Building Disputes Tribunal of NSW

- **Philip Davenport***

1. Introduction

The Building Disputes Tribunal of New South Wales grew out of a Consumer Claims Tribunal. It brings finality to building disputes with the speed and economy of a Consumer Claims Tribunal. The Building Disputes Tribunal is equally available to owners and to licensed contractors and subcontractors to pursue claims against each other. The Building Disputes Tribunal commenced in 1991 and receives over 1,000 claims annually.

The Building Disputes Tribunal is only concerned with residential building work. It is not concerned with commercial building work and can award no more than $25,000. It is a statutory tribunal created by the *Consumer Claims Tribunals Act* 1987 (NSW). This article describes the Tribunal and how it works.

2. Background

A major reason for the creation of the Tribunal was a widespread dissatisfaction with commercial arbitration. Rather than barring arbitration in residential building contracts, as was done in Queensland (*Queensland Building Services Authority Act* 1991), NSW compromised by creating the Building Disputes Tribunal. Prior to creation of the Building Disputes Tribunal, the *Consumer Claims Tribunals Act* 1987 (NSW) provided for tribunals known as Consumer Claims Tribunals. Those tribunals continue under the *Act*, side by side with the Building Disputes Tribunal, sharing the same premises, the same registry and some of the same Referees, but not the same jurisdiction.

The Tribunal has a registry, a Registrar, and general staff. Most referees are part time and are rostered for hearings. The head office of the registry is at 175 Castlereagh St., Sydney and there are branch registries in various suburbs and country towns. The estimated gross cost in 1994-95 of running the Building Disputes Tribunal was $876,727. The average cost per claim was $628 based on 1,395 claims. The estimated revenue was $139,500, representing a 16% cost recovery.

The Building Disputes Tribunal is completely separate from the Building Services Corporation which licenses builders and the BSC Insurance Scheme which provides insurance for clients of licensed builders. It is not possible to contract out of the jurisdiction of the Tribunal.

A Building Disputes Tribunal is usually constituted by a Part Time Referee sitting alone. Only some of the 16 Part Time Referees have legal qualifications. They are paid $385 per day and each is rostered to sit at regular intervals, e.g. one day per week. Typically a Referee's hearing day would comprise 5 matters, listed for 9.00, 10.30, 12.00, 14.00 and 15.00. The Referee would rarely make a final order in all five matters that day. Some may be settled in the hearing. Some may be adjourned for further evidence or an inspection of premises by the Referee.

3. Who can make claims

A person residing anywhere can bring a claim in the Building Disputes Tribunal against a builder located anywhere in Australia who performed residential building work in NSW or contracted to perform residential building work in NSW, even though the contract was made outside NSW or the builder is resident outside NSW or both.

Where the claimant is the supplier of the goods or services (i.e. the builder or subcontractor), the claimant can only make a building claim in the Building Disputes Tribunal when both:

(a) the claimant holds a licence enabling the claimant to contract to supply the relevant goods or services; and

(b) the relevant goods or services cannot lawfully be supplied without such a licence.

Where the claimant sues in the capacity of a supplier of building goods or services, not only must the claimant have had a licence authorising the entering of the contract for the supply of those goods or services, but the claim must arise from the supply of goods or services covered by the licence or under a contract that is collateral to a contract for the supply of goods or services covered by the licence.

A builder can be both a supplier to the owner and a purchaser or recipient of building goods or services from a wholesaler, a retailer, a consultant or a subcontractor. As a respondent to a claim, the builder can have rights to claim which would not exist if the builder initiated the claim.

Section 4 of the *Building Services Corporation Act* 1989 (NSW) provides that a person must not contract to do any residential building work except as or on behalf of an

individual, partnership or corporation that is the holder of a licence authorising the holder to contract to do that work. With certain exceptions, section 12 of the *Act* makes it an offence for an unlicensed person to carry out residential building work.

A person who contracts in breach of section 4 or carries out work in breach of section 12 cannot initiate a claim in the Building Disputes Tribunal. However the person can be sued in the Tribunal and, if sued, can raise a crossclaim .in the Tribunal. If the Tribunal finds in favour of a builder on the builder's crossclaim, the Tribunal can order the owner to pay moneys to the builder even though the builder is unlicensed and could not have initiated such a claim in the Tribunal except by way of crossclaim.

Section 6(1) of the *Building Services Corporation Act* 1989 (NSW) provides that a builder cannot enforce an oral contract for residential work. The fact that a builder does not have a contract in writing signed by the owner does not preclude the builder from lodging a claim in the Tribunal. The builder may be able to obtain an order for restitution on the basis of the doctrine of unjust enrichment. Such orders are made almost every day in the Building Disputes Tribunal.

