



Commercial and Consumer Tribunal

CITATION: *DOWNER EDI ENGINEERING POWER PTY LTD & THE CHIEF EXECUTIVE, OFFICE OF FAIR TRADING V AUTO GROUP COMMERCIAL (QLD) PTY LTD (IN LIQUIDATION) & BEDNALL & RYAN* [2008] CCT PC040-07

PARTIES: DOWNER EDI ENGINEERING POWER PTY LTD
THE CHIEF EXECUTIVE, OFFICE OF FAIR TRADING
DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL

V

AUTO GROUP COMMERCIAL (QLD) PTY LTD (IN LIQUIDATION)
BEDNALL Scott Ian
RYAN Daniel Thomas

APPLICATION NUMBER: PC040-07

DELIVERED ON: 16 July 2008

DELIVERED AT: Brisbane

HEARING DATE: 11 June 2008

DECISION OF: Mr K A Barlow

CATCHWORDS: Claim against fund—breach of Chapter 12, Part 1 - Whether directors liable for the claimant's loss – *Property Agents and Motor Dealers Act 2000* sections 470(1)(a), 488(3)(c), 530(c)

REPRESENTATION:

SECOND RESPONDENT: Mr Bednall

THIRD RESPONDENT: Mr Ryan

SOLICITORS:

APPLICANT: Mr Lambert

DECISION CATEGORY CLASSIFICATION: C

NUMBER OF PARAGRAPHS: 42

REASONS FOR DECISION

Introduction

1 This is an application, made on referral to the Tribunal by the Chief Executive under the *Property Agents and Motor Dealers Act 2000* (“the Act”). It is a claim against the claim fund established under the Act. The first applicant, Downer EDI Engineering Power Pty Ltd (“Downer”), alleges that it has suffered financial loss, in the sum of \$74,638.24, because of breaches by each respondent of a number of sections in Chapter 12, Part 1 of the Act, and of section 470(1)(e).

2 There was no appearance, at the hearing of the proceeding, by the first respondent. However, I am satisfied that its liquidators have notice of the claim, and were aware of the hearing, and have chosen not to participate. I was therefore prepared to proceed with the hearing in the absence of the first respondent, in accordance with section 59 of the *Commercial and Consumer Tribunal Act 2003*.

Factual background

3 The first respondent, Auto Group Commercial (Qld) Pty Ltd (in liq) (“Auto Group”), carried on a business as an auctioneer. In the course of its business, Auto Group accepted motor vehicles and other equipment for sale on consignment for its customers. For the purpose of that business it maintained a trust fund, into which it was required to pay the proceeds of sales of equipment for its customers and from which the net proceeds, after payment of commission and any expenses to itself, were required to be paid out to its customers, in accordance with Chapter 12, Part 1 of the Act.

4 In November 2005, Downer appointed Auto Group to sell a truck crane on behalf of Downer. The crane was sold in early February 2007 for \$63,800.00. That sum was paid to Auto Group by the purchaser’s financier and was deposited into Auto Group’s trust account on 2 February 2006. Allowing for a commission on the sale, the net proceeds payable by Auto Group to Downer were \$62,524.00.

5 Before the net proceeds could be paid to Downer, receivers and managers were appointed to Auto Group and to its parent company and related corporations. All accounts operated by those companies were frozen by the receivers.

6 The Chief Executive subsequently appointed receivers to the trust account, pursuant to the Act. Those receivers reported to the Chief Executive that there was a shortfall of funds in the trust account; that is, there were inadequate funds in the trust account to pay all claims by people who maintained that their monies were held in that account.

7 It appears that there had been a shortfall in the trust account for some period of time. According to the receivers, the shortfall arose because of a number of factors, including poor record keeping, lack of appropriate monitoring and controls, difficulties with reconciliation of commissions and other charges due and associated transfers to the general account of Auto Group, and matters associated with the complex financial transactions undertaken by the Auto Group group of companies controlled by Auto Group’s parent company (a public company situated in Sydney).

