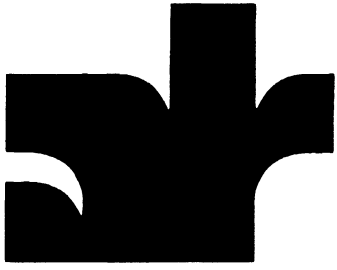

COMMERCIAL TRIBUNAL DECISIONS JANUARY 1992 TO JUNE 1993

BUILDERS LICENSING ACT 1986 (SA)

Commissioner for Consumer Affairs v Pentateuch Nominees Pty Ltd

19 February 1992
68/91/07
Judge Noblet, Ms Clothier, Mr Robinson

Legislation considered: Builders Licensing Act 1986 (SA) ss4, 9, 19
Keywords: disciplinary inquiry; complaint dismissed

Facts:

The Commissioner brought a complaint in which it alleged that the respondent had carried on business as a builder without being the holder of a licence, contrary to s9 of the *Builders Licensing Act* 1986 (SA). The Tribunal made an order that an inquiry be conducted pursuant to s19 of the Act. The question raised at the hearing subsequent to the inquiry was whether or not the work conducted by the respondent was actually building work.

Determination:

(1) The respondent was a supplier of spa pools. This work comprised digging a hole in the ground, placing the spa pool in the hole and

backfilling the hole with sand. The respondent also supplied a kit to the purchaser of the spa consisting of a pump and blower, a power lead and a plug suitable for plugging into a power supply. However, the respondent itself did not perform any electrical work or connect the water supply to the spa pool. The Tribunal concluded, therefore, that the work carried out by the respondent company required no more building expertise than that required to dig a hole and install a fish pond in a backyard.

(2) Moreover, although the definition of building work in s4 of the Act includes "work of a prescribed class" (which is, in turn, defined in regulation 4(2) to include the construction of a swimming pool), a spa pool could not be regarded as a swimming pool. Therefore, the work carried out by the respondent was not work of a prescribed class.

(3) The Tribunal stated that where something was built or constructed, or where an improvement was made to a building, it did not necessarily follow that building work was involved. The construction of a spa pool in a different case may involve building work yet, in the circumstances of this case, it did not. Consequently, the respondent was not in breach of s9 of the Act.

RA Jordan Pty Ltd v Commissioner for Consumer Affairs

24 April 1992
54942-3
Judge Noblet, Ms Clothier, Mr Robinson

Legislation considered: Builders Licensing Act 1986 (SA) ss10(8), 10(9), 14
Cases referred to: Panter (Commercial Tribunal, 4 December 1987); *Rawlings* (Commercial Tribunal, 7 December 1987)
Keywords: builder's licence application; "special reasons"; building work supervisor approval

Facts:

The applicant already held a Category 3 licence in the classified trade of plumbing; it sought an upgrading to a Category 1 licence which would enable it to carry out building work of any kind. The applicant also sought approval of one RA Jordan as its building work supervisor for the purposes of the licence. The Commissioner lodged an objection to the application on

the grounds that two of the directors of the applicant company had been directors of a number of insolvent companies within the last ten years.

Determination:

(1) The requirements of s10(8), which provides that the Tribunal must grant a licence upon payment of the prescribed fee if they are satisfied of a number of conditions, was first discussed. The first of these requirements is that the directors of the applicant company be "fit and proper persons"; here there was no doubt on the facts that the directors were such persons. Similarly, there was no doubt that the second requirement was fulfilled; namely, that the directors had sufficient business knowledge and experience. The third requirement of s10(8) is that the company must have sufficient financial resources for the purposes of properly carrying on its business; here the company seemed to have been trading profitably in recent times, and to have substantial cash reserves and credit facilities through its bankers.

(2) However, since two of the directors had been directors of insolvent companies within the last ten years, s10(9) provided that the Tribunal could not grant the application unless satisfied that there were "special reasons" why the application should be granted. The applicant must bear the onus of proof in relation to these special reasons.

(3) The Tribunal adopted without repeating the interpretation of "special reasons" given in *Panter* and *Rawlings*.

(4) In relation to one of the insolvent companies concerned, the relevant directors only became directors shortly before its liquidation, and the factors which led to the insolvency occurred before their office commenced. In relation to the other companies, the primary cause of their collapse was not the imprudent or fraudulent practices of the two directors, but was the sudden and unpredictable collapse of another company with which they were undertaking a joint venture. The two directors had obtained appropriate advice and had acted quite properly. Apart from these collapses, the two directors had an otherwise unblemished record, and the liquidators in all cases spoke of the directors' helpfulness in the liquidation proceedings.

(5) The applicant company had been operating (under various names) since 1956, and so was not a company formed simply to take over

the business of the insolvent bodies which the directors left behind them.

(6) It is true that s10(9) seems designed primarily to protect the interests of suppliers, employees, subcontractors, and other trade creditors. It was relevant therefore that most of these were paid during the liquidation of the insolvent companies. However, the simple fact that most of the creditors of a company are financiers would not, of itself, be a special reason for granting the application (for if it was, then a loan could be taken out to pay debts to trade creditors, and that loan could remain unpaid).

(7) Having regard to (4), (5), and (6) above, the Tribunal held that, in all the circumstances of the case, there were special reasons for granting the application.

(8) Mr Jordan was also held eligible to be approved as a building work supervisor, being a director of the company, a registered building work supervisor, and not being already approved as such a supervisor in relation to the business of any other licence.

(9) Mr Jordan's registration as a building work supervisor, however, was only in category 3, and this would have to be upgraded through the proper channels in order for him to supervise work carried on by the company outside the classified trade of plumbing.

Strata Title No 2444 Inc v MS & BT Tincknell Pty Ltd

26 May 1992
31/01/07
Mr Canny, Mr Robinson, Mr Wilson

Legislation considered: Builders Licensing Act 1986 (SA) ss6, 23, 27(2), 29, 32(2)
Keywords: domestic building work contract

Facts:

The respondent company, at the request of the applicant, forwarded a written report and quotation regarding structural damage of Unit 1, 51 Williamson Road, Para Hills (the unit). The applicant accepted the quotation, and paid the monies due for the quotation and for the writing of the report. The respondent company did not seek or obtain Council

approval for the work, nor did they comply with the requirements of s23 or take out builder's indemnity insurance under s29. The respondent company commenced the underpinning of the unit, as per their report and quotation, without undertaking a soil test or obtaining an engineer's report. Almost nine months later the respondent company contacted the applicant and informed it that there were problems in the repair work; the underpinning had been unsuccessful and cracking had recurred. The applicant sought the aid of the Tribunal pursuant to s32.

Determination:

(1) Mr Herriot conducted a report for the applicant's agent upon the work performed on the unit by the respondent company. The report stated that there was little doubt that the cracking in the unit was caused by soil movement due to moisture change in the clays. Such moisture change could have been either "wetting up", "drying up", or both, and a number of possible causes were given. Another possibility was that the original footings were founded on fill, but whether or not this was the case, most (if not all) movement related to fill consolidation should have occurred by now. Mr Herriot stated strongly that underpinning is not an appropriate remedy where the cause is clay moisture change, and suggested alternative remedial work.

(2) Mr Herriot gave a further report for the applicant's agent. In this report he gave a list of three possible causes for the cracking of the unit, but stated his almost certain belief that the correct cause was the significant moisture loss in reactive clays due to the presence of adjacent trees. If this was the case, he continued, the underpinning by the respondents would have done little to rectify the problem as (a) the underpins were far too shallow and (b) the basic cause of movement (the nearby trees) was not addressed.

(3) Mr Herriot also gave a report to the respondent company, in which he stated that the underpin excavation revealed that the footings were founded on fill. Had the consolidation of this loose fill been the major cause of the cracking, then underpinning may have been an appropriate solution. Cracking which occurred after the underpinning was likely to have been caused by long term drying out of reactive clays.

(4) Dr PW Mitchell gave a report to the applicant's agent. In this report, Dr Mitchell stated that the cracking was associated with soil movements. The results of a soil report showed that the soil profile was dry, due to excessively dry weather and the presence of nearby trees. Underpinning, he concluded, was not an appropriate remedy, as the basic cause of movement (soil drying) was not addressed. He further stated that a soil test would have indicated the problem, and gave a list of appropriate remedies for the cracking.

(5) Mr Goldfinch, called to give evidence by the respondent company, agreed with Mr Herriot and Dr Mitchell that a soil test should have been carried out before underpinning was commenced. He also agreed with the evidence which they submitted in their reports, with the qualification that the movement could also have occurred by consolidation of filling, in which case the respondent company's actions were quite appropriate.

(6) Mr BR Kneebone, a building inspector for the City of Salisbury, gave evidence that underpinning (by s6) is part of the definition of building work. Building work must receive Council approval by the appropriate methods, and requires an engineer's report, a soil report and (where the work is of a value in excess of $5000) a certificate of indemnity insurance. He added further that the relevant application was normally filed by the builder on behalf of the owner, and that it had not been filed in this case.

(7) The Tribunal held that the respondent company should not have commenced work without Council approval having been obtained. Had such approval been forthcoming, a soil report and an engineer's recommendation would have been obtained, and it seemed likely that the underpinning would not then have been so shallow. The respondent company did not comply with the requirements of s23, and no building indemnity insurance was taken out.

(8) Thus the respondent company was in breach of the warranty implied in s27(2)(f), for the underpinning did not achieve the result which the applicant could reasonably have expected, and underpinning to such a shallow depth was not an appropriate remedy. The respondent company was ordered to recompense the applicant for monies paid for the underpinning and the interior replastering, as well as for costs.

C Sterzl v G Sanson

2 June 1992
43/91/07
Mr Canny, Mr Wilson, Mr James

Legislation considered: Builders Licensing Act 1986 (SA) s32
Keywords: domestic building work contract

Facts:

The respondent built a house which he and his wife then onsold to the applicant pursuant to a written contract of sale. Schedule A of the contract set out a number of remedial works to be performed by the respondent. The applicant claimed these had not been done and sought an order, pursuant to s32, compelling performance.

Determination:

(1) A building inspector from the Office of Fair Trading gave evidence as to the level of completion of the tasks set out in Schedule A. After careful consideration of this evidence, the Tribunal was satisfied that the respondent had failed to perform warranties to which the proceedings related. The respondent was ordered to perform the remedial work within six weeks of the order and, pursuant to s32(8), to submit to the Tribunal, within fourteen days of its completion, a certificate from a general builder's licence holder certifying that the work had been properly completed in accordance with the order.

Commissioner for Consumer Affairs v LM Turner;
Commissioner for Consumer Affairs v Mantel Homes Pty Ltd

18 June 1992
COMTR-11-92-17; COMTR-10-92-17
Judge Noblet, Ms Clothier, Mr Robinson

Legislation: Builders Licensing Act 1986 (SA) ss19, 27(7)
Keywords: disciplinary inquiry; strong reprimand

Facts:

The Tribunal had conducted two inquiries pursuant to s19, and had found that there was proper cause for disciplinary action against both Mr Turner and Mantel Homes. The Tribunal had found that Mr Turner had "failed to exercise proper care in the supervision of building work", and that both Mr Turner and Mantel Homes had failed to ensure that building work performed in pursuance of their licences was properly supervised. The Tribunal was then faced with a decision as to the appropriate disciplinary action to be taken against the respondents.

Determination:

Re Mr Turner:

(1) The Tribunal made it clear that the circumstances under which Mr Turner was forced to work were both extraordinary and difficult. The supervisor responsible for the building failed to comply with his duty, and did not even ensure, for example, that Mr Turner had the running water which is essential to proper bricklaying.

(2) Mr Turner had already been heavily penalised for his faulty brickwork, having been forced to rectify the problems by five weeks labour at no charge and by supplying replacement bricks at his own personal expense.