If a claim is in respect of defective building work, the claim must be commenced in the Building Disputes Tribunal by lodging a claim within three years after the defective work was done. If the claim relates to work not performed, the claim must be lodged within three years after the date by which the contractor agreed to perform the work. If a claimant misses the time limit for commencing an action in the Tribunal, the claimant is not thereby precluded from suing in the court.

4. Who can be sued

Action can be brought against builders whether licensed on not. The limitation on unlicensed builders initiating action does not prevent them being sued. Licensed builders regularly use the Tribunal to recover debts and licensed subcontractors regularly sue contractors and vice versa.

The Tribunal has power to join as a claimant or respondent any person who, in the opinion of the Referee, has sufficient interest in resolving the dispute. This power is not one open to arbitrators or courts generally.

For example, the owner may have relied upon the advice of a supplier, the manufacturer, that certain bricks would be suitable. Assume that the owner specifies those bricks in the building contract and that the builder purchases the bricks from the manufacturer and lays them. Assume that the unlicensed builder is not in breach of contract to the owner. The Referee could order that the manufacturer be made a party to the proceedings. The liability of the manufacturer could be in tort or for breach of statute (e.g. the *Fair Trading Act* 1987 (NSW)).

To succeed in a claim, the claimant must demonstrate a legal right, e.g. a debt, breach of contract, tort, breach of statute or right to restitution. The fact that an owner can initiate a building claim against a manufacturer or subcontractor does not of itself overcome the problem of privity of contract. The owner must still demonstrate a right, e.g. in tort or under statute.

5. Procedure for making claims

To make a building claim, the claimant must complete a claim form. The claimant lodges the completed form and the prescribed fee .which can be as little as $2 and no more than $100. The fee varies depending upon the amount of the claim and whether the claimant is a pensioner or full time student. There is provision for the waiver of the fee in the case of hardship.

In completing the claim form, the claimant must insert the claimant's name and address and if the claimant is a contractor, the claimant must fill in details of the claimant's licence. The form requires only a very brief description of the claim and the remedy sought. There are no formal pleadings. No notice of appearance or written defence has to be lodged by the respondent.

As soon as practical after a claim has been lodged, the Registrar must set the matter down for hearing and serve on the parties notice of the claim and of the hearing date and time. The hearing is usually about two months after lodging of the claim.

There can be several claimants and several respondents but the claim must arise out of the same supply of goods or services. For example, two subcontractors who have separately contracted with the one contractor cannot join in making the one claim. Each must bring a separate claim because each provided separate services under a separate contract. There is power in section 17(2) of the *Consumer Claims Tribunals Act* 1987 (NSW) for a referee to hear and determine together two or more consumer claims if they are "related".

In item 10 of the claim form the claimant must nominate the orders sought. The claimant can seek any one or more of seven types of order (see 10. below, *Orders which can be made*).

The fact that in the claim form the claimant claims an amount greater than $25,000 does not invalidate the claim. Similarly, if the claimant seeks several orders, the combined value of which would exceed $25,000 the claim is not thereby invalidated. The jurisdiction of the Tribunal is still limited to making orders in favour of the claimant or claimants which in total do not exceed $25,000.

6. Representation

Generally speaking, a party must present his or her case in person. There is an exception for trustees and deceased and certain incapacitated persons. The Registry will arrange an interpreter free of charge if requested. When a party is a corporation, the party can be represented by an officer or member.

Where a party to the claim is, or is represented by a person who is entitled to practice as a legal practitioner, any other party is entitled to be represented. It is not necessary to seek the leave of the Referee. If a Referee decides that a party would be placed at a disadvantage if not represented, the party is entitled to be represented.

Some solicitors, unaware of their right to attend as a *McKenzie friend*, mistakenly advise their clients that lawyers are barred from attending the hearing. The assistance of a lawyer at the hearing can be of considerable benefit to a party.

7. Concurrent arbitration or litigation

Section 11 of the *Consumer Claims Tribunals Act* 1987 (NSW) deals with the situation where a claim is commenced in a court or an arbitration before or after a claim involving the same issues is lodged in the Building Disputes Tribunal. In essence, the action commenced first prevails.

Take the case where a claim is first commenced in the Building Disputes Tribunal. Thereafter no other tribunal, court, arbitrator, expert or person can validly hear or determine an issue which is before the Building Disputes Tribunal - unless the Building Disputes Tribunal or the Supreme Court dismisses the Building Disputes Tribunal claim for want of jurisdiction or the claim in the Building Disputes Tribunal is withdrawn.

