global amount. The Ontario Court of Appeal in *Farnham v. Fingold*[57] held that where there was no need for separate calculations, damages capable of being distributed by simple mathematical formulae could be claimed. A recent decision of the same Court accepted the novel device of claiming the same amount of damages for each class member as a way of avoiding separate calculations.[58]

Clearly, if it be thought necessary to establish a class action procedure in Australia, the best way would be by a thorough legislative enactment which could deal with the subservient issues of machinery, costing practice and ethics.[59] Indeed, the Australian Law Reform Commission favours this approach in its recent discussion paper.[60] But no matter what form the Commission's final recommendations may take, and more importantly whatever their fate,[61] an avenue for development, as in the Canadian experience, might exist through the courts which, after all, created the original procedural rules.

GRANT STILLMAN*

R. v. THE SMALL CLAIMS TRIBUNAL AND MUNRO; EX PARTE ESCOR INDUSTRIES PTY LTD (No. 2)

Administrative Law — Consumer Protection — Small Claims Tribunal — Jurisdiction with regard to a 'small claim' — Claim by ultimate purchaser seeking enforcement of a manufacturer's warranty — Small Claims Tribunal Act 1973

THE FACTS

Early in 1977 Dr John Munro purchased a Franklin Caravan from a dealer, Page Bros. Franklin is a division of Escor Industries Pty Ltd. A 12 month warranty was given with the caravan. However, when during that period defects appeared in the van, Escor claimed that they were not liable under the warranty because the damage was due to 'unfair wear and tear'.

[57] [1973] 2 D.R. 132.

[58] *Naken v. General Motors of Canada Ltd* (1978) 7 C.P.C. 209 (breach of warranty). See also Williams N. J., 'Class Actions — The Canadian Experience' (1979) 53 *Law Institute Journal* 721.

[59] *E.g.* Draft Bill in Law Reform Committee of South Australia, *36th Report: Class Actions* (1977) and Model Act in Williams N. J., 'Consumer Class Actions in Canada — Some Proposals for Reform' (1975) 13 *Osgoode Hall L.J.* 1.

[60] Australian Law Reform Commission, *op. cit.* 36 f.

[61] The South Australian report has been shelved pending nationwide proposals. *Adelaide Advertiser* 2 July 1979.

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[1] The normal practice of the Registrar of the Small Claims Tribunals, due to the strict requirements which apply to a 'small claim', is to register the claim against the other contractual party. This was of particular importance before collateral contracts were accepted in the *Escor* decision as satisfying the contractual requirement of a 'small claim'. The claimant in this case varied from the norm by jointly naming Escor and Page as traders. The Registrar believes that if this had not been done, the case would probably have never gone to the Supreme Court. Escor would have been joined as an interested third party and similar orders made. (Both the collateral contract point and the joining of third parties are discussed later in this case note): Telephone conversation with Mr J. Folino, Registrar of the Small Claims Tribunals, May 26 1980.

Munro lodged a claim with the Small Claims Tribunal against the dealer, Page, and Escor,[1] claiming compensation of $1000 to cover costs to date for replacement of faulty parts.[2]

The Tribunal ordered that Escor pay the $1000 and dismissed any claim against Page. Escor obtained an order *nisi* for a writ of *certiorari* to quash the order of the referee and the matter came on for hearing towards the end of 1978 before McInerney J.[3]

THE DECISION AT FIRST INSTANCE

Section 14 of the Small Claims Tribunals Act 1973 limits the jurisdiction of the Tribunal to 'small claims'. These, in turn, are defined in section 2(1) to mean:

> (a) a claim for payment of money in an amount not exceeding $1000; or
> (b) a claim for performance of work of a value not exceeding $1000.
> that in either case arises out of a contract for the supply of goods or the provision of services being a claim that has arisen not more than two years previously between persons who, in relation to those goods or services, are a consumer on the one hand and a trader on the other.

It will be noted therefore that the existence of a contract for the supply of goods or provision of services is of the essence to a claim. The contract for the supply of goods in the case was clearly between Munro and Page. However it was argued that a collateral contract could be construed between Munro and Escor:[4] the warranty form handed to Munro on delivery of the van constituted an offer for provision of repair services by Escor; return of the attached slip after completion by the purchaser provided the acceptance and the consideration requirement was fulfilled by the purchase of a caravan manufactured by Escor.