(3) The bricks with which Mr Turner was forced to work were of unequal sizes, and the steps which he could have taken to have reasonably completed the job were so time consuming that no bricklayer could reasonably have been expected to have taken them. Indeed, the bricks were so unsatisfactory that they were ultimately taken off the market.

(4) Mr Turner had been involved in the building industry, primarily as a bricklayer, for some 46 years without blemish, and the Tribunal was not prepared to find him generally incompetent.

(5) The Tribunal recognized the commercial pressures on Mr Turner, but stated that he was foolish to commence the work which he knew could not be physically completed. *A fortiori*, when Mr Turner was told to pull down the work and recommence it, he certainly ought to have obtained advice, rather than reattempting the impossible.

(6) The Tribunal noted that all Mr Turner need have done to defend himself was to write a small note to the owner advising that the job ought not to be carried out in the way instructed. Had he done that, Mr Turner would have had a defence under s27(7) to any subsequent claim.

(7) Given all the facts, the Tribunal thought it unjust to take any action against Mr Turner's licence, and ordered that a strong reprimand be given. It noted also that, should any similar complaint against Mr Turner come before it, then in all likelihood some action would be taken against his licence.

Re Mantel Homes:

(1) The Tribunal again noted the appalling lack of supervision at the site, largely due to the company's poor choice of a supervisor. The company, however, could not simply hide behind its supervisor and claim that the problems were all his fault: reporting systems should have been in place within the company itself.

(2) The evidence before the Tribunal indicated a serious lack of awareness by directors of their company's affairs. In essence, the company left Mr Turner to work on his own, without adequate supervision and without the essential elements of his trade. Furthermore, when the brickwork had to be pulled down and relaid, a task which obviously called for close supervision to ensure that the defects were properly rectified, no supervision whatsoever was provided.

(3) The deficiencies in the house were ultimately rectified and, being an isolated instance of poor supervision rather than a continuous course of such conduct, the appropriate order was again a strong reprimand, coupled with a fine of $3000. The Tribunal also warned Mantel Homes that, should it be found to have continued such conduct after this order, then some action against its licence would almost certainly be taken.

Commissioner for Consumer Affairs v N Ianera

2 September 1992
COMTR-32-92-17
Judge Noblet, Mr Robinson, Mr Krumins

Legislation considered: Builders Licensing Act 1986 (SA) ss10(9), 19(6), 19(11)(c)(iii)
Keywords: disciplinary inquiry; licence limitation

Facts:

The respondent was the director of an insolvent company, was registered as a Category 1 building supervisor, and held a Category 1 builder's licence. The respondent admitted the allegations made in the complaint, and so the Tribunal found that there was proper cause for disciplinary action pursuant to s19(11)(c)(iii). The Tribunal were then faced with a determination as to the appropriate disciplinary action to be taken.

Determination:

(1) The Tribunal were satisfied that the liquidation of the company was not due to significant mismanagement by the respondent, nor by the directors generally. The liquidator's report ascribed the liquidation to the general economic decline of the building industry.

(2) The liquidator wrote, in a letter to the Tribunal, that they were of the opinion that the directors and shareholders of the company took appropriate action to minimise losses, and also drew attention to the respondent's assistance and cooperation throughout the provisional liquidation proceedings.

(3) The Tribunal were presented with a number of character references, and with letters from some of the creditors who had suffered a loss as a result of the liquidation and yet were still willing to extend credit to the respondent on a personal basis. There was also evidence that another company would be prepared to ensure the respondent had up to twenty domestic building work contracts within a twelve month period.

(4) The provision of s10(9) was held not to apply strictly here, as the respondent was not seeking to apply for a builder's licence; ie the respondent need not show that there were special reasons why he should retain his licence. However, all relevant circumstances were required to be considered, and this included the policy and intention of Parliament which lay behind s10(9). Here there was no question of reckless or imprudent trading practices in relation to the company's insolvency. The primary reason for imposing disciplinary action upon the directors of an insolvent company is to

ensure public protection (eg customers, suppliers, etc) from future insolvency, and is not simply to punish the directors. The risks of the respondent becoming insolvent in the future were relatively slight.

(5) Thus, the appropriate action under s19(6) was held to be a reduction of the respondent's licence from Category 1 to Category 2, and to impose conditions such that the work may only be domestic, or else of a value no greater than $100,000.

(6) The Tribunal added that the number of building work contracts which the respondent may undertake would be adequately restricted by the building indemnity insurance system; the insurer must consider the number of projects being undertaken to be within the capacity of the respondent's financial resources.

Platts v Howson

1 October 1992
COMTR-01-92-07
Mr Canny, Ms Clothier, Mr Robinson

Legislation considered: Builders Licensing Act 1986 (SA) s32; *Commercial Arbitration Act* 1986 (SA) s28
Keywords: domestic building work contract

Facts:

The applicant owned land in Blanchetown and entered a contract with the respondent to build a house upon it. Unsatisfied with the respondent's standard of work in relation to the building, the applicant sought the performance of various remedial tasks. The respondent counter-claimed, and the dispute was submitted for arbitration. Still dissatisfied with the decision, the applicant applied to the Tribunal pursuant to s32. The respondent again counter-claimed.

Determination:

(1) Section 28 of the *Commercial Arbitration Act* 1986 (SA) provides that unless a contrary intent is expressed in the agreement, the award made by the arbitrator shall, subject to the Act, be final and binding on the parties to the agreement. Here, the Tribunal held, there was no such contrary intent. Hence the Tribunal refused to consider any

matters previously considered by and included in the award of the arbitrator.

(2) The Tribunal turned therefore to those matters which were not dealt with by the arbitrator's award and awarded the applicant a further $630.

(3) The applicant claimed compensation for stress to both himself and his wife. It was held that the applicant was living in the house before he married his wife, and so his wife could not be a party to the dispute. Moreover, the applicant's claim of sickness and bad nerves was unsubstantiated by satisfactory evidence and so could not be allowed.

(4) Since the applicant's claim was in the vicinity of $10,000 and the order made was only for $630, the applicant was held to have substantially failed in his application. Further, the applicant had wasted the Tribunal's time by attempting to claim compensation for matters governed by the arbitrator's award, as did the respondent in its counter-claim. Thus, no order for costs was made.

R Alexandre v M Wordley

3 December 1992
COMTR-23-92-07
Judge Noblet, Ms Clothier, Mr Robinson

Legislation considered: Builders Licensing Act 1986 (SA) ss27(2), 32 and Part VI Division II; *Acts Interpretation Act* 1915 (SA) s22; *Commercial Tribunal Act* 1982 (SA) ss12(b), 13(1)
Cases referred to: Walkley v Dairyvale Co-operative Ltd (1972) 39 SAIR 327; *HG Collett Pty Ltd v Alsop & Alsop* (1982) SAIR 309; *Charles Moore (Aust) Ltd v SA Commissioner for Prices and Consumer Affairs* (1977) 51 ALJR 715 at 723; *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689; *Henriksens A/S v Rolimplex* [1974] 1 QB 233 at 248; *Young v Kitchin* (1878) 3 ExD 127; *Government of Newfoundland v Newfoundland Railway Co* (1888) 13 App Cas 199; *Stoddart v Union Trust Ltd* [1912] 1 KB 181; *Ventura v Svirac* [1961] WAR 63, *Tito v Waddell (No 2)* [1977] 3 All ER 129.
Keywords: domestic building work contract; assignment of statutory amenities; "in respect of statutory warranties"

Facts:

The respondent entered into a domestic building work contract with Mr DE Jolly. This contract attracted certain statutory warranties under Part VI, Divisiomn II of the *Builders Licensing Act* 1986 (SA). Mr Jolly onsold the building constructed by the respondent to the applicant and another. The applicant filed an application under s32 seeking an order by the Tribunal for the performance of various remedial works by the respondent. The respondent counterclaimed for the payment of monies still owed by Mr Jolly (now bankrupt) in relation to the building. A preliminary hearing was called to enable the Chairperson, under s12(b) of the *Commercial Tribunal Act* 1982 (SA), to determine a question of law relating to the dispute; namely, whether a purchaser who succeeds to the rights relating to statutory warranties of their predecessor in title receives those rights subject to any liabilities of the predecessor in relation to the building contract from which the statutory rights arise.

Determination:

(1) The Chairperson first set out the warranties provided by s27(2), and the express assignment of those rights to a purchaser provided by s27(3).

(2) Section 13(1) of the *Commercial Tribunal Act* 1982 (SA) states that "the Tribunal shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms". This means that the Tribunal is not bound, strictly speaking, to decide proceedings *stricti juris*: *Walkley v Dairyvale* per Olsson J. If one is to apply a test of equity and good conscience, one must first discern the strict legal situation. Once the legal position is clear, one must then consider whether, on the totality of the evidence, an application of the principles of equity and good conscience demand some variation of or departure from strict legal principles: *Collett v Alsop* per Olsson J. The Chairperson, however, considered this to be a case of statutory interpretation, and hence the proper approach to be an application of strict legal principles: *Charles Moore* at 723, per Gibbs J.

(3) Mr Jolly was entitled to the statutory warranties, but this entitlement was subject to him paying the contract price. If the question was one of assignment by contract, or of equitable assignment, then the

assignee (here the applicant) would take the burden of the liabilities with the benefit of the rights.

(4) Here, however, it was not a case of assignment in contract or equity, but a case of statutory assignment; that is, the assignment of rights by operation of law under a statutory provision. The statute itself does not address the question of whether or not the liabilities attached to the rights are also assigned, and there are two possible interpretations. First, the Act is designed to protect consumers, and consistent with this policy would be an interpretation that the purchaser has a right to the statutory remedies, whether or not the original contractor has paid the contract price to the builder. Alternatively, one might argue that Parliament intended the purchaser to stand in the shoes of the original contractor (thus being subject to the liabilities) for it would seem most unjust to require a builder to pay damages for defective work for which they have not been paid.

(5) The Chairperson held the first to be the correct interpretation. That is, since s27(3) provides that the purchaser shall inherit rights "in respect of statutory warranties", and not all rights under the domestic building work contract, then Parliament cannot have intended the purchaser to inherit the liabilities of the vendor who entered into the contract with the builder. The builder must look to the contracting party for payment, and not to the purchaser. The builder's inability to recover monies because of insolvency of the original owner/vendor arises, not from the builder's licensing legislation, but from bankruptcy legislation, and such inability should not prejudice any statutory rights which the purchaser might have against the builder. The words "in respect of statutory warranties" in s27(3) means that the purchaser takes the benefit of the statutory warranties, without taking the burden of liabilities under the building contract.

R Lee & P Leow v B Osborn

21 December 1992
COMTR-43-92-07
Judge Noblet

Legislation considered: *Builders Licensing Act* 1986 (SA) ss4, 32; *Builders Licensing Regulations* reg4(4)

Cases referred to: *Moran & Son Ltd v Marsland* [1909] 1 KB 744; *Black v Shaw & Official Assignee in Bankruptcy of Walter Shaw* (1913) 33 NZLR 194; *Oxford Shire County Council v Millson* The Times, 24 April 1985; *Methuen-Campbell v Walters* [1979] 1 All ER 606 at 621; *Dyer v Dorset County Council* [1988] 3 WLR 213 at 221; *Hislop v Spurr* [1982] WAR 180

Keywords: domestic building work contract; "domestic building work"; "structure"; "curtilage"

Facts:

The respondent was involved in the construction of a tennis court on the applicants' property. This tennis court was constructed on steeply sloping land which required levelling with fill. The fill was held in place by a retaining wall in excess of 5.5 metres high. Part of the wall collapsed with adverse effects upon the tennis court and the applicants sought the aid of the Tribunal pursuant to s32. The respondent claimed that s32 was not applicable, as the contract which he and the applicants entered into was not a "domestic building work" contract. As a question of law, the issue was submitted to the Chairperson for preliminary hearing.