That means that even though a building contract includes an arbitration clause, either party can avoid arbitration by commencing a claim in the Building Disputes Tribunal before the other party commences an arbitration.

If, part way through an arbitration, an arbitrator discovers that a claim involving the same issues as those before the arbitrator was lodged in the Building Disputes Tribunal before the arbitration commenced, the arbitrator must immediately cease the arbitration of that claim. The arbitration of that claim would have been a nullity since the beginning.

Section 53 of the *Commercial Arbitration Act* 1984 (NSW) will be of no avail to stop proceedings before the Tribunal. Section 53 provides that if a party to an arbitration agreement commences proceedings in a court against another party to the arbitration agreement, the other party can apply to the Supreme Court to stay the proceedings. A stay of the proceedings in the Building Disputes Tribunal would not mean that an arbitrator had jurisdiction. Section 11 of the *Consumer Claims Tribunals Act* 1987 (NSW) deprives the arbitrator of jurisdiction.

Now take the opposite situation. Assume that a party has already instigated proceedings in a court, or an arbitration has commenced, before a claim involving the same issues is lodged with the Building Disputes Tribunal. Now the Building Disputes Tribunal has no jurisdiction unless the other proceedings are withdrawn or dismissed by the court, arbitrator or other person having the conduct of the proceedings.

8. Crossclaims exceeding jurisdiction

There is only a conflict between jurisdictions when each adjudicator is faced with a common issue. Assume an owner is claiming $25,000 from a builder for defective work. Assume the builder has a claim against the owner for $50,000 for the balance of the contract price. Assume the builder does not want to raise the $50,000 claim in the Building Disputes Tribunal because the Building Disputes Tribunal cannot award more than $25,000. The fact that the owner has commenced a claim in the Building Disputes Tribunal does not mean that the builder is necessarily barred from instituting a claim in arbitration or court for the $50,000.

Initially the issue before the Building Disputes Tribunal is an allegation of defective work. The builder would have to be careful not to raise in the Building Disputes Tribunal the builder's claim for $50,000. The builder is not bound to raise that claim as a crossclaim in the Building Disputes Tribunal. In fact, once the builder commences proceedings in arbitration or court to recover the $50,000, the Building Disputes Tribunal would not have jurisdiction to consider a crossclaim for the $50,000.

Of course, in the arbitration or court proceedings, the owner could not raise the claim of defective work as a defence. That claim would already be before the Building Disputes Tribunal when the builder commences the arbitration or court proceedings. Hence the arbitrator or court would not have jurisdiction to consider the owner's claims of defective work. The owner who wishes to raise defective work as a defence in the arbitration or court proceedings would have to first withdraw the Building Disputes Tribunal claim.

The fact that a party to a claim seeks remedies exceeding in amount the monetary limit of the Tribunal's jurisdiction is not a bar to the Tribunal hearing the claim and making an award within the Tribunal's jurisdiction.

9. The Hearing

A date for hearing is usually set down approximately two months after the claim is lodged. Hearings may take place in rooms specially set aside for that purpose, e.g. at the Sydney Registry at 175 Castlereagh Street, Sydney or suburban or country tribunal registries or offices of Consumer Affairs, in local court houses or anywhere else the Senior Referee nominates. Hearings are set down for a particular time and a particular duration, usually an hour.

Hearings are not as formal as in a court. Usually the Referee sits at the head of a long table with the claimant sitting on one side and the respondent on the other side. The Referee has no transcript writer, clerk or usher present. The Referee is alone with the parties and their witnesses. The Referee has control of the procedure. Some Referees insist on more formality than others. If none of the parties to the claim object, the Referee can permit to attend the hearing a person who wishes to attend for educational, research or study purposes.

Privacy and confidentiality are two different things. The hearing is private but confidentiality does not attach to any documents produced in the hearing or any evidence given in the hearing. There is no restriction upon anyone disclosing what happened during the hearing except for any statement or admission made in the course of attempts at reconciliation.

The Referee is not bound to follow the rules or practice of evidence. Sometimes a Referee may require witnesses to wait outside until called to give evidence. Of course, none of the parties must be excluded from the hearing at any time. An overriding requirement is that the procedure must conform with the requirements of natural justice.

Some Referees follow the adversarial system, some follow the investigative system. The former ask few questions and leave it to the parties to present their respective cases and refute the case of the other. The latter enquire of the parties the cause of the complaint and may cross-

examine them. Some Referees adopt a combination of the adversarial and the investigative processes. Again, the overriding requirement is that the parties are accorded natural justice.

