Fairbairn v Indopac Holdings Limited (General) [2013] NSWCTTT 307 (1 July 2013)

CONSUMER, TRADER & TENANCY TRIBUNAL
General Division

APPLICATION NO:	GEN 11/36360
APPLICANT:	Sharon Louise Fairbairn
RESPONDENT:	Indopac Holdings Limited (formerly known as Superwoman Group Limited and Empowernet International Limited)
APPLICATION:	Application for an order to refund moneys paid by the applicant to the respondent under a contract for supply of services
APPEARANCES:	Ms SL Bethel nee Fairbairn & Mr J Donnelly of counsel (18 March 2013 only) for the applicant Mr B Walton, solicitor, for the respondent
HEARING:	6 November 2012 & 18 March 2013
LEGISLATION:	*Consumer Claims Act 1998* NSW *Consumer Trader and Tenancy Tribunal* Act 2001 NSW
KEYWORDS:	Proper party to contract Procedural fairness Breach of Contract Failure of Consideration

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ORDER

1. The application is dismissed.

REASONS FOR DECISION

Application

1. This application was lodged in the Tribunal on 25 July 2011.

2. The applicant Sharon Bethel nee Fairbairn (hereinafter referred to as Ms Bethel or the applicant) seeks a money order in the amount of $20,000 comprising a refund of the moneys paid by her under a contract for services which was made in or about March 2008. At the formal hearing on 18 March 2013, the applicant did not press an application to amend her application to include out of pocket expenses (of up to $3,000) for travel to Texas USA in April 2008.

3. During March 2008, Ms Bethel attended a three (3) day seminar 'Unleash Your Marketing Genius' ("UYMG Sydney 2008") at the Acer Arena in Homebush, Sydney.

4. From 29 September 2006 to 30 November 2009, the respondent, Indopac Holdings Limited, was known as Empowernet International Limited ("Empowernet"). Empowernet carried on the business of event promotion.

5. UMYG Sydney 2008 was promoted by Empowernet as a 'Stephen Pierce Event', a three day internet marketing seminar/workshop hosted by Mr Stephen Pierce ("Mr Pierce") during which Mr Pierce and seven other speakers who had been invited by Mr Pierce held seminars/workshops on the development of online products and how to use the internet effectively to market those products.

6. As the event promoter, Empowernet was responsible for the costs of promoting and staging UYMG Sydney 2008.

7. Mr Pierce and the other seven speakers each offered various internet marketing products for sale to the event's participants which included Ms Bethel. The product which interested Ms Bethel was 'Stephen Pierce's Product Creation Laboratory' ("PCL").

8. PCL was a three day product creation and internet marketing workshop conducted at the home of Mr Pierce in Texas USA. Mr Pierce's home included a recording studio.

9. After his presentation at UYMG Sydney 2008, Mr Pierce invited those interested in the PCL product to attend a further presentation in a separate conference room.

10. The applicant attended the further presentation and then elected to purchase the PCL product signing a product purchase order form, the form and content of which are discussed later in these Reasons. The purchase price was $20,000.

11. From 17 – 20 April 2008, the applicant travelled to Whitney, near Dallas, Texas in the USA and stayed at the home of Mr Pierce. Ms Bethel expected that the PCL would facilitate (during and following the three day workshop) her development of a profitable internet marketing program. Her product idea was 'Strata Keys: Seven Keys to Success'.

In particular, the applicant wished to avail herself of facilities at the home of Mr Pierce (a premium product creation laboratory) and then, with the assistance of Mr Pierce and his company, Stephen Pierce International Inc. (SPI), design and package an information product based on her idea that could be launched to 300,000 subscribers and with 5,000 affiliates to help sell the product.

12. The applicant was promised a professionally edited recording with royalty free music following her three day attendance at Mr Pierce's home. However, it is her contention that the services provided by Mr Pierce and his team at SPI did not meet expectations in that there was no professional editing for the product idea and she was left with what she considered a 'substandard raw unedited recording'.

13. For about three years thereafter, the applicant had ongoing communication with Mr Pierce and SPI, as regards the development of her preferred product: 'Strata Keys: Seven Keys to Success'.

14. On or about 21 April 2011, the applicant made complaint against Mr Pierce and SPI to the Better Business Bureau of Metropolitan Dallas in the USA (the "BBB"). Her efforts to obtain a refund from Mr Pierce and SPI via that avenue were not successful. Mr Pierce, apparently, maintained to Ms Bethel and the BBB that the applicant's recourse was against the respondent. Accordingly, this application was brought in the Tribunal on 25 July 2011.

Jurisdiction

15. The contentious issue as regards the jurisdiction of the Tribunal was decided by another member on 13 February 2012. The other aspects bearing upon jurisdiction are not in doubt: the applicant attended UMYG Sydney 2008 in March 2008, she paid $20,000 in respect of a contract for services arising out of that event and she then incurred expenses in April 2008 when she travelled from Australia to Texas USA.

16. The Tribunal is satisfied that at all material times the applicant was a consumer within the meaning of the definition of 'consumer' in *section 3* of the *Consumer Claims* Act 1998 NSW, that the applicant's claim arose from a supply of services to her, that a contract for services emanated from her attendance at the UMYG Sydney 2008 event and that such contract was made in New South Wales. However, as the application was lodged with the Tribunal on 25 July 2011, there was an issue as to whether the application had been brought within the time required under the *Consumer Claims* Act.