8 Ultimately, the receivers identified a shortfall (after payment of their fees) of \$122,925.20 in the trust account. In accordance with the Act, the remaining funds in the

account were transferred by the receivers to the Chief Executive. Downer has not been paid the money due to it. Hence this claim against the claim fund established under the Act.

Liability of first respondent – Section 470(1)(a) and Chapter 12, Part 1

9 Downer was represented at the hearing by its solicitor, Mr Lambert. He submitted that Downer has suffered financial loss, which it is entitled to recoup from the fund, because:

- a. *Auto Group's failure to pay the balance of the purchase price to Downer by no later than 42 days after the sale of the crane was in breach of its obligation under section 385(4) of the Act; and*
- b. *The shortfall in funds in the trust account arose from breaches by Auto Group, over a period of time, of its obligations under sections 379(1), 381(2)(b), 383(a), 384(1) and 386 of the Act. Those sections were identified, in a report from the receivers to the Chief Executive, as sections which it appeared Auto Group had breached, resulting in the trust account shortfall.*

10 I consider it unnecessary (and indeed it would constitute speculation) to make any findings about Auto Group's alleged failure to comply with its obligations under the sections referred to in para.9b above. This is because I am satisfied that Auto Group did not pay to Downer the amount to which it was entitled within 42 days after Downer first had the right to receive it, and therefore Auto Group has breached section 385(4). That section, of course, falls within Part 1 of Chapter 12 of the Act. I am also satisfied that that breach by Auto Group is an event that has caused Downer to suffer financial loss, the amount of which I shall discuss below.

Liability of Auto Group – Section 470(1)(e)

11 In his written submission, Mr Lambert briefly submitted that Downer's loss was also suffered as a result of a contravention by Auto Group of section 470(1)(e). However, neither in his written submission nor in his address at the hearing did he expand upon that assertion. It is not clear to me that there was a stealing, misappropriation or misapplication by Auto Group of Downer's property and therefore I am not satisfied that there was such a breach.

Conclusions – Liability of Auto Group

12 It appears, from evidence attached to affidavit of Niall Powell, read on behalf of Downer, that Auto Group was the holder of a licence as both an auctioneer and a motor dealer, relevantly, for the period 11 July 2005 to 11 July 2006, at which stage its licence expired. I am therefore satisfied that Auto Group was a licensee and therefore a "relevant person" as defined in section 469 of the Act.

13 In light of the above, I am satisfied that:

- a. the first respondent is a relevant person;
- b. the first respondent breached section 385(4) of the Act;

- c. Downer has suffered financial loss because of the happening of that event.

Amount of the first applicant's loss

14 Mr Lambert submitted that Downer has sustained financial loss totalling \$74,638.24, comprising:

- a. \$62,524.00, being the balance of the sale price due to it; and
- b. \$12,114.24, being damages for loss of the use of the balance of the purchase price between February 2006 and June 2008.

15 As I have said, I am satisfied that Downer has lost the balance of the purchase price.

16 A claim for compensation for loss constituting the lost opportunity to use, and earn interest or other income from, a recoverable principal sum, on the principles enunciated in *Hungerford v Walker* (1989) 171 CLR 125, is one that can properly be made against the fund. See *Chief Executive, Department of Tourism, Racing and Fair Trading v Hunter* [2002] QDC 272, at [38].

17 However, notice of such a claim ought to be given to the respondents and the amount of the claim must be proved. There was no evidence tendered on behalf of Downer as to the use of the funds, and the income that it would have earned from them, had it received them. Nor had there been any prior notice to the respondents that Downer intended to make such a claim. Its claim lodged with the Department was simply for the amount of the lost sale price.

18 In those circumstances, I made directions at the hearing that Downer, should it choose to pursue that part of its claim, should file and serve further material in support of it. It has not done so. I therefore infer that it has abandoned that part of its claim. In any event, I am not satisfied that it has suffered any loss in addition to the funds which ought to have been paid to it by Auto Group.

19 In my view, therefore, the amount of Downer's loss is \$62,524.00.

Liability of the second and third respondents to the first applicant

20 The second respondent, Scott Bednall, was a director of Auto Group from 4 November 1999. He was also an employee of that company, holding the position of General Manager. He held a licence as a motor dealer principal and auctioneer principal.