McInerney J. accepted this contention adding that if it was open to find that such a contract existed, the Tribunal could not be said to have acted in excess of its jurisdiction by finding that there was such a contract.[5]

Therefore, to support a claim for a writ of *certiorari*, it had to be shown that the claim arising out of that contract failed in some other way to satisfy the definition of 'small claim'; specifically, that it did not arise between a 'consumer' on one hand and a 'trader' on the other.

It was accepted that Escor was a trader within the meaning of the Act.[6] However it was contended that Munro was not a 'consumer' as defined in section 2. That is:

> a person not being a corporation, who buys or hires goods otherwise than for resale or letting on hire or than in the course of or for the purposes of a trade or business carried on by him, or than as a member of a business partnership.

It was argued that that definition refers to persons for whom services *are* supplied, requiring that services must actually have been supplied by the 'trader' to the 'consumer'. In fact no services had been supplied, the warranty merely constituting a promise to supply such services, if and when necessary, over the next 12 months, thereby rendering the contract wholly executory.

[2] The Small Claims Tribunals Act 1973 limits the jurisdiction of the Tribunal to the resolution of disputes involving amounts up to $1000.

[3] *R. v. The Small Claims Tribunal and Munro; Ex parte Escor Industries Pty Ltd (No. 1)* [1979] V.R. 503.

[4] *I.e.* of the *Shanklin Pier Ltd v. Detel Products Ltd* [1951] 2 K.B. 854; *Wells (Merstham) Ltd v. Buckland Sand and Silica Ltd* [1965] 2 Q.B. 170 variety.

[5] [1979] V.R. 503, 509.

[6] S. 2(1) defines a 'trader' as:

> a person who in the field of trade or commerce carries on a business of supplying goods or providing services or who regularly holds himself out as ready to supply goods or to provide services of a similar nature.

McInerney J. considered the point and found that:

> The Act is not . . . intended to create a Tribunal to deal with the complex and difficult situations which may arise in relation to executory contracts between manufacturer and ultimate purchaser.[7]

He therefore, found that a person will only be a 'consumer' if the contract out of which his claim arises has been executed; that is 'the goods have in fact been sold and delivered or hired and received or the services in fact rendered'.[8] This clearly did not apply to Munro.

The final argument by the respondent before McInerney J. in favour of the Tribunal's order was based on sections 23 and 24 of the Small Claims Tribunals Act. These sections provide that interested persons may be joined as parties to proceedings. The sections are to be read together with section 18 which empowers the Tribunal to make, *inter alia*, orders for payment of money against any party to the proceedings.

The Small Claims Tribunal has long proceeded on the basis that, providing the original claim satisfied the requirements of a 'small claim', the Tribunal had power to make orders involving interested persons joined under sections 23 and 24 even though no 'small claim' existed between the consumer and the party joined. These provisions were often used against manufacturers joined under sections 23 and 24 to claims originally brought by purchasers of defective products against retailers; an order being made subsequently against the manufacturer and the original claim against the retailer being dismissed.

Therefore the respondents, at first instance, contended that all that was necessary was that initially a 'small claim' be referred to the Tribunal. Once this had been done, the Tribunal acquired jurisdiction to deal with the dispute even if that dispute did not itself answer the description of a 'small claim'.

McInerney J. rejected this argument. He stated that the sections deal with questions and procedures which are ancillary to a 'small claim' already before the Tribunal and therefore could not be used to extend the jurisdiction of the Tribunal to disputes which did not arise directly out of a 'small claim'.

The claim made against Escor was separate and distinct from that made against Page Bros and, as it was not itself a 'small claim', the Tribunal had no jurisdiction to make the order.

The effect of this decision was seemingly to deprive the sections of any purpose — the former purpose having been ruled *ultra vires* and no indication being given of any alternative function.[9]

Having found that the Tribunal had no jurisdiction to make the order, McInerney J. directed that the order *nisi* for *certiorari* be made absolute.

From that order the Small Claim Tribunal appealed to the Full Court.[10]

THE DECISION OF THE FULL COURT

As a preliminary point, the Full Court noted that whilst it is unusual for a tribunal to take an active part in proceedings between litigants (the concern being to maintain an appearance of impartiality), it is common to join a tribunal where the jurisdiction of a superior court is invoked by way of application for a prerogative writ. Where this is done, the Tribunal becomes entitled to be heard and, if necessary, to appeal

[7] [1979] V.R. 503, 510.
[8] *Ibid.*
[9] Duggan A. J., 'Tying Down Small Claims Tribunals' (1979) 4 *Legal Service Bulletin* 49, 50.
[10] [1979] V.R. 635. The members of the Full Court of the Victorian Supreme Court were Young C.J., Lush and Beach JJ.

from the decision on the prerogative writ. On such occasions the Small Claims Tribunal has appeared to defend its own decisions.[11]

However the Full Court queried whether, in the present case, the tribunal had been properly named. The Small Claims Tribunals Act provides[12] that a Small Claims Tribunal shall be constituted by a referee sitting alone so that the order *nisi* for *certiorari* and the order absolute should have been directed to the referee 'sitting as a Small Claims Tribunal',[13] instead of simply to the Small Claims Tribunal.