Determination:

(1) The Chairperson first cited the definitions of "building", "building work" and "domestic building work" as contained in s4 of the Act and reg4 of the Regulations. The applicant sought to rely upon reg4(4)(b) by establishing that the contract involved "building work ... that is carried out within the curtilage of a house". That is, the plaintiff sought to establish that the tennis court was a structure (and hence a building), that the contract was for that structure's construction or erection (and hence building work), and that such construction or erection was within the curtilage of a house (and hence domestic building work).

(2) The Chairperson had no doubt that a project involving placing, spreading, and compacting soil to a height of 5.5 metres, and then retaining it by means of a concrete wall, was a structure within the meaning of the Act.

(3) The Chairperson then considered whether the structure was within the curtilage of the applicants' house. Both the size of the house and the size of the land were held to be relevant, but the Chairperson considered the curtilage of a suburban block (as compared with a

large sheep station, for example) to include the whole block of land, even where that suburban block is large.

(4) Thus, the construction and retention of the soil for the tennis court was within the definition of "domestic building work", and resort could be had to s32.

Commissioner for Consumer Affairs v SR Kirkwood

4 March 1993
COMTR-07-90-07
Judge Noblet, Mr Robinson, Judge Wilson

Legislation considered: Builders Licensing Act 1986 (SA) ss19(6), 20(1), 20(3)
Keywords: disciplinary inquiry

Facts:

The respondent was absolutely disqualified from holding a builder's licence for ten years, and further disqualified from holding such a licence until further order by the Tribunal, under s19(6)(d) (see (1992) 14 *Adel LR* 133). The respondent then appealed to the Supreme Court which held that, although the Tribunal may exercise more than one of the powers contained in ss19(6)(a)-(e) concurrently, it may not exercise concurrently more than one power from each individual placenta; that is, the powers exercisable within each individual placenta (a)-(e) are disjunctive. Thus the case was remitted to the Tribunal to enable it to reconsider the appropriate order for the respondent's previously found fraudulent conduct.

Determination:

(1) The Tribunal first noted the current difficulty in finding employment, and that s20(1) prohibited the respondent from obtaining any employment within the building industry without the prior approval of the Tribunal.

(2) The Tribunal refused to reduce the period of the respondent's disqualification. It also refused to allow the respondent to retain his registration as a building work supervisor, subject to conditions. It did, however, decide to make an order under s20(3) in order that the respondent might work within the building industry in a limited capacity.

(3) The differences in responsibility between a salaried employee and a sub-contractor were discussed, and it was concluded that the respondent should not be permitted to operate in a capacity requiring high responsibility, such as a sub-contractor. The Tribunal held that the respondent ought to be allowed to work as a salaried employee, provided that he have no legal or equitable interest in the business by which he is employed.

GZ Ceilings Pty Ltd

10 June 1993
COMTR-57308-7
Judge Noblet, Mr Robinson, Ms Clothier

Legislation considered: *Builders Licensing Act* 1986 (SA) s10(8)(b)
Cases referred to: *Sobey v Commercial and Private Agent's Board* (1979) 22 SASR 70
Keywords: licence application; business knowledge and experience; fitness and propriety

Facts:

The applicant company applied for a licence under the *Builders Licensing Act* 1986 (SA). The business which the applicant company had been running (without a licence and so in breach of the law) had been formerly run by another company, the directors of which were the parents of the applicant company's directors. The parents' company was in serious financial difficulty, and should an action be taken against it by one of its large debtors (including the objector in the current proceedings) it would probably be wound up. The Tribunal was therefore called upon to determine whether the application for a licence by the new company could succeed.

Determination:

(1) The Tribunal was in no doubt, since the company had been operating profitably and had funds and access to funds sufficient to properly carry on the business, that the company had sufficient financial resources for the purpose of properly carrying on the business authorised by the licence. Thus, one of the three requirements of s10(8)(b) were made out.

(2) The Tribunal was also required to be satisfied that the directors of the company had, between them, sufficient business knowledge and

experience for the purpose of properly carrying on the business. A distinction was drawn by the Tribunal between the business knowledge and experience required by the directors of a licensed company and the qualifications and experience of a more technical kind which relates to building work supervision. There was no doubt that the directors had the latter qualifications (they were competent tradespersons). The relevant question, however, was whether the directors had the former type of experience; ie that relating to the proper carrying on of the business.

(3) The type of business knowledge and experience required by the directors had to be judged in relation to the type of licence applied for. Here, a basic knowledge of the concepts of business financing, as well as general knowledge of the provisions of the *Builders Licensing Act* 1986 (SA), were necessary. The Tribunal held that the directors did not have sufficient knowledge and experience of this kind, and such a deficiency could not be recompensed by having access to such knowledge and experience. The relevant requirements must be met by the directors, and not by some employee of the company.

(4) The Tribunal went on, however, to consider the third requirement of s10(8)(b). The directors of the applicant company must be fit and proper persons. It held that, in the context of the *Builders Licensing Act* 1986 (SA), the question of requisite knowledge of the duties and responsibilities of being a director went to the issue of business knowledge and experience. The issue of fitness and propriety, then, was solely a question of the moral integrity and rectitude of character of the directors.

(5) By a majority decision the Tribunal held that the arrangement taking place here was no more than a sham, a device to allow the old business to continue as before with all its assets and none of its liabilities. Thus the directors of the applicant company, being parties to this arrangement, were not fit and proper persons in the context of this application. The minority agreed in principle with the majority, but could not find enough evidence to support the majority's factual conclusions.

COMMERCIAL AND PRIVATE AGENTS ACT 1986 (SA)

BM Kitson

3 March 1992
65402-0
Judge Noblet, Mr Whiley, Mr Fiora

Legislation considered: *Commercial and Private Agents Act* 1986 (SA) ss11(1)(a), 12, 12(9)(a)(iv)
Cases referred to: *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70; *Pav v Commercial and Private Agents Board* (1988) 143 LSJS 1
Keywords: licence application; fit and proper person; criminal convictions

Facts:

The applicant here applied for a licence under the Act endorsing him as a Commercial Agent, an Inquiry Agent, a Security Agent, a Security Alarm Agent and a Process Server. The applicant had recently been convicted for offences of "shop break and larceny", "attempted break and enter", and "larceny". These offences were committed in 1978 and were discovered and prosecuted as a result of an investigation into corruption in the South Australian Police Force. The applicant had been a member of the Police Force stationed at Christies Beach, where there was a group of officers committing offences such as breaking and entering and larceny. The more officers who became involved in the group, the less likely it became that anyone would be informed of its illicit activities. Honest policepersons were made subject to group pressure and duress. It was made apparent that any officer not participating in the scheme who required assistance in a dangerous situation would not receive backup from the members of the group. The applicant remained honest for quite some time, but eventually succumbed to the coercion and duress of his fellow officers. He was sentenced to eighteen months imprisonment which was suspended on a good behaviour bond of $2000 for a period of three years. References were produced which told of the applicant's exemplary behaviour over the last thirteen years and recommended the applicant in whatever career he proposed to follow. The Commissioner for Consumer Affairs and the Commissioner of Police objected to the application and the Tribunal was left to determine the appropriateness of granting a licence to the applicant.

Determination:

(1) Section 12(9)(a) of the Act provided that the applicant would be entitled to a licence with the endorsements he sought if he were over the age of eighteen years, a resident of South Australia, and a fit and proper person to hold such a licence. The first two requirements were met without doubt in this case.

(2) The only question, therefore, was whether the applicant was a fit and proper person to hold a licence with the sought endorsements. There was no doubt that, had the applicant been convicted of the offences shortly after they took place, no question of fitness and propriety would have arisen: *Sobey v Commercial and Private Agents Board, Pav v Commercial and Private Agents Board.* The applicant's criminal record could not be held against him indefinitely. The Tribunal refused, therefore, to attach any significance to the date of the convictions. It was not the convictions, but the offences themselves, which might make the applicant an unfit and improper person to hold a licence. No more significance could be attached to the convictions than would have been attached had the applicant been convicted immediately after the offence was committed.

(3) The applicant was under a good behaviour bond, and in some cases, the Tribunal felt this might be relevant. For example, where an applicant had had a number of convictions over a long period with only marginal intervals between them, it might be wise to allow the good behaviour bond to serve out its time before holding the applicant to be a fit and proper person. Here, however, given the nature of the events which surrounded the offences, the applicant was not likely to reoffend. The fact that the applicant had lied to the investigating team when first questioned was also dismissed; after thirteen years had elapsed between the commission of the offences and the investigation, the applicant had acted in reasonable self preservation, rather than in blatant dishonesty.

(4) The real question before the Tribunal was whether the applicant's character and reputation were such that members of the public could deal with him in reasonable confidence that he would act honestly, reliably, responsibly and diligently. The Tribunal was of the view that the public could rely upon the applicant to act in such a way.

The licence was granted with the endorsements which the applicant sought.

(5) It was noted that s12(9)(a)(iv) provides for an applicant to satisfy the Tribunal as regards attainment or compliance with any prescribed educational standards. No such standards had been prescribed. Since Parliament had legislated with respect to educational requirements as an independent criterion from fitness and propriety, an applicant's education is irrelevant to the establishment of whether that person is fit and proper to hold a licence. Section 12(9)(a), therefore, may be ignored by intending applicants. The Tribunal expressed its concern over this state of affairs. An occupational licensing system ought to ensure the proper education of those carrying out the business in that occupation, especially in an area such as security in which skill and experience ought to be required. The Tribunal called for the relevant authorities to remedy this deficiency in regulation.

JR Neill

3 March 1992
65533-0
Judge Noblet, Ms Clothier, Ms Germaine

Legislation considered: *Commercial and Private Agents Act* 1986 (SA) s12
Cases referred to: *BM Kitson* (1993) 15 *Adel LR* 259 (Commercial Tribunal, 3 March 1992)
Keywords: licence application; fit and proper person; criminal convictions

Facts:

The applicant here applied for a licence under the Act with all possible endorsements. The applicant had been convicted as a result of investigations into corruption in the South Australian Police Force. The convictions and penalties were identical to those imposed upon BM Kitson (see above). Indeed the offences were committed together, the applicant being on patrol with Mr Kitson that night. The Tribunal, therefore, was faced with the same issues as faced it in the Kitson case.

Determination:

(1) The Tribunal adopted, without repeating, the general principles set out in *Kitson*. In summary, the applicant would be entitled to a

licence with all the endorsements if she or he was over eighteen years of age, a resident of South Australia, and a fit and proper person to hold such a licence. The applicant here was over the age of eighteen years and a resident of South Australia.

(2) A large portion of the applicant's evidence was reproduced in the judgement. It highlighted the one-off nature of the offences, the lack of any profit made by the applicant, the pressured circumstances in which the offences were committed, and the injustice of the fact that the applicant could not find a job as a result of the offences, whereas the main perpetrators of the corruption were immune from prosecution as police informers. With regard being given to the time which had expired since the occurrence of the offences, and exemplary conduct of the applicant in the subsequent thirteen years, the Tribunal held that the applicant was a fit and proper person to hold a licence with all possible endorsements.

Commissioner for Consumer Affairs v JC Nesbitt

12 August 1992
COMTR-05-91-10
Judge Noblet, Ms Clothier, Ms Germaine

Legislation considered: *Commercial and Private Agents Act* 1986 (SA) ss11(1), 12(9)(a)(iii), 16(3), 16(4), 16(6), 16(6)(c)(iii), 16(10)(a), 16(10)(b), 16(10)(d)(i), 16(10)(e)(ii); *Commercial and Private Agents Regulations* reg 7
Cases referred to: *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70
Keywords: disciplinary inquiry; "fit and proper person"; relevant time; facts known to Tribunal when granting licence; endorsement as security agent

Facts:

The applicant made a complaint against the respondent to the Tribunal and a disciplinary inquiry was conducted pursuant to s16. The applicant alleged that the respondent had ceased to be a "fit and proper person" to hold a licence under the Act, having been convicted of larceny and two counts of cruelty to animals. A consequence of one of the aforesaid convictions had been a prohibition upon the respondent from owning a dog during the period of five years from the order. This order, however, had been withdrawn with the consent of the RSPCA by the time of the final hearing.