21 I am satisfied, in these circumstances that Mr Bednall was a relevant person, as he was both a licensee and an employee of a licensee. He also appears to have been a person having apparent charge or control of the licensee's business, although it is unnecessary for me to make a finding to that effect.

22 The third respondent, Mr Ryan, was not the holder of a licence under the Act. Nor was he an employee of Auto Group. He was appointed Chief Financial Officer of Auto Group's parent company on 26 September 2005. Shortly after his appointment, the chief executive officer of the parent company resigned. Upon the chief executive officer's resignation, Mr Ryan was appointed director, in place of the former chief executive officer,

of each of the subsidiary companies of the public company, including Auto Group. However, he did not have any direct involvement in the day to day operation of any of the subsidiary companies.

23 In his oral address, Mr Lambert expressly said that:

- a. *although Mr Bednall was a relevant person, the first applicant did not attribute the breaches of the Act by Auto Group to Mr Bednall, but solely to the company; and*
- b. *he accepted that Mr Ryan was not a relevant person, and Downer did not attribute the breaches of the Act by Auto Group to Mr Ryan.*

24 Therefore, the first applicant does not submit that the Tribunal ought find, nor make an order, that either Mr Bednall or Mr Ryan is liable to Downer for its financial loss.

25 The second applicant, the Chief Executive of the Office of Fair Trading, did not appear at the hearing of this proceeding to make any submissions that the Tribunal ought find that either Mr Ryan or Mr Bednall is liable to the first applicant for its financial loss.

26 There is a letter on the Tribunal's file, in which a person with the title of Manager, Claims and Recoveries Branch, of the Department that administers the Office of Fair Trading, said the following:

"Please note, [the first applicant] is currently under external administration. In the interest of recovering any debt which may become owing to the Claim Fund from this party, please note this on the Order and consider naming directors and/or executive officers as liable for the claimant's loss."

27 I take that letter to be a request that the Tribunal make an order, under section 530(b) and in accordance with section 488(3)(c), naming the second and third respondents as persons liable for the claimant's loss. However, given the reference to "executive officers" in the letter, it could also be taken to be seeking a finding that they are "executive officers", as defined in Schedule 1 of the Act. Such a finding, if made on proper evidence, would have the effect, under section 490(2)(b), that they would be liable to reimburse the fund to the extent of the amount paid to the claimant.

28 On 26 November 2007, the Chairperson of the Tribunal made a direction that the Chief Executive was not required to participate in the proceedings. However, that does not mean that, if the Chief Executive chooses not to participate, the Tribunal ought proceed as if he or she had appeared and participated. In my view, it is inappropriate for the Tribunal to act simply on a request of such a nature in correspondence. If the Chief Executive wishes to seek orders against the second and third respondents, then it is incumbent on him or her to prove a case against them. Indeed, one might have thought it was incumbent on the Chief Executive, in the proper administration of the claim fund, to appear and seek such orders in appropriate cases.

29 Given that the first applicant does not seek any orders against the second and third respondents in this case, and the Chief Executive has chosen not to appear to seek any such orders, it seems to me that there is no claim properly being pursued against those respondents for orders that they are liable for the first applicant's financial loss.

30 I am therefore not satisfied that either Mr Bednall or Mr Ryan is a person who is liable to the first applicant for its financial loss.

Liability of the second and third respondents to reimburse the fund

31 As I have said above, one might read the letter from the Department as seeking a finding that the second and third respondents are “executive officers”, as defined, with the consequences that would have under s.490.

32 Any liability of the second or third respondents to reimburse the claim fund may depend on whether either of them was concerned, or took part in, the management of the first respondent. It is certainly not necessarily the case that, simply because the second and third respondents were directors of the first respondent at the time of the loss, they fall within the definition, in the Act, of “executive officer”. Whether a person is concerned in, or takes part in, the management of a corporation is a question of mixed fact and law that depends on the circumstances of each case. See, for example, *Commissioner for Corporate Affairs v Bracht* [1989] VR 821 and *Cullen v Corporate Affairs Commission (NSW)* (1988) 12 ACLR 789.