10. Orders which can be made

Usually a Referee orally gives a decision, with reasons, at the end of the hearing. The Referee tells the parties what the order is and, after the hearing, the Referee writes out the order and reasons and places them on the file. Sometimes the Referee will reserve the decision and deliver it in writing at a later date. This is more common when issues of jurisdiction are raised. The reasons of some Referees rarely exceed a page of handwriting. Others type out pages of reasons.

Section 27 empowers a Referee to dismiss a claim which the Referee considers frivolous, vexatious, misconceived or lacking in substance. The Referee can also dismiss a claim when for any other reason the Referee considers that the claim should not be dealt with. Since such a dismissal is not necessarily a decision on the merits, the dismissal would not necessarily be a bar to the claimant bringing another claim either in the Tribunal or in a court.

The orders which can be made against either a claimant or a respondent are:

1. a party must pay the other an amount up to $25,000;
2. a party must perform specified work;
3. a party must supply specified services;
4. a declaration that a specified amount of money is not owed by one party to another;
5. a party must deliver goods of a specified description;
6. a party must return specified goods;
7. a party must replace goods;
8. a claim is dismissed in whole or in part.

This is a condensed description.

When there are two respondents, e.g. a contractor and a subcontractor, the Referee cannot make an order that one respondent pay the other respondent, or does not owe money to the other respondent, or must provide goods or services to the other respondent. The *Consumer Claims Tribunals Act* 1987 (NSW) only permits an order in favour of a claimant to be made against a respondent or an order in favour of a respondent to be made against a claimant.

Section 32 of the *Consumer Claims Tribunals Act* 1987 (NSW) limits the Referee to making an order not exceeding $25,000 in value, whether it is money or the value of the work to be performed or goods to be supplied. Similarly, the Referee cannot make a declaration that an amount in excess of $25,000 is not owing.

Provided that a party has requested multiple orders and the orders would not be inconsistent, the Referee can make multiple orders, e.g. for a payment of money, for specified work to be done and for specified goods to be supplied. An order may require the owner to pay the builder an amount of money and the builder to do work within a specified time.

A particularly useful jurisdiction given to the Tribunal but not to arbitrators and courts generally is the power to entertain a claim by a debtor (or potential debtor) against the creditor, seeking an order that the debtor is not liable. For example, if a builder gives an owner an invoice, the owner can commence an action in the Tribunal for an order that the owner is not indebted for the whole or part of the invoice. To avoid the cost of potential litigation or arbitration, owners frequently commence such actions in the Tribunal before the builder has time to commence an arbitration. The owner thereby limits costs to a maximum of $100.

11. Fair and equitable

Section 31(1) of the *Consumer Claims Tribunals Act* 1987 (NSW) provides:

> *"When making an order or orders under section 30, a tribunal must make such orders as, in its opinion, will be fair and equitable to all the parties to the claim."*

This provision does not authorise a Referee to decide issues otherwise than according to the general law. The Tribunal does not administer "palm tree justice". This term was used by Yeldham J in *Fairey Australasia Pty Ltd v Joyce* [1981] 2 NSWLR 314 at 321. It has since been used on a number of occasions to reflect the fact that the Tribunal must decide issues according to law and not according to some general notion of fair play.

The term was used in *Jet 60 Minute Cleaners Pty Ltd v Brownette*, unreported, Supreme Court of NSW, Hunt J, 24 February 1981. In describing the obligation of the Referee to act in accordance with and apply the general law in determining a claim, Hunt J said:

> *"The Consumer Claims Tribunal is required to make such order as is, in its opinion, fair and equitable to all the parties to the proceeding before it. That obligation, however, in its context relates to the nature of the order to be made; it does not give the tribunal freedom to act otherwise than in accordance with the general law in determining whether the claim before it has been made out. "*

The case went on appeal, *Jet 60 Minute Cleaners Pty Ltd v Brownette* [1991] 2 NSWLR 314 but the appeal was dismissed.

12. Interest and costs

In the *Consumer Claims Tribunals Act* 1987 (NSW) there is no power given to the Tribunal to award interest. Nevertheless, the Tribunal's order can include a component for interest which is part of a debt or damages.

There are two categories. The first is interest which a party has contracted to pay. That interest is part of the debt owed. When the Tribunal orders that the debt be paid, the debt will include that interest component. It is not the Tribunal which is creating the liability for interest. The parties have themselves agreed it.