Determination:

(1) The Tribunal first noted the distinction between the current proceedings and a prosecution for a specified offence. In a prosecution case, the prosecutor must prove that the respondent at some past date committed the specified offence. In proceedings which involve the determination of a particular state of affairs, such as ceasing to be a fit and proper person, for example, the relevant time is the time of the hearing, and not some time prior to the trial. Thus, should the respondent have ceased to be a fit and proper person to hold a licence at some stage prior to the hearing, and had since rectified this state of affairs, then no order could be made against that former unfitness or impropriety.

(2) The Tribunal then held that where a respondent had been granted a licence by it, and the earlier Tribunal knew the facts later alleged to make the respondent an unfit and improper person, then those facts alone could not be cause for the imposition of disciplinary action. The Tribunal, however, placed two important qualifications upon this principle; first, the Tribunal must have known all the relevant facts when granting the licence; and secondly, subsequent events may alter the importance of facts known to the earlier Tribunal (subsequent similar convictions, for example.)

(3) A finding that a respondent had ceased to be a fit and proper person was necessarily held to require that some disciplinary action be taken. The range of orders which could be made would be governed by s11 and s16(6), which provide for a reprimand, a fine, a suspension or cancellation of a licence, a disqualification from holding a licence, or a condition being imposed upon a licence. In deciding which order is appropriate, the Tribunal must consider the case as if the respondent were applying for a licence, and the result of such an application. For example, should the Tribunal be of the view that it would refuse to grant a licence to the respondent were he now applying, then the appropriate order would be that the licence be cancelled, or at least suspended. Similarly, if a licence would have been granted subject to conditions in s11, then the licence should be allowed to be retained subject to one of those conditions.

(4) The Tribunal mentioned, as an aside, that where a dog is supplied to an employee by their employer in order that the employee may perform security services, then that employee need not be endorsed

as a security agent, only as a security guard. This is because the employee is not hiring out, nor otherwise supplying, the dog for the purposes of protecting or guarding persons or property.

(5) It was then held, having regard to the points of law decided above, that the respondent had not fully disclosed details of his prior larceny conviction, nor of the pending trial for cruelty to animals, when applying for his licence.

(6) Regard was had to the subsequent full and frank disclosure of the respondent to the relevant authorities, to character references submitted to the Tribunal, and to the fact that the respondent had undertaken RSPCA approved courses and worked with veterinary surgeons with pleasing reports.

(7) However, in the light of all the facts, the Tribunal held that it would not, were the respondent now applying for a licence, be satisfied that he was a fit and proper person to hold such a licence, and would have granted one subject to conditions. It was ordered therefore that the condition within s11(1)(b) be imposed upon the respondent's licence. This effectively provided that the respondent could only work under the supervision of someone (not necessarily his employer) who had been licensed for at least twelve months and whose licence did not require supervision.

LAND AGENTS, BROKERS AND VALUERS ACT 1973 (SA)

De Angelis

5 March 1992
4762-6
Judge Noblet, Ms Clothier, Mr Black

Legislation considered: *Land Agents, Brokers and Valuers Act* 1973 (SA) s26
Cases referred to: *Sobey v Commercial and Private Agents Board* (1979) 22 SASR 70; *Tremmelling v Commissioner for Consumer Affairs and Commissioner of Police* (Unreported, Olsson J, SA Supreme Court, 8 October 1991).
Keywords: sales representative; not a fit and proper person

Facts:

An application was made pursuant to the Act for registration as a sales representative. Objections were lodged by both the Commissioner of Police and the Commissioner of Consumer Affairs on the ground that the applicant was not a fit and proper person to hold such a licence. The objections were raised because the applicant had twice been bankrupt and had also been convicted of a number of criminal offences.

Determination:

(1) The Tribunal is not limited to matters raised in the objections in determining whether or not the applicant is a fit and proper person. The onus is on the applicant to satisfy the Tribunal of their fitness and propriety having regard to all matters raised in evidence. However, the degree of fitness and propriety needed to obtain registration as a sales representative is less than that required to obtain registration as a manager, or a licence as an agent, since a sales representative does not have the same degree of responsibility and works under supervision.

(2) Bankruptcy of itself is not a matter which disqualifies an applicant from obtaining registration as a sales representative. However, the applicant had been bankrupt twice, three companies under his control had failed financially and he had been convicted (although six years ago) of criminal offences, including one for forgery in a real estate transaction, identical in kind to ones in which the applicant might be involved if he were to work as a sales representative. The Tribunal was not satisfied therefore that the applicant was a fit and proper person for registration as a sales representative. The application was refused.

VJ & PM Paternoster v Agents Indemnity Fund

12 March 1992
35/93/80
Judge Noblet, Mr Krumins, Mr Price

Legislation considered: *Land Agents, Brokers and Valuers Act* 1973 (SA) ss76(2)(b), 76b(1), Part VIII
Cases referred to: *Scholfield v Consolidated Interest Fund* (1988) 49 SASR 546; *Wong v Agents Indemnity Fund* (Commercial Tribunal, 3 October 1988); *Craik v Agents Indemnity Fund* (Commercial Tribunal, 28 May

1991); *Khoo Tek Keong v Ch'ng Joo Tuan Neoh* [1934] AC 59; *Nocton v Ashburton* [1914] AC 932 at 962
Keywords: Agents Indemnity Fund; fiduciary default

Facts:

The applicants invested monies on the security of a first mortgage through a company. This company was taken over by the Swan Shepherd group of companies. The mortgage was discharged and the applicants' agent with power of attorney was contacted by Swan Shepherd Pty Ltd (hereafter Swan Shepherd). The agent was notified that the money returned from the applicants' investment ($28,000) was being held pending further instruction. The agent then received a circular letter giving details of Swan Shepherd, placing emphasis upon that company's age and experience in providing safe and secure investment, and encouraging investment with the company. The circular advised of two possible methods of investment; first, by trust deed, with RW Swan Nominees Pty Ltd (hereafter RW Swan) acting as trustee; and secondly, directly through Swan Shepherd itself. An average investor reading the circular would have gained the impression that both mortgage schemes would be administered by Swan Shepherd, and that RW Swan was nothing more than a nominee company, or a vehicle through which Swan Shepherd channelled its funds. Swan Shepherd was an Agent for the purposes of Part VIII the Act, whereas RW Swan was not. The applicants' agent agreed with the investment adviser of Swan Shepherd to invest the $28,000, plus an additional $12,000, by means of the trust deed method, with various conditions and stipulations as to how the money was to be invested. The agent signed the trust deed for the applicants, the deed appearing on its face to represent the terms as described in the circular letter. The terms, however, if closely scrutinised, conferred much broader investment powers on the trustee than the circular letter had, and indeed Swan Shepherd was not mentioned in the deed. Both Swan Shepherd and RW Swan were later placed into liquidation by the Supreme Court. The applicants claimed against the Agents Indemnity Fund for fiduciary default.

Determination:

(1) After a very detailed description of the facts, and of various reports on the facts, the Tribunal stated that it was prepared to rely upon the relevant passages of the Consumer Affairs Commission report from which it had made quotations. Thousands of dollars had been spent in the preparation of the report, and in legal fees related to the liquidation proceedings, and the Tribunal felt it unnecessary to

burden the applicants with the reproduction of that effort. The report stated the failure of the Swan Shepherd group's controlling hand, Mr Aylen, to discharge the duties and obligations which he assumed, and the wilful and callous way in which those duties and obligations were disregarded.

(2) The Tribunal held that Swan Shepherd was seriously in breach of trust in relation to the $28,000 it held following the discharge of the prior mortgage. These monies were in the control of Swan Shepherd, and that company was an Agent for the purposes of Part VIII of the Act. Those who controlled Swan Shepherd, in particular Mr Aylen, must have known that the transfer of this money from Swan Shepherd to RW Swan would result in the money being advanced as an unsecured loan to other companies within the corporate group. This was not only a breach of trust, but a direct contravention of the instructions given by the applicants' agent.

(3) The Tribunal then noted that, although RW Swan (under the trust agreement) was given wide discretion as to how to invest the money, authority provided that the trustees must exercise such discretion honestly, and that a loan made upon an unsecured promise to pay is not even within the definition of investment.

(4) The Tribunal considered that, upon the whole of the facts, it could not ignore that the trust deed had been signed shortly after the agent's receipt of the circular which set out the manner in which Swan Shepherd made investments for its clients. Emphasis was placed in that circular upon the age and experience of Swan Shepherd in carrying out such transactions, and the clear impression was clearly that Swan Shepherd would be undertaking the investment. Although a careful reading of the trust deed could have corrected the misrepresentation by Swan Shepherd, "no one is entitled to make a statement which on the face of it conveys a false impression and then excuse himself on the grounds that the person to whom he made it had available the means of correction": *Nocton v Ashburton*.

(5) The applicants had suffered a loss of as a result of Swan Shepherd's fiduciary default; there was no other means by which the applicants might recover this loss, and so they were entitled to recover from the Agents Indemnity Fund.

D Winzor

3 April 1992
12/91/05
Judge Noblet, Ms Clothier, Mr Price

Legislation considered: *Land Agents, Brokers and Valuers Act* 1973 (SA) ss75(4)(a), 76b; *Commercial Tribunal Act* 1982 (SA) s13
Cases referred to: *Craik v Agents Indemnity Fund* (1992) 14 *Adel LR* 157 (Commercial Tribunal, 28 May 1991); *Croton v R* (1967) 41 ALJR 289; *Re Bishop deceased* [1965] 1 Ch 450; *Walkley v Dairy Vale Co-operative Ltd* (1972) 39 SAIR 327; *HG Collett Pty Ltd v Alsop & Alsop* (1982) 49 SAIR 309; *AJ, CF & MA Zollo v Agents Indemnity Fund* (1992) 14 *Adel LR* 162 (Commercial Tribunal, 24 September 1991)
Keywords: Agents Indemnity Fund; fiduciary default; joint bank account; trust monies; "equity, good conscience and the substantial merits of the case"

Facts:

The claimant and her husband subscribed to the customer subscription service of the Lotteries Commission of South Australia. This entitled them to have any prize money which they had won but not claimed to be forwarded to them after 13 weeks. Unbeknownst to the Winzors, they won a prize of $21,118.66, which was forwarded to them by cheque in due course. After some discussion, the Winzors agreed that Mr Winzor, a broker under the *Land Agents, Brokers and Valuers Act* 1973 (SA), would invest the money on first mortgage as bridging finance. Mr Winzor, however, was not as honest as his wife would have wished. Subsequent to these events (but prior to the instant case) he had been sentenced to thirteen years imprisonment, with a non-parole period of ten years, for 133 fraudulent offences under the *Criminal Law Consolidation Act* 1935 (SA). By the time of this case, approximately $4.5 million had already been paid out of the Agents Indemnity Fund on account of fiduciary defaults by Mr Winzor. It is not surprising, then, that Mr Winzor did not invest the prize money as agreed with his wife. Without Mrs Winzor's consent, Mr Winzor placed the money in their joint bank account, from which both of them could make withdrawals, and subsequently drew the entire amount from the account by various cheques. Most of the money was placed in the trust account of Mr Winzor in order set off existing deficiencies in that account; the money was inextricably mixed with other funds and could not be traced. The remaining money was used to pay a debt of Mr Winzor's business. A

fake mortgage agreement was drawn up by Mr Winzor, which his wife duly signed and later discharged. There was no mortgage, and indeed no investment of the money at all. Mrs Winzor here claimed against the Agents Indemnity Fund.