33 It seems to me that these issues are unlikely properly to be subjects for determination in proceedings in this Tribunal. Rather, the question whether a person is an executive officer of a corporate responsible person found liable for a claimant’s loss, and therefore is liable under section 490(2) to reimburse the fund, is one that ought be determined if and when the Chief Executive seeks reimbursement, in a court, from an alleged executive officer. The orders that the Tribunal may make on a claim against the fund, are those described in section 530. Although the Act is somewhat ambiguous in this respect, my preliminary view (without, however, having the benefit of submissions on the point) is that section 530(c), which provides that the Tribunal may make an order about recovery of an amount payable in relation to a claim, permits an order that the applicant may recover the amount of its claim from the claim fund, but says nothing about (and does not appear to give the Tribunal jurisdiction to determine) whether a respondent is liable to reimburse the fund under s.490(2)(b).

34 Therefore, in my view these questions do not arise in the present application. They are issues that may arise at a later time, should the fund seek to obtain reimbursement from Mr Bednall or Mr Ryan, in a court of competent jurisdiction, on the basis that he is an executive officer of the responsible person (Auto Group) who has been found liable for the first applicant’s loss. Therefore, I do not propose to make any findings on the issues.

Legal costs

35 Downer also sought an order that the respondents pay its costs of this proceeding. I understood that claim to be pursuant to section 71 of the *Commercial and Consumer Tribunal Act 2003*. Mr Lambert said that he relied upon the decision of the Court of Appeal in *Tamawood Ltd v Paans* [2005] QCA 111.

36 The *Commercial and Consumer Tribunal Act* provides, by section 70, that the main purpose of Division 7 of the Act is to have parties pay their own costs unless the interests of justice require otherwise. Sub-section 71(4) sets out criteria to which the Tribunal may have regard in deciding whether to award costs. Sub-section 71(5) provides that a party is not entitled to costs merely because the party was the beneficiary of an order of the Tribunal or the party was legally represented at the proceeding.

37 These provisions have been considered by the Court of Appeal in *Tamawood Ltd v Paans* [2005] QCA 111. In that case, Keane JA (with whom Williams JA and Philippides J agreed) said (at [23]) that the language of sections 70 and 71(5)(a) is sufficiently clear to negate the proposition that costs should, prima facie, follow the event unless the Tribunal considers that another order is more appropriate. His Honour went on to say (at [30]) that, where the Tribunal had found that each party was justified in engaging the services of legal representatives to assist them in the conduct and defence of what was recognised to be a complex proceeding, that finding alone could be a sufficient basis to conclude that the interests of justice warranted the exercise of the discretion to award costs in favour of the successful party, at least in the absence of any countervailing consideration. On the other hand, his Honour also noted (at [33]) that there was a clear distinction, in terms of the interests of achieving justice, between the mere fact of having representation and the fact of having reasonably obtained that representation because of the complexity of the case. His Honour said, *“In the absence of countervailing considerations, where a party has reasonably incurred the cost of legal representation, and has been successful before the Tribunal, it could not rationally be said to be in the interests of justice to allow that success to be eroded by requiring that party to bear the costs of the representation which was reasonably necessary to achieve that outcome.”*

38 On 14 January 2008, the Chairperson of the Tribunal made an order by consent that the first applicant was permitted legal representation in the proceeding. As that order was made by consent, there has been no finding that the proceeding is complex and for that reason merits legal representation, apart from for the benefit of the first applicant. I would not classify the proceeding as complex.

39 Furthermore, the first applicant did not seek any orders against the second and third respondents.

40 In the circumstances, having regard to the purpose of Division 7 of the Act set out in section 70, I am not satisfied that it is appropriate that any respondent be ordered to pay Downer’s legal costs of the proceedings.

Orders

41 The first applicant’s claim against the fund is allowed in the sum of sixty-two thousand five hundred and twenty-four dollars **\$62,524.00**).

42 The person liable for the first applicant’s financial loss is the first respondent, Auto Group Commercial (Qld) Pty Ltd (in liquidation).

MR K A BARLOW
MEMBER
Commercial and Consumer Tribunal