The second category is a component of damages. It is commonly called *Hungerfords interest* or *Hungerfords damages*. It is interest incurred or interest forgone as a

foreseeable consequence of the breach of contract or wrong in respect of which the Tribunal is making the order.

The terms *Hungerfords interest* and *Hungerfords damages* are used interchangeably. They derive from the name of the case in which the Australian High Court recognised that damages could include interest paid or interest forgone. The case is *Hungerfords v Walker* [1989] 171 CLR 125. Strictly speaking, *Hungerfords interest* is not interest. It is damages just like any other damages.

The Tribunal has no power to award costs to or against a party. Therefore the successful claimant cannot recover the fee (up to $100) for lodging the claim. No witness expenses can be awarded. Nor can the Tribunal order compensation for the time spent by a party in preparing the claim or defence or in attending the hearing. The cost of photographs to be used in evidence and expert reports to be presented at the hearing are part of the costs which the Tribunal cannot award.

When a defect is discovered, it may be necessary to engage an expert to advise on what is the cause and what should be done to rectify the defect. If the cost of the expert is a necessary expense whether or not the matter goes to litigation or arbitration, then it is probably part of the damage recoverable from the builder. The Tribunal could award that cost. The additional cost of having the expert prepare a report for the Tribunal or give evidence would be a cost which the Tribunal could not award.

13. Grounds for challenging an order

There are no appeals from the Tribunal. Section 34 of the *Consumer Claims Tribunals Act* 1987 (NSW) provides:

> *"An order of a tribunal is final and binding on all parties to a consumer claim that is heard and determined by the tribunal and no appeal lies in respect of an order of the tribunal."*

There are four grounds upon which a Tribunal order can be challenged in the Supreme Court. They are:

(1) The Tribunal had no jurisdiction;
(2) A party disputed the Tribunal's jurisdiction and the Tribunal failed or refused to give a ruling as required by section 26 of the *Consumer Claims Tribunals Act* 1987 (NSW);
(3) The Tribunal gave an erroneous ruling on jurisdiction;
(4) A party to the claim was denied natural justice.

It goes without saying that only a valid order of the Tribunal is final and binding. For example, if the Tribunal purported to decree a divorce or to order someone be imprisoned, the decision would be beyond the jurisdiction of the Tribunal and would be a nullity. If an order of the Tribunal is outside the jurisdiction given to the Tribunal by the *Consumer Claims Tribunals Act* 1987 (NSW), the Supreme Court may grant an injunction and declare the purported order of the Tribunal to be void.

If the Referee had jurisdiction and accorded the parties natural justice, the fact that the Referee made an error of law or fact, no matter how obvious, or made a decision which the Supreme Court considers unjust, is not grounds for setting aside the Referee's order. Section 17 of the *Consumer Claims Tribunals Act* 1987 (NSW) provides that a Tribunal has control of and responsibility for its own procedures but "must conform to the rules of natural justice".

The Supreme Court can also grant relief when, after a party has disputed the jurisdiction of the Tribunal, the Tribunal fails or refuses to give a ruling under section 26 on its jurisdiction or gives a ruling that is erroneous. Section 26(1) of the *Consumer Claims Tribunals Act* 1987 (NSW) provides:

> *"If, before a tribunal has determined a consumer claim, the jurisdiction of the tribunal to hear and determine the claim is disputed by a party to the claim, the tribunal must not proceed to determine the claim without first giving a ruling as to whether or not it has that jurisdiction."*

Section 26(3) provides that after giving the ruling, the Referee must not determine the claim earlier than the 15th day after the ruling was given. If proceedings are instituted in the Supreme Court in respect of the ruling on jurisdiction, the Referee must not decide the claim until the Court proceedings have been concluded. The Referee can nevertheless proceed to hear the claim without waiting the prescribed 14 days. It is only the final order which must be adjourned.

14. Enforcement of orders

If an order is for payment of an amount of money, the time for payment stated in the Referee's order has expired and the payment has not been made, the party to whom the money is payable can make a request to the Building Disputes Tribunal registry for a certified copy of the Referee's order. The party can then file the certified copy of the order in a Local Court. No fee is payable for filing the order in the Local Court but to file the order the applicant must file with it an affidavit specifying the amount then unpaid under the order. The order is then deemed to be an unsatisfied judgment of the Local Court for the amount specified in the affidavit as being unpaid.

If an order, other than a money order, e.g. an order to rectify work, is not complied with, the matter can be relisted before the Referee and a money order substituted for the unsatisfied order. ❑

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