Determination:

(1) The Tribunal found, as a matter of fact, that on the balance of probabilities an agreement was reached between Mr and Mrs Winzor to the effect that the money was to be placed in Mr Winzor's trust account and invested on the security of a first mortgage. This agreement was made at the time of, or prior to, the handing of the cheque over to Mr Winzor.

(2) The legal principles laid down in *Craik v Agents Indemnity Fund* were adopted without repetition. In particular, the approach was taken that in order to prove entitlement to compensation, four events were required to be proved by Mrs Winzor in this case. First, that she paid the money to her husband in circumstances in which it became "trust money"; ie money to which Mr Winzor was not entitled absolutely. Secondly, that while such money was in the possession or control of Mr Winzor a "defalcation, misappropriation or misapplication" of the money ocurred. Thirdly, that Mrs Winzor suffered a pecuniary loss as a result of this defalcation, etc. Finally, that she had no reasonable prospect of recovering the money other than by recovery from the Agents Indemnity Fund.

(3) The requirement that the money be "trust money" was then discussed in some detail. Complexity was introduced by the payment of the money into the joint bank account, and so a consideration of authorities in this area of the law was necessary. Comment was made on the English authorities, where the opening of a joint bank account on terms that either party may withdraw had been dealt with by assuming that the parties did not intend their respective rights to benefit from the account to be ascertained according to strict legal principles. Rather, the arrangement is one of trust and confidence as between themselves. Indeed, the evidence here strongly suggested that the arrangement between Mr and Mrs Winzor, in relation to the account's funds, was one of mutual trust and confidence.

(4) Where there was a binding arrangement of a kind to be legally enforceable that the credit in the [joint] account should only be used for a sufficiently defined purpose and one party evidenced an intention to use the proceeds for some unconnected purpose, then that party might be found guilty of misappropriation: *Croton v R* per Barwick CJ. Here the Tribunal held that there was such a binding arrangement for the investment of the lottery proceeds. This was confirmed by the fact that Mr Winzor had drafted the sham mortgage document and Mrs Winzor had signed and later discharged it. Thus, the use of the funds by Mr Winzor for an unconnected purpose constituted, at the very least, a misapplication of the money

(5) The cases relating to joint bank accounts were then distinguished. These cases allow each spouse to draw upon the account, not only for the mutual benefit of them both, but for their own personal benefit. However, this is only so in the absence of facts or circumstances which indicate that the account was intended, or was kept, for some specific purpose. Since the agreement between Mr and Mrs Winzor was concluded before the money was deposited in the account, this was not a case of money in a joint account to which the parties had not addressed their minds, it was a case in which Mrs Winzor entrusted the money to her husband following an agreement as to the investment of that money. This clearly indicated that the money was to be used for a specific or limited purpose.

(6) The objectors in the case raised various arguments relying on the special nature of joint bank accounts. For example, it was argued that, since the money was deposited in the account, no one but the bank had the money in their control or possession, and so Mr Winzor could not have made any fiduciary default of that money. These arguments were dismissed by the Tribunal. The money was deposited into the account without the consent of Mrs Winzor. It could be no escape from the consequences of fraud that, before the fraud was committed, the money was paid into a joint account. The money was advanced to Mr Winzor as trust money, and it could make no difference to Mrs Winzor's entitlement to compensation that the money had happened to pass (without her knowledge) through an account held in their joint names.

(7) In any case, should the Tribunal's decision have been wrong at law, it held that "equity, good conscience, and the substantial merits of the case" demanded that the applicant be granted compensation. To

deny it simply on grounds that the arrangement was not legally enforceable would be to abide by technicalities and legal forms inconsistent, in this case, with equity and good conscience.

(8) Mrs Winzor had suffered a pecuniary loss as a result of Mr Winzor's fiduciary default and, aside from $232.89 already recovered from a receiver, had no reasonable prospect of recovering that loss. She was therefore entitled to compensation from the Agents Indemnity Fund of $10,326.44 (being her half of the prize money, minus the money already recovered) together with interest on that amount and her costs of the proceedings. These costs were to be regarded by the Commissioner as part of the cost of administering the Agents Indemnity Fund.

Commissioner for Consumer Affairs v EJ Griggs

16 June 1992
19/91/05
Judge Noblet, Mr Wilson, Mr Alexander

Legislation considered: *Land Agents, Brokers and Valuers Act* 1973 (SA) ss74(a), 85, 85a(4)(b)(i)
Keywords: disciplinary inquiry; failure to produce trust records

Facts:

The administrator of the respondent's trust account required the respondent to produce various records in relation to that account; these records were not produced. A complaint was lodged by the Commissioner and an inquiry conducted by the Tribunal pursuant to s85. The respondent no longer practised as a land broker, and indeed had surrendered his licence. He could not account for the missing files, believed that the administrator may have received them already, and offered to continue the search for them or to reconstruct them from other sources. The administrator indicated that there was no deficiency in the account balances, yet further documents were needed in order to trace the movements of various funds into and out of the account.

Determination:

(1) The Tribunal first highlighted the importance of s74(a), which requires compliance with orders from administrators. The section ensures that fraud is detected as early as possible in order to

minimise third party losses, and also serves to minimise administration costs and hence lighten the burden placed upon the Agents Indemnity Fund.

(2) Sympathy for the respondent's situation was expressed; the high stress medical condition of the respondent played a significant part in both his bankruptcy and his failure to provide the required records. At no stage had the respondent wantonly held back information, but he had acted as appropriately as he could have in the circumstances.

(3) The respondent, however, had failed to comply with the requirements of the administrator, and hence had committed an offence under s74(a). Thus there were appropriate grounds for disciplinary action pursuant to s85a(4)(b)(i).

(4) Since the respondent no longer had a licence, he could not have his licence suspended pending fulfilment of the administrator's requirements. The ordinary disciplinary action in such a case would be a quite substantial fine.

(5) Given the extenuating circumstances of the case, and the fact that there was no deficiency in the account balances, the Tribunal held that the hearing be adjourned for a period of three months in which the respondent could fulfil his undertaking to provide or reconstruct the requested documents.

(6) At the recommencement of the hearing, the Tribunal heard evidence that the respondent had taken no steps whatsoever to comply with his undertaking. He had been contacted by the administrator and had failed to reply.

(7) The Tribunal once more emphasized the seriousness of a contravention of s74(a). It expressed disappointment that the respondent had not taken advantage of the additional time allowed by the Tribunal to complete his undertaking. The respondent, therefore, was held to have blatantly disregarded his obligations as a trustee by failing to comply with the requirements of the administrator, and then by failing to honour an undertaking made to the Tribunal. The respondent's actions indicated that he was no longer a person who could be entrusted with the duties pertaining to a licence or registration under the Act.

(8) The Tribunal thus ordered that the respondent pay a fine of $2,500 and that he be disqualified absolutely from holding a licence for a period of ten years and thereafter until further order.

Kissane

18 December 1992
COMTR-67785-5
Judge Noblet, Mr Hawkins, Ms Clothier

Legislation considered: *Land Agents, Brokers and Valuers Act* 1973 (SA) ss57, 97
Cases referred to: *Gun v Commercial Tribunal* (1988) 142 LSJS 137 at 142
Keywords: land broker licence application

Facts:

The applicant applied for a licence as a land broker under the *Land Agents, Brokers and Valuers Act* 1973 (SA). The applicant held a degree of the Bachelor of Laws at the University of London, was an admitted practitioner of the High Court of Australia, was entitled to engage in practice as a chartered accountant, was a registered tax agent, a registered auditor, a Commissioner for Oaths in the Northern Territory, and was at one stage licensed as a commercial agent and process server in the Northern Territory.

Determination:

(1) The Tribunal set out the various requirements which must be met by a licence applicant, and noted that no objection to the application had been lodged. There was no doubt as to the applicant's fitness or propriety to be licensed. The only question which arose was whether the applicant had suitable educational qualifications to be licensed, as required by s57(c).

(2) The applicant had neither of the two qualifications acceptable to the Tribunal under the common rule made pursuant to s97. The question resolved, therefore, into whether the applicant could fall within an exception to the common rule, the acceptance of his application being justified in the circumstances, under s97(2).

(3) None of the applicant's qualifications came even close to providing the training which the required educational qualifications provide.

(4) The Tribunal held that where a deficiency in educational qualifications existed, it may be counterbalanced by extensive practical experience and so justify accepting the application in the circumstances of the case. Here, however, the applicant did not have sufficient practical experience to teach him the matters which the required educational qualifications would have given him.

LANDLORD AND TENANT ACT 1936 (SA)

D Willshire-Smith v Votino Brothers Pty Ltd

13 March 1992
139/90/03
Judge Noblet, Mr Stratton, Mr Whicker

Legislation considered: *Landlord and Tenant Act* 1936 (SA) ss14(2), 68; *Commercial Tribunal Act* 1982 (SA) s13(1); *Electricity Act* 1943 (SA) s6
Cases referred to: *Legal and General Life of Australia Ltd v A Hudson Pty Ltd* (1985) 1 NSWLR 314 at 335-336; *James McEwen & Co Pty Ltd v Deleltante Pty Ltd* (Unreported, SA Supreme Court, No S3281, 26 February 1992); *Walkley v Dairyvale Co-operative Ltd* (1972) 29 SAIR 327; *HG Collett Pty Ltd v Alsop & Alsop* (1982) 49 SAIR 309; Owen v Gadd [1956] 2 QB 99; *Brown v Flower* [1911] 1 Ch 219; Kenny v Preen [1963] 1 QB 499; *JD Berndt Pty Ltd v Walsh* [1969] SASR 34; *Gaetjens v Arndale (Kilkenny) Pty Ltd* [1969] SASR 470; *Peter and Robert Salons Pty Ltd v General Accident, Fire and Life Assurance Corporation Ltd* (1988) 145 LSJS 24
Keywords: commercial tenancy agreement; rent and outgoings payable by tenant; quiet enjoyment; warrant to distrain; tenant's right to deal with landlord directly

Facts:

The landlord made a commercial tenancy agreement with a third party. This tenancy was then assigned to the applicant by the original tenant. After a protracted debate prior to the hearing, a number of disputes were referred to the Tribunal for determination. These were (1) the monthly rent payable by the applicant, (2) the rates taxes, and other outgoings payable by the applicant, (3) the obligation of the applicant to pay a higher percentage of rubbish removal costs than specified in the agreement, (4) the total amount outstanding under the lease, (5) whether the construction of additions to the building involved unreasonable interference with the applicant's right to quiet enjoyment of the property, (6) whether a warrant to distrain was

properly issued or properly executed, (7) the applicant's entitlement to any damages for (5) or (6) above, and (8) the obligation on a tenant to deal with an agent appointed by the landlord, and any entitlement a tenant might have to deal with the landlord directly.

Determination:

(1) The applicant claimed that the original rent payable under the lease was excessive because it exceeded the amount which would have been payable had the rent been calculated upon the basis of a percentage of the total lettable area. The Tribunal held that there was nothing in the lease which would even suggest such a method of calculation, and that although outgoings were charged on this basis rent was not. It considered ludicrous the notion that a person could accept assignment of a lease, knowing full well the rent payable under it, and yet challenge such payment as excessive. This part of the applicant's claim was therefore rejected without hesitation.

(2) The applicant, during occupation, received a notice of rent increase from the landlord pursuant to the tenancy agreement's review provisions. The applicant disputed this assessment and, pursuant to the agreement's terms, put the matter forward for arbitration. A licensed valuer was appointed, who proceeded to assess the rent based upon the current market value of the property. The applicant challenged this assessment and appointed its own valuer to assess a fair and reasonable rent. The Tribunal held that although it preferred the assessment of the applicant's valuer, it was not the Tribunal's role to decide between the valuations, nor to make a valuation of its own. In the absence of fraud or other such circumstances, the valuation conducted as per the agreement of the parties must be accepted by those parties. This was so despite the absence from the agreement of the words "arbitration shall be final and binding as between the parties". The parties had agreed to the manner in which the dispute was to be resolved, the dispute was resolved in that manner, and so both parties were bound by that resolution.