The Full Court then turned its attention to the major arguments presented at first instance. They considered the definition of 'small claim' and identified the existence of a contract and the relation of 'consumer' on one hand and 'trader' on the other as the essential features. So far as the contract was concerned, there was no disagreement with McInerney J.'s finding that a collateral agreement comprising the manufacturer's warranty existed between Dr Munro and Escor.

The Full Court went on to make a general statement regarding the contentious point of executed and executory contracts. They referred to McInerney J.'s statement that the Tribunal was not equipped to deal with the complexities of situations involving executory contracts and found that:

> There is . . . nothing in the definition of 'small claim' to confine such a claim to cases in which goods have been supplied or in which services have been provided. On the contrary, if this definition stood alone it would be wide enough to cover both contracts which have been executed . . . and those which remain executory at the time of the claim.[14]

Thus, as a general finding, the warranty *was* a contract for the provision of services within the definition of 'small claim'. It then fell for consideration whether there was anything in the definitions of 'consumer' or 'trader' which limited the operation of the Act to executed contracts.

The definitions were found to be 'limiting' in that they showed that, in relation to the supply or provision of goods or services, not all persons may have recourse to the procedures of the Act nor could the procedures be used against all persons.

However it was argued that the word 'buys' in the definition of 'consumer' and the use of the present tense of the verbs therein indicated that 'small claims' referred only to claims arising out of executed contracts. This argument was rejected by the Court.[15] Choice of tense was considered a neutral factor in the issue. The contention that the word 'buys' limited claims to executed contracts was based on the interpretation given to that word in the Goods Act 1958. There it is used to refer to an actual purchase and not an agreement to purchase. However the word 'buyer' in the Goods Act includes a person who agrees to buy, thus supporting a broader, more comprehensive interpretation.

The same approach, that is the view-point of 'ordinary English usage',[16] was applied to the words 'for whom services are supplied for fee or reward.[17] The Court also noted that there was no counterpart of the suggested restriction in the definition of 'trader'.[18]

[11] See *The Small Claims Tribunal and Syme; Ex parte Barwine v. Nominees Pty Ltd* [1975] V.R. 831; *Walsh v. Palladium Car Park Pty Ltd* [1975] V.R. 949; *R. v. The Small Claims Tribunal and Homewood; Ex parte Cameron* [1976] V.R. 427.
[12] S. 3.
[13] [1979] V.R. 635, 637.
[14] *Ibid.* 638.
[15] *Ibid.* 639.
[16] *Ibid.* 638.
[17] Small Claims Tribunals Act 1973, s. 2(1).
[18] [1979] V.R. 635, 638.

The Court went on to consider whether there were any policy reasons for limiting the Act to executed contracts. While it was accepted that where a contract is not performed the consumer can seek out another trader and make a new contract, it was held that the Act was designed to provide remedies to a consumer who has paid money but has not received the benefits of complete performance. Though this type of case may give rise to the complex legal problems to which McInerney J. adverted, the Court deemed this to be 'a consideration of limited validity and, if valid, of limited relevance'.[19]

It was held, therefore, that the Small Claims Tribunals Act should not be read as restricted to contracts executed by the trader.

The final contention on behalf of Escor, that Dr Munro was not a consumer because any services to be supplied were not for fee or reward, was rejected in that the services were not being provided gratuitously, the reward being part of the purchase price of the caravan.[20]

The appeal was allowed and the order of the Tribunal restored, with Escor being ordered to pay the Tribunal's costs.

COMMENT

The decision of the Full Court will be welcomed by the Tribunal and consumers generally. It restores an interpretation of the definition sections in harmony both with the objects of the legislation and the current trends in consumer protection.

