should be dismissed with costs.

[1]

[1981] 2 NSWLR 314

[2] (1986) 2 Qd R 282

[3] *Fairey* at 321

[4] *Fairey* at 323

[5] See for example: *R v Small Claims Tribunal*; ex parte *Barwiner Nominees Pty Ltd* [1975] VicRp 82; [1975] VR 831 at 836 where Gowan J held that the correct remedy was an action for damages `prima facie being the difference between the value of the goods at the time of delivery and the value they would have had if they had answered to the warranty'.