(3) In relation to outgoings generally, the Tribunal held that the tenant's liability was clearly to pay those rates, taxes, and other outgoings as stated in the agreement. In regard to the electricity, however, the landlord had adopted a new method of calculation which had resulted in large profits. Ignoring any possible breach of s6 of the *Electricity Act* 1943 (SA), the landlord had made a unilateral

decision (to alter assessment of electricity rates payable by tenants) in order to reduce management costs. In the absence of contrary agreement with the tenants, therefore, this reduction in costs should have been passed on to the tenants. Thus, the amounts due to the landlord were reduced by the amount of profits received by means of this change in assessment procedure.

(4) The landlord had also unilaterally altered the assessment method of the percentage of rubbish removal costs payable by the majority of tenants. This alteration resulted in the tenants having to pay a higher percentage of the total cost of rubbish removal. The Tribunal held this alteration to be outside the terms of the lease, and further held the landlord to be unable to unilaterally alter the agreement. The applicant was therefore not bound to pay the higher percentage of rubbish removal costs.

(5) Shortly after the applicant commenced occupation the landlord commenced alterations to the shopping complex. There were some delays in the completion of these alterations. After a detailed discussion of the authorities, the Tribunal held that where (as here) the lease agreement contained a specific provision allowing the landlord to undertake additions to the premises subject to a proviso, then the question to be determined is whether or not the landlord had complied with that proviso: *Peter and Robert v GAFLA*.

(6) Here, the landlord was required to "carry out such works in such a manner as will minimise so far as may be practicable any inconvenience or interruption to the business of the lessee caused thereby". The Tribunal was satisfied that, despite the delays, the work was carried out with reasonable speed. The substantial inconvenience caused to the applicant was not sufficient to constitute a breach of the covenant of quiet enjoyment. The only compensible breach related to a water leak through the ceiling of the applicant's shop, which involved a direct and physical interference with the applicant's enjoyment of the premises.

(7) As regards the warrant to distrain the goods in the tenant's shop, the Tribunal held that, not having been dated, it was technically deficient: s14(2) of the *Landlord and Tenant Act* 1936 (SA). This deficiency, however, was insufficient to invalidate the whole process of distress for rent to such an extent that the applicant should receive damages. The applicant also complained of the

manner in which the warrant was executed (ie by placing a lock on the door to the shop in order to deny the applicant access to the goods.) This method, however, was simpler for the bailiff to execute than taking possession of the goods by removing them from the store. The method used was also more beneficial to the applicant for, had the bailiff taken possession of the goods in the manner the applicant suggested, then it would have taken much longer to restore business to normal after paying the rent due (for all of the goods would have been required to be returned to the premises.)

(8) In relation the final issue, the Tribunal held that a landlord may appoint an agent to deal with their tenant or tenants. A tenant wishing to communicate with the landlord should first do so through the agent. However, there is nothing to prevent a tenant approaching the landlord directly where the agent is being unresponsive (as the agent was here.)

(9) The Tribunal then declared that the precise amounts payable were to be calculated by the parties upon the basis of its decisions. The liberty to apply for further order to resolve any remaining dispute was also left open.

JW Gillespie & A Eady v Salvatore & N Barca

16 June 1992
48/91/03
Mr Canny, Mr Proeve, Mr Stratton

Legislation considered: *Landlord and Tenant Act* 1936 (SA) ss56(7), 68
Cases referred to: *Kamakura Pty Ltd v J Oks* (Commercial Tribunal, 27 September 1990); *Balfour and Clark v Hollandia Ravensthorpe NL* (1978) 18 ASR 240 at 252
Keywords: commercial tenancy agreement; misrepresentations; quiet enjoyment

Facts:

The applicants were landlords of a shop in a shopping centre and here sought an order pursuant to s68 for payment, by the respondent tenants, of monies due by way of rent and outgoings. There were allegedly representations made by the applicants at the time the tenancy agreement was created relating to the letting of other shops in the shopping centre. There had also been problems with the air-conditioning of the premises.

Determination:

(1) The Tribunal held that the respondents had failed to prove the applicants' alleged representations to the effect that all the other tenancies in the shopping centre would be filled. In any case, had any such representations been made, they would have been representations as to something to happen in the future (as compared with a representation as to the present existence of an intention, belief, or state of knowledge) and so, in the absence of fraud, could not have been misrepresentations.

(2) The Tribunal held that the respondents had a valid defence in that the applicants were in breach of an implied warranty as to quiet enjoyment of the premises. This had occurred by reason of the disconnection of air-conditioning facilities, and the respondents' liability was reduced accordingly.

(3) The Tribunal noted that the resulting liability of the respondents' was in excess of the $20,000 limit to the Tribunal's jurisdiction. However, since the applicants were prepared to waive any entitlement in excess of the monetary amount of $20,000, the respondents' liability was reduced to $20,000 plus costs.

A Tognetti v Ambrosini Nominees Pty Ltd

1 July 1992
COMTR-77-92-03
Judge Noblet

Legislation considered: *Landlord and Tenant Act* 1936 (SA) ss56(2), 56(3), 56(4), 68
Keywords: commercial tenancy agreement

Facts:

The applicant made an application pursuant to s68 for the resolution of a commercial tenancy dispute. The respondent sought to issue a notice against a person not privy to the agreement, but who was related to the dispute by reason of a separate agreement for the purchase and sale of a business. The determination of that third party's rights was not within the jurisdiction of the Tribunal and the respondent sought the removal of the proceedings to a court. The applicant, however, requested an expedient determination of the issue by the Tribunal.

Determination:

(1) The action brought by the applicant was properly commenced in the Commercial Tribunal. The claim did not come within one of the categories set out in s56(2), and so should not have been commenced before a court. Nor did s56(3) apply, as the respondent's claim was not part of the proceedings when first commenced, and again the action was not one which should have been brought before a court.

(2) The respondent sought to rely upon s56(4) which provides for the removal of proceedings to a court upon the addition of a claim which changes the character of the action so that, had that action such a character at its inception, it should have been commenced before a court. The Tribunal noted that the actual wording of the provision was not clear. From a logical perspective, a subsequent desire by the respondent to issue a third party notice cannot give a claim a character which it might have had at its inception, for a third party notice issued by a respondent cannot be part of proceedings issued by an applicant. Despite the ambiguity, however, the Tribunal held the intention of Parliament to be that a dispute between the original parties, and possibly additional parties which an original party may seek to add, should be dealt with in the same forum.

(3) The Tribunal was satisfied, therefore, that the addition of the third party notice changed the character of the action so that, had the claim had that character at its inception, it ought to have been brought before a court since the matters arising under the third party notice were not within the jurisdiction of the Tribunal. The proceedings were ordered to be removed to the Local Court.

LA Johnson Pty Ltd v Bus Australia

4 August 1992
COMTR-115-92-03
Judge Noblet

Legislation considered: *Landlord and Tenant Act* 1936 (SA) ss10, 12(5), 56, 68(2)(db); *Commercial Tribunal Act* 1982 (SA) ss13(1), 16; *Commercial Tribunal Regulations* Schedule 1
Cases referred to: *Walkley v Dairyvale Co-operative Ltd* (1972) 39 SAIR 327; *Long Service Leave (Engine Drivers) Award Case* (1961) AILR Case 308; *Tobin v Tobin and Myers* (1977) 75 LSJS 9

Keywords: commercial tenancy agreement; costs where proceedings abandoned before final hearing; "equity, good conscience and the substantial merits of the case"

Facts:

The applicant applied to the Supreme Court for an injunction against the respondent landlord restraining interference with the use and enjoyment of premises which it sub-let. Both counsel, however, conceded (perhaps wrongly in the light of s56, as amended) that the Commercial Tribunal had exclusive jurisdiction over the matter. The hearing was thus removed to the Tribunal and an interim injunction was granted. The applicant made an undertaking to pay any damages in relation to that injunction in the event that the respondent ought not to have been restrained at all. The question of costs was reserved by the initial Tribunal pending determination of the case. Prior to this final hearing the respondent served upon the applicant a valid notice to quit within one month of the notice. A resolution of the dispute was therefore reached by the parties, yet the question of costs remained undetermined. Both parties considered it futile to conduct the final hearing in order to determine who would have lost the case, and hence who would have been required to pay the costs of the other. The question of costs, then, was put before the Chairperson pursuant to Schedule 1 of the Commercial Tribunal Regulations for determination.

Determination:

(1) The Chairperson first expressed doubts as to whether, if the parties had requested it, the proceeding could have gone to trial on its merits despite the dispute having been resolved, simply for the purpose of determining who should pay costs.

(2) The interim order was made on the basis that both parties had an arguable case, and was motivated simply by the fact that the balance of convenience lay with restoring the status quo until the dispute could be resolved. Generally, where an applicant makes an application and subsequently withdraws it, the respondent is entitled to costs arising out of that application. Here, however, the applicant argued that it had succeeded in the proceedings to date, so the respondent ought to pay the applicant's costs in the circumstances.

(3) The Chairperson looked then to the requirement that the Tribunal have regard to the justice of the case and determine the dispute with reference to "equity, good conscience, and the substantial merits of

the case": s13(1) of the *Commercial Tribunal Act* 1982 (SA). The Tribunal may not, in the exercise of this power, disregard any absolute statutory directive which bears upon the subject matter and which is manifestly not intended to be read down in the light of any general power of conscience. In the exercise of a discretionary power (costs, as here, for example) the position is different, and the question must be approached by asking "what order would be fair in all the circumstances from a practical and common sense point of view".

(4) It was held that in practical reality the tenant had got itself into difficulty by not paying the rent initially. The applicant had commenced proceedings against the respondent in order to buy it some time to relocate its business. Indeed, the applicant made no secret of the fact that it refused an early hearing so that it would have more time to relocate. The Chairperson held that the tenant had bought its time and now faced the cost of that time. In all the circumstances, it was fair and reasonable that the applicant pay the respondent's costs.

J & J Le Cornu v D Hicks

4 September 1992
COMTR-129-92-03
Judge Noblet, Mrs Symons, Mr MacDonald

Legislation considered: *Landlord and Tenant Act* 1936 (SA) ss64, 68(2); *Commercial Tribunal Regulations* reg 17(4)(a)
Keywords: commercial tenancy agreement; unreasonable refusal to consent to transfer

Facts:

The applicant tenants proposed to transfer their rights under a commercial tenancy agreement to two other parties as joint tenants. Numerous requests were made of the respondent landlord for consent to the transfer. Entreaties were made by the applicants personally, by their land broker, by their solicitor, and by the proposed new tenants. After receiving continuous refusals to grant consent, the applicants approached the Tribunal and applied for an order pursuant to s68. Again the respondent (presumably as a result of her age and infirmity) caused countless difficulties and, despite the efforts of the Tribunal clerk, would not attend the final hearing, nor would

she produce a medical certificate in explanation of her absence. The hearing proceeded, therefore, without the respondent being present.

Determination:

(1) The Tribunal, after giving a detailed description of the events preceding the final hearing, turned to s64 of the *Landlord and Tenant Act* 1936 (SA). This section essentially stated that in every commercial tenancy agreement shall be implied a term which allowed for the tenant to assign rights under the lease to another. This right to assign was subject to the landlord's consent, yet the landlord could not unreasonably withhold, nor make any charge (other than incidental expenses) for giving such consent. The section further provided that the burden of proving consent to be reasonably withheld lay upon the landlord.

(2) The terms of s64 make it clear that the section is not a statutory requirement, but a statutory term implied into every agreement. Thus, since the Tribunal has jurisdiction to grant relief from the operation of any provision of the tenancy agreement (s68(2)(da)), then the Tribunal has jurisdiction to grant relief from the operation of a term implied by s64.