However all the difficulties have, by no means, been removed. Evident from the above discussion is the failure of the Full Court to consider the use of sections 23 and 24. This has left the issue somewhat in doubt. There currently exists a finding of a senior judge of the Supreme Court on the point and yet, that finding is contained in a judgment which, for all other purposes, has been set aside. It remains to be seen whether or not McInerney J.'s interpretation will be taken up. If it is, the consumer will be denied, in the absence of a direct or collateral contract, an important avenue of access to third parties, particularly manufacturers. It may be of interest to note that the Tribunal has not, in any significant sense, altered its policy on this issue.

The Registrar of the Tribunal indicated to the writer[21] that while maintaining the strict criteria for the initial 'small claim', once this is established the Tribunal's main concern is with who is to blame.

The aim is to encompass all issues in the one matter thus reducing the time which would be involved in ordinary court procedures to, at the most, a matter of weeks. Furthermore it has been seen that the likelihood of a satisfactory settlement being made is enormously increased if all interested parties are present and involved. Arrangements whereby (for example) the manufacturer, retailer and importer all contribute to meet the consumer's claim are commonly seen. 'It may not be strictly legal' but swift inexpensive justice is nonetheless dispensed.[22]

While the result is commendable, the situation obviously demands immediate legislative attention to bring the existing law into line with current practice, not, it is hoped, *vice-versa*!

In relation to Mr Justice McInerney's decision at first instance, it has been noted that important amendments to the Trade Practices Act 1974 (Cth) dealing with

[19] *Ibid.* 640.

[20] The Court stated that the object of the words 'fee or reward' was to exclude services performed gratuitously as a matter of friendship or otherwise.

[21] Information on this point was provided by the Registrar of the Small Claims Tribunal, Mr J. Folino, during a telephone conversation on May 26 1980.

[22] *Ibid.*

manufacturers' liability came into force one week before that decision was handed down. Those amendments shifted responsibility for defective products from retailers to manufacturers and impose obligations on manufacturers relating, *inter alia*, to failure to make reasonably available spare parts and repair facilities. These and other provisions[23] of the Trade Practices Act have been significant gains in the field of consumer protection. However, it seems more than likely that claims under the Trade Practices Act, Division 2A, Part V would *not* fall within the jurisdiction of Small Claims Tribunals.

Division 2A confers jurisdiction on 'courts' of competent jurisdiction and the Tribunal is not a court. Furthermore it has been pointed out[24] that Division 2A claims arguably do not arise out of a contract but are more akin to a torts claim or, alternatively, are based on some unspecified statutory fiction created under the Trade Practices Act. Either way they would not fall within the meaning of 'small claim'. Amendments to both Acts would do much to clarify the situation and would ensure that the achievements so far gained in the field of consumer protection are maintained.

The potential of the Small Claims Tribunal as a forum which brings the oft elusive justice within easy reach of the man on the street must be encouraged and it is hoped that, in the light of *Escor*, both judicial and legislative moves will be seen to further this goal.

N. L. SCHEINKESTEL*

R. v. CHEE[1]

Theft — Evidence — Admissibility of similar fact evidence

Lance Lamuel Chee was presented on September 4 1978 at the Supreme Court (sitting in Melbourne) presided over by McGarvie J. on a presentment charging him on seven counts, two of theft of a motor car with intent to use it in connection with the commission of a felony (counts 1 and 4) and five counts of robbery (counts 2, 3, 5, 6 and 7). He pleaded not guilty to each count. Though originally charged with a co-accused (one Graeme Russell Jensen), Jensen changed his plea during the trial and pleaded guilty to counts 5, 6 and 7. The Crown entered a *nolle prosequi* in respect of the other counts. The jury, having brought in a verdict of guilty against Jensen on counts 5, 6 and 7 were discharged without verdict as to Jensen in relation to the other counts. The learned trial Judge refused an application made on behalf of Chee to discharge the jury.

The accused was found not guilty (by direction of the learned trial Judge) on count 1, but guilty on each of the remaining counts.

Chee appealed to the Full Court against conviction and applied for leave to appeal against sentence.

The robberies fell into two groups. The first, committed in October 1977 were robberies at the Totalizator Agency Board (TAB) agencies at Brunswick on October 7 (count 2) and West Footscray on October 18 (count 3) and at the Fitzroy City Council Depot on October 20. The second, committed in November 1977, were

[23] *E.g.* s. 74D Trade Practices Act which concerns those who derive title to goods through a consumer.

[24] Duggan, *op. cit.* 50.

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[1] [1980] V.R. 303. The members of the Full Court of the Supreme Court of Victoria were McInerney, Anderson and Brooking JJ.