(3) The burden lay upon the respondent to prove that her consent was not unreasonably withheld. Since the respondent did not appear before the Tribunal at the final hearing, the evidence of the applicant was accepted and the burden was not discharged. Thus the Tribunal held that the respondent had unreasonably withheld her consent to the transfer of rights under the lease.

(4) In considering the appropriate order, the Tribunal noted the history of the case. In this context it seemed likely that the respondent would refuse to comply with an order compelling her to grant consent to the transfer. Thus it was ordered that the transfer take place, and that the Registrar-General record on the registered instrument both the landlord's unreasonable refusal to consent to the transfer and the Tribunal's subsequent order. The respondent was ordered to pay costs.

J Fry & K Bennets v A Andary

8 September 1992
COMTR-53-92-03
Judge Noblet, Mr Whittenbury, Mr Proeve

Legislation considered: Landlord and Tenant Act 1936 (SA) s68
Keywords: commercial tenancy agreement; leased area

Facts:

The respondent sold a delicatessen business, and granted a lease over the business premises, to the applicants. The subject premises were located in a portion of a large rectangular unit. The lease as originally drafted conferred to the applicants the right of possession over this entire rectangular unit. At some stage this agreement was amended to grant rights over the business premises only. The applicants claimed that the amendments were made subsequent to the agreement's settlement, and that they were led to believe that they were leasing the entire unit. They therefore applied to the Tribunal pursuant to s68 for a reduction in their rent.

Determination:

(1) The Tribunal first identified the respondent's land broker as the most likely source of the initial confusion surrounding the precise area leased. The land broker perhaps thought he was fully explaining the options available to the tenants, while indeed he may not have expressed himself in sufficiently clear terms. However, the Tribunal felt it necessary to look further, in order to discern whether or not the applicants persisted in their mistaken belief at the time the lease agreement was signed.

(2) The Tribunal noted that when the applicants first went into possession there was a "to let" sign in the window of the vacant shop in the unit, and that this sign was not removed for quite some time. It was surprising that, if the applicants believed themselves to be already leasing that part of the premises, they did not query the sign's presence there. Much other confusing and conflicting evidence was brought forward, and would have been almost impossible to reconcile had not evidence been given by the solicitor for the respondent. This evidence was well documented in the solicitor's files, and was accepted as a true statement of the facts by the Tribunal.

(3) Upon hearing this evidence, the Tribunal was satisfied that the tenants were aware that the lease only extended to one portion of the rectangular unit; namely, the premises of the business which they had bought from the respondent. The solicitors for the respondent were initially under the impression that the business comprised the entire unit, but discovered their mistake before settlement took place. The land broker acting for the tenants was aware before that settlement that the lease related only to the delicatessen portion of the unit. The application was therefore dismissed with no order as to costs.

Dowell Australia Ltd v C Faggotter

22 September 1992
COMTR-251-91-03
Mr Canny, Mr MacDonald, Mr Symons

Legislation considered: Landlord and Tenant Act 1936 (SA) s68
Cases referred to: *Re May Brothers Ltd* [1929] SASR 512; *Pan Australian Credits* (SA) Pty Ltd (1981) 27 SASR 352
Keywords: commercial tenancy agreement; fixtures and fittings

Facts:

The applicant was the tenant of premises which it sub-let to a company. That company installed a partition wall and a suspended ceiling which it sold to the applicant upon vacating the premises. The company also installed an air-conditioning system for the new sub-tenant, a Mr Fossleitner. Mr Fossleitner later sold his business (which purportedly included the air-conditioning system) to the respondent. The sub-lease was also transferred from Mr Fossleitner to the respondent. Upon the respondent's vacation of the premises, and against the advice of the applicant, he removed the partitioning wall, the suspended ceiling, and the air-conditioning system. He was served with a notice for their replacement but failed to comply. The applicants therefore replaced the missing items and sought an order from the Tribunal pursuant to s68 for, inter alia, the costs of replacing those items.

Determination:

(1) The first issue to be considered was whether the partitioning wall and the ceiling were fittings or fixtures. If they were fittings, then they were the property of the applicant and the applicant would have

standing to sue. If they were fixtures, then they were the property of the landlord. However, the terms of the principal lease agreement made it clear that partitioning work and installation remained the property of the lessee (the applicant) and was the lessee's responsibility. Thus, the Tribunal held it to be unnecessary to decide whether the wall and ceiling were fittings or fixtures, for in either case the applicant would have the right to seek compensation for their removal by the respondent.

(2) The fact that the replacement wall was of a slightly higher standard than the original wall was irrelevant, since it was not established that this superior quality was at the direction of the applicant. The higher standard may have occurred simply because the current builders applied higher standards of practice than the original builders had applied.

(3) Therefore, the respondent was ordered to pay for the replacement costs of the partitioning wall and the suspended ceiling.

(4) The Tribunal held that, given the extent to which the air-conditioner was fixed to the premises, it was properly categorised as a fixture and not a fitting. Thus it was not Mr Fossleitner's to dispose of, but could be ordered for delivery up by the landlord. Since the principal tenant (here the applicant) would be obliged, upon the issue of such an order by the landlord, to deliver up the air-conditioning equipment, the applicant was held to be entitled to recover compensation from the respondent for its replacement. The landlord could not reasonably expect to receive a completely new system, and so the applicant was ordered to pay one third of the cost of a new system.

(5) In relation to a number of outstanding contractual obligations, the Tribunal ordered that the respondent compensate the applicant. The respondent was not required to pay, however, for an extra $80 which accrued as a result of cost escalation between the time the applicant obtained the quotation and the time that it commissioned the work.

(6) The respondent was required to pay to the applicant a sum equivalent to two months rent, since that was the amount of time that the respondent (by requiring replacement work to be done) had delayed the possibility of obtaining another tenant.

(7) In addition, the respondent was ordered to pay costs.

Kuhar v Industrial Hydraulics (SA) Pty Ltd

25 February 1993
79/92/03
Mr Canny, Mr Symons, Mr MacDonald

Legislation considered: *Landlord and Tenant Act* 1936 (SA) s68
Keywords: commercial tenancy agreement; repudiation of lease

Facts:

A director of the respondent company signed an agreement to lease premises from the applicant landlord. The applicant wrote to the respondent in order to clear up an ambiguity in the terms of the agreement. The applicant then forwarded, inter alia, a copy of the memorandum of lease to the respondent. This memorandum was never lodged for execution. The respondent vacated the premises before the lease had expired, claiming that the premises had been repeatedly broken into, that the roof leaked and had not been replaced, that a roller door had been replaced by another of inferior quality, and that the correspondence from the applicant had sought to introduce new terms into the agreement after settlement. The applicant sought an order from the Tribunal, pursuant to s68, demanding compensation for the respondent's early vacation of the premises.

Determination:

(1) The Tribunal held first that the security of the premises was the responsibility of the tenant, not of the landlord, and so the respondent could not justify its early vacation upon such grounds. In any case, the applicant had done more than it was required to by fitting grills to some of the windows.

(2) The landlord had replaced several sheets of roof iron where the leakage had occurred. The leakage had been the result of blocked gutters which the tenant was under a duty to keep clear. The applicant had offered to re-roof the premises once the lease had been executed. The Tribunal therefore rejected the respondent's claim that the premises were vacated by reason of the applicant's failure to replace the roof.

(3) As regards the roller door, the Tribunal held that it appeared suited to the application it was put to, and the respondent had brought forward no evidence to substantiate its claim. Therefore this ground for vacation was also rejected.

(4) The Tribunal held further that, since the terms purportedly "introduced" by the applicant had been similar to provisions contained in earlier leases between the parties, it could not accept that the correspondence added any new or unexpected terms to the agreement.

(5) The respondent had every intention of entering into a new lease with the applicant, and had only changed its mind because it discovered new premises at a much cheaper rent. Even had no new tenancy agreement been entered into by the parties, a monthly periodic tenancy arose out of the facts of holding over, with the respondent remaining in possession and paying a rent to the applicant as landlord. Thus proper notice was required to be given to the applicant and the respondent had given no such notice.

(6) The Tribunal was satisfied that the applicant had taken all reasonable steps to mitigate its loss by attempting to re-let the premises. It was therefore ordered that the respondent pay to the applicant the equivalent of fourteen months rent, the applicant's application fee, and the applicant's costs as agreed by the parties or, failing agreement, as fixed by the Chairperson. Thus, the respondent was ordered to pay $23,356.32 plus costs.

State Government Insurance Commission v Questa Australia Pty Ltd

20 April 1993
COMTR-182-92-03
Mr Canny, Mr MacDonald, Mr Proeve

Legislation considered: *Landlord and Tenant Act* 1936 (SA) ss66A, 68; *Commercial Tribunal Act* 1982 (SA) s13
Keywords: commercial tenancy agreement; periodic lease arising by holding over; duration of a periodic lease

Facts:

A commercial tenancy agreement was entered into by the applicant landlord and the respondent tenant. This lease had expired and the respondent had remained in possession, paying rent each month to the applicant as landlord. The applicant sought to terminate the lease and gave a one month notice to quit the premises. This was done on the basis that the respondent was holding over on a monthly periodic tenancy. The respondent, however, claimed that the period of the lease was one year, and hence greater than one month's notice was required for termination. The applicant applied to the Tribunal pursuant to s68 for an order requiring possession to be given over to it, and that its costs be paid by the respondent.

Determination:

(1) The previous lease, which was evidenced by a commercial tenancy agreement in writing, operated from 1 December 1991 to 16 December 1992. There was no option to renew the lease. Rent was assessed at a total amount to be paid per annum, plus car park expenses and ETSA payments which were to be assessed monthly. The question before the Tribunal was whether, upon expiry of this lease, the tenant held over as a monthly tenant, on the facts here, nor was there any ground for applying principles of estoppel, and that s66A of the *Landlord and Tenant Act* 1936 (SA) was not applicable. The respondent was ordered to pay costs.

B Frankos v D Hocking

28 June 1993
COMTR-144-92-03
Judge Noblet, Mr Symons, Mr Sheehan

Legislation considered: *Landlord and Tenant Act* 1936 (SA) ss55(1)(a), 66, 68(2); *Commercial Tribunal Act* 1982 (SA) ss13, 16; *Residential Tenancies Regulations* reg13; *Stamp Duties Act* 1923 (SA) s22; *Housing Improvement Act* 1940 (SA)
Cases referred to: *Keith Prowse v National Telephone Co* [1894] 2 Ch 147
Keywords: commercial tenancy agreement; quiet enjoyment; repairs and improvements to property

Facts:

The facts of this case were long and complex. In essence, a commercial tenancy agreement was entered into by the respondent tenant and the applicant landlord and the landlord's daughter. The lease agreement related to two shops and an upstairs "dwelling". Possession of another upstairs dwelling was retained by the applicant's family, although the family and the applicant were living in Greece for the majority of the lease's duration. The leased premises were in a shocking state of disrepair. For example, the floor of one of the rooms which the respondent voluntarily cleaned up (which did not even form part of the leased premises) was covered in up to eighteen inches of pigeon droppings. At various periods of the tenancy, and in return for a number of vague promises made by members of the applicant's family, the respondent and her husband had personally expended much time and effort, and thousands of dollars, in renovating the premises. The applicant here sought the aid of the Tribunal in recovering possession from, and the payment of a number of allegedly outstanding payments by, the respondent pursuant to s68. The respondent counter claimed damages for the prevention of the proper running of her business, for loss to that business, and for refusals to transfer the lease and thus preventing the sale of the goodwill and stock in trade of that business.

Determination:

(1) The Tribunal was first called upon to deal with a technical problem in the lease agreement itself. The written agreement was entered into between the respondent and the applicant's daughter. However, the applicant's daughter was not the owner of the property at the time the agreement was entered into; the property belonged to the applicant. The applicant and her daughter seemed to the Tribunal to have had "a chameleon-like ability to swap identities as it [suited] them". The daughter could not legally enter into an agreement to lease the premises if she was not the owner. Similarly, since the lease was not transferred, the applicant could not have remained the landlord of the premises after December 1992 for she transferred ownership to her daughter. Therefore, the Tribunal held that, having regard to the "substantial merits" of the case, the applicant and her daughter would be regarded as joint lessors. Any rights of contribution or apportionment could be sorted out between them: "they created the confusion; they [could] sort it out".

(2) The Tribunal held also that, pursuant to reg13 of the *Residential Tenancies Regulations*, the *Residential Tenancies Act* 1978 (SA) did not apply to premises used for both residential and business/commercial purposes. In contrast to this, where the premises consisted of a shop premises and an adjacent dwelling, then the *Landlord and Tenant Act* 1936 (SA) was applicable. The effect of this was that the provisions of the Housing Improvement Act, of themselves, could not prevent the applicant from validly serving a notice to quit upon the respondent.

(3) As yet another preliminary matter, the Tribunal turned to the behaviour of the applicant and her family during the court proceedings. The Tribunal's contempt of the applicant and her family's behaviour cannot be easily paraphrased. Indeed, the Tribunal went so far as to say that the applicant and her family were "the rudest, most dishonest, unreliable and generally impossible people that the Tribunal ... had ever had appear before them. ... As far as their evidence [was] concerned, they were all guilty of gross exaggeration, distortion of the facts and, in some cases, downright lies".

It is in this context, then, that the Tribunal turned to the central issues of the case.

(4) It was held that, on interpretation of the facts, in particular a letter to the respondent from the applicant's daughter, a reasonable tenant would have perceived the following facts: (1) that the respondent was prohibited from extending or building on to the premises, (2) that a certain room could not be turned into a kitchen, (3) that if repairs were carried out to improve the condition of the premises then a new lease would be granted for three to five years at a rent not exceeding the rent currently payable, and (4) that if the applicant's daughter was "satisfied" then the respondent could stay on as long as she liked. The Tribunal noted the large extent to which the respondent had actually repaired the building. It was true that the building of an additional verandah and the installation of a makeshift kitchen possibly could not be classified as repairs, but the applicants had far from suffered any loss from these actions, and indeed had benefited. In any case, the Tribunal ordered that the respondent remove the kitchen when she vacated the premises.

(5) In short, the extent of the repairs by the respondent far exceeded any duty which she might have owed to the applicant pursuant to the terms of the lease agreement. It was also clear that these repairs were carried out in reliance on the various promises made by the applicant's family.

(6) The Tribunal held that the applicant failed in claims for what was described in the agreement as a "part share" of water and council rates. The term "part share" was too vague to attribute any particular meaning to it, and the Tribunal refused to take a "broad brush" approach by estimating the amounts reasonably payable by the respondent. The applicant's claim for monetary damages also failed. The Tribunal thought it preposterous, given the time, labour and expenditure which the respondent had put into repairing and maintaining the flat, that the applicant could even attempt to claim for purported damage to the premises by the respondent.

(7) The applicant served a valid notice to quit upon the respondent, and then accepted rent from the respondent. This had the effect of waiving the notice of termination: *Keith Prowse v National Telephone Co.* The respondent claimed that the representations made by the applicant's daughter (as outlined in the summary of the perceptions of a reasonable tenant above) prohibited the applicant from serving a notice to quit upon the respondent. This was not the case. The Tribunal held that the terms of the letter were too vague to confer any legal right upon the tenant to enforce a further lease. This matter was held to be more appropriately dealt with in the context of the respondent's counter claim for damages.

(8) An order was therefore made that the respondent surrender possession within one month from the date that the reasons for decision of the case were published. No further notice to quit was necessary, rent was required to be paid for that further month, and any acceptance of rent could not affect the order.

(9) The Tribunal held, then, that upon the evidence the applicant's family had blatantly and unreasonably interfered with the respondent's right to quiet enjoyment of the property. Their behaviour not only contributed to the respondent's acute depression, but also to the breakdown of her marriage, and to the inability of the respondent to sell her business as a going concern. The behaviour of the applicant and her family and the breach of an implied warranty

in the lease agreement pursuant to s66 of the *Landlord and Tenant Act* 1936 (SA) (in relation to the state of the premises) clearly warranted an order of damages payable by the applicant. The damages for these individual matters were not separately quantified, but a single sum of $6,000 was awarded to the respondent.

Corralyn Pty Ltd v Elizabeth City Centre Pty Ltd

22 July 1993
COMTR-40-93-03
Mr Somerville, Mr Symons, Mr MacDonald

Legislation considered: *Landlord and Tenant Act* 1936 (SA) ss62, 68
Cases referred to: *Bressan v Squire* [1974] 2 NSWLR 460; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387
Keywords: commercial tenancy agreement; option to renew; time at which notice becomes effective

Facts:

The respondent company granted a lease over premises to the South Australian Housing Trust. By a sub-lease and a series of assignments the applicant was the ultimate tenant of the premises. The applicant claimed to have posted a letter by ordinary mail to the respondent, thereby exercising a right to renew the sub-lease for a further five years. The respondent denied receiving such a letter, and claimed that it had simply sat back and waited for the current lease to expire. The matter was brought before the Tribunal pursuant to s68.

Determination:

(1) The issues identified by the Tribunal were threefold. First, did the applicant write and post a letter to the respondent exercising the option pursuant to the terms of the current sub-lease. Secondly, if such a letter was written and posted, was it actually received by the respondent or, alternatively, was acceptance of the option constituted by the mere fact of sending (with no receipt by the respondent being necessary.) Thirdly, if the applicant did not accept the option (ie if the respondent did not receive the letter and posting could not constitute acceptance) then could the applicant have any entitlement under a deed executed by the landlord and prior tenants.

(2) A majority of the Tribunal held that, on the balance of probabilities, the applicant had written and posted the letter exercising the option. It also held, this time unanimously, that on the balance of probabilities the respondent had not received the letter. Could the applicant, then, establish an entitlement to a renewal of the sub-lease simply by proving that the letter was posted.

(3) The authority of *Bressan v Squire*, per Bowen CJ, was cited with approval. The general rule is that acceptance is not effective until communicated to the offeror. Acceptance by post is an exception to this general rule. However, ultimately the issue will resolve into an interpretation of the particular instrument involved in the case. Here it would have been easy enough for the parties to make acceptance effective only upon communication to the respondent. This was not done by the parties, and upon interpretation of the lease (both the particular provision and the instrument as a whole), the posting of the letter was sufficient of itself to constitute acceptance of the offer. That is, the simple fact that the applicant had posted the letter was sufficient to constitute an exercise of the option to renew, irrespective of whether or not the respondent had received the letter.

(4) The Tribunal therefore ordered that the respondent grant the applicant a further sub-lease of the premises for a term of five years.

(5) It was held further that, had the applicant failed in its claim related to the posting of the letter, then in any case it would have succeeded in its claim under the deed. The Tribunal would have been prepared to exercise its discretion to vary the deed instrument (to ensure its certainty) and would have ordered that a five year lease be entered into pursuant to that varied deed.

(6) It was held that a case of equitable estoppel based upon *Waltons Stores v Maher* could not be made out, as the respondent had not induced the applicant, nor intended that the applicant act upon any mistaken assumption. The present case was not one in which the respondent was silently watching as the applicant deluded itself and thereby suffered detriment. The issue of whether the respondent's unconscionable conduct could give rise to an equity in the applicant, thus enabling the enforcement of a new sub-lease, was not decided by the Tribunal.

SECOND HAND MOTOR VEHICLES ACT 1983 (SA)

SG Smith v Minority Interests Pty Ltd

13 April 1992
136/91/02
Judge Noblet, Ms Clothier, Mr McFarlane

Legislation considered: *Second Hand Motor Vehicles Act* 1983 (SA) ss25(2), 25(7), 25(10), 26
Keywords: dealer's duty to repair; compensation; costs

Facts:

The respondent dealer made representations to the applicant that the mileage of a certain 1984 Daihatsu Delta diesel van was, at the time the vehicle was purchased from the private owner, 48,679 kilometres. This influenced the decision of the applicant to purchase the vehicle, which he did after obtaining an RAA report on its condition. Most, but not all, of the vehicle's problems as identified by the RAA report were repaired by the dealer. The applicant immediately had trouble in starting the vehicle. It was discovered that an inferior battery had been installed, and the applicant rectified this at his own cost. Overheating also occurred. The respondent dealer consistently failed to address the problem, even after receiving notice that the applicant was being advised by the Department of Consumer Affairs and that action might be taken. The problem was eventually rectified by independent repairers at the applicant's expense. The applicant here sought compensation for the costs of repairing the vehicle and for losses incurred by the respondent's failure.

Determination:

(1) The Tribunal first noted, as a preliminary matter, the improbability that a seven year old delivery van would have travelled only 48,679 kilometres. During one of the services which the applicant had undertaken on the vehicle, an auto-electrician described their work as a 150,000 kilometre service. Clearly, the state of the vehicle did not suggest that the van had travelled so little as the odometer reading indicated. Nevertheless, the dealer represented to the applicant at the time of the sale that the van was a "low mileage" vehicle, and the applicant relied upon that representation. Therefore, by reason of the s25(10) definition of "defect", the dealer was under a duty to repair any defect in the vehicle which would not

reasonably be expected to be present in a vehicle which had travelled only 48,679 kilometres.

(2) Section 25(7) of the Act provides that a dealers duty to repair only extends to defects in a battery if, at the time the purchaser takes possession, the vehicle "does not comply with the Road Traffic Act 1961-1982", or else cannot be driven safely or at all, by reason of the defect. There were occasions upon which the vehicle would not start at all. Accordingly, the Tribunal was satisfied that the dealer was under a duty to repair the defect in the battery. He had failed to do so satisfactorily, and the applicant was entitled to claim the $95 cost of the replacement battery.

(3) A letter was written by the applicant to the respondent which stated the steps the applicant proposed to take if the vehicle's overheating problems were not rectified. The applicant received no response to this letter, and so obtained independent repairs. After two unsuccessful attempts to remedy the overheating, a small crack was eventually discovered in the block. The attitude of the independent repairer was sharply contrasted to that of the respondent; the independent repairer undertook to ascertain and repair the defect and so, when the initial repairs proved ineffective, continued to work on the vehicle on two separate occasions and for considerable periods without making any additional charge for the work done.

(4) The dealer then offered to repair the crack by welding the block. This was not, so the Tribunal held, an offer to repair in a manner which would have conformed to accepted trade standards. The applicant was therefore justified in refusing the offer.

(5) An offer was then made by the dealer to the effect that he would replace the engine block with a second hand block of equal or better standard. It was clear, however, that this offer was "in full and final settlement of [the] matter"; that is, the offer was conditional upon the applicant surrendering any other claim which he might have had against the dealer. Thus the offer was not reasonable and the applicant was right to refuse it.

(6) In summary, the Tribunal held that there were defects in the vehicle which the respondent was under a duty to repair. The applicant had given the respondent a reasonable opportunity to do so, and the respondent had not taken that opportunity. The main defect was

admittedly difficult to identify, and yet, had the respondent been as conscientious as the independent repairer, it would have ultimately been ascertained and rectified. It was reasonable for the applicant to reject the less than reasonable offers of the respondent, and so the respondent was liable to pay the reasonable costs of repair. This included the recheck report (not the initial report) obtained from the RAA, as it was clear that the dealer had failed to carry out all of the repairs identified in the first report. The respondent was also liable to pay the applicant's court costs, as the applicant recovered greater than any amount which the respondent had previously offered to pay.

(7) The applicant was also entitled to receive compensation for losses incurred as a result of the dealer's conduct. The precise loss was unquantifiable and the Tribunal was forced to take a "broad brush" approach. It allowed, having regard to the particular facts of the case, an award of $200 to the applicant.Commercial Tribunal