17. At a hearing of this matter on 13 February 2012 as to the issue of jurisdiction only, the Tribunal determined that within *subsection 7(4)(a)* of the *Consumer Claims* Act 1998 NSW, the cause of action giving rise to the applicant's claim first accrued in or about April 2011 and

therefore, that the application was within time for the purposes of the *Consumer Claims* Act. In her Reasons, the presiding member stated:

"... the Tribunal finds the cause of action in respect of Ms Fairbairn (sic) accrued when the Texan service provider finally ceased all communications with Ms Fairbairn in May 2011, suggesting she sue the respondent in Sydney ... I find that the applicant formed the view in early to mid 2011 that there was no likelihood that the respondent had any intention to perform its contractual obligations despite receipt of $20,000 ... The cause of action accrued when the applicants (sic) formed the view in mid 2011 that the contract would not be performed."

Having regard to such determination previously made by the Tribunal and also to the other relevant matters of jurisdiction referred to above, the Tribunal finds that it has jurisdiction pursuant to the *Consumer Trader and Tenancy Tribunal Act 2001 section 21* and *Schedule 1*, and pursuant to the definition of a *"consumer claim"* under the *Consumer Claims* Act *section 3A* to hear and determine this application.

Submissions

18. Apart from the hearing on 13 February 2012 as to the issue of jurisdiction only, there have been other directions hearings and a return of summons, usually involving attendance by telephone by the applicant, as Ms Bethel lives interstate. The formal hearing was conducted over two days on 6 November 2012, when Ms Bethel appeared by telephone, and on 18 March 2013, when Mr J Donnelly of counsel (pursuant to the Tribunal's leave) appeared for the applicant. Ms Bethel also attended in person on 18 March 2013 when she gave sworn oral evidence to supplement the written material already provided to the Tribunal pursuant to procedural directions.

19. Pursuant to leave granted by the Tribunal, the respondent was represented on both days of the formal hearing by its solicitor Mr Walton. Also on 6 November 2012, the respondent's director Mr Warrand attended and gave sworn oral evidence and then, pursuant to orders made on 6 November 2012 (see order 4), Mr Warrand made a statutory declaration on 8 March 2013 with annexures referring to how amounts totalling $20,000 received from the applicant in or about March and April 2008, were applied to pay Mr Pierce and SPI, and also as regards the funds retained by the respondent for its services.

20. Moreover, there is another File No GEN 11/31443 (the "related matter") with the same respondent but different applicants (also interstate residents) which ran in tandem with this application. The related matter is substantially similar to this application being a claim for a full refund on a contract for services arising out of the UMYG Sydney 2008 event, but also including a claim for out of pocket travel expenses. In the related matter, the applicants attended the home of Mr Pierce in Texas, USA during early May 2008. Since about October 2011, this matter and

the related matter have been listed together, including as regards the hearing on the issue of jurisdiction on 13 February 2012.

21. At the commencement of the formal hearing on 6 November 2012, Mr Walton objected to this application and the related matter being heard together. Consistent with a discretion to determine its own procedure subject to the rules of procedural fairness (see *section 28* of the *Consumer Trader and Tenancy Tribunal* Act 2001) and in order to accommodate any prejudice to the respondent in either or both matters arising from evidence being taken at the same time as to different factual issues in each matter, the Tribunal then ordered that while both matters could continue to be listed together the evidence in each matter was to be taken separately to reflect that although the legal and factual issues in both matters may be substantially similar there were differences as to matters of fact and that the respondent was entitled to ask questions of a particular party without the other party participating in that part of the hearing. That was the procedure followed during the formal hearing on 6 November 2012 and also on 18 March 2013.

22. The Tribunal has a continuing obligation to use its best endeavours to bring the parties to a settlement that is acceptable to all parties: *section 54* of the *Consumer Trader and Tenancy Tribunal* Act 2001. Further, the Tribunal has to take such measures as are reasonably practicable to ensure that the parties in any proceedings understand the nature of the assertions made in the proceedings and the legal implications of those assertions: see *subsection 28(4)(a)* of the *Consumer Trader and Tenancy Tribunal* Act 2001.

23. On 6 November 2012 (the first day of the formal hearing), the Tribunal promoted conciliation and also was concerned to ensure that the parties were afforded every opportunity to resolve their differences. The Tribunal indicated to Ms Bethel (who appeared by telephone on that occasion) that having regard to the nature of the legal and factual issues which were in dispute but with particular focus on the issue of whether the respondent entered into any contract with the applicant in March 2008 as the agent of a disclosed principal (i.e. either Mr Pierce or his company SPI), she ought to obtain advice and if so advised, have settlement discussions with the other party prior to the next hearing. Ms Bethel was also directed to provide further documents addressing the agency issue (see order 3 made on 6 November 2012).

24. When the formal hearing resumed on 18 March 2013 it was tolerably clear that the parties had been unable to resolve their differences by conciliation. They insisted that the matter proceed on that occasion and further that it be heard and determined in accordance with the evidence before the Tribunal comprising the written material including the signed statements and other documents provided by the applicant, the statutory declaration of Mr Farrand, and the sworn oral evidence and submissions of the parties during the two days of the formal hearing.

25. At the conclusion of the hearing the parties were permitted to provide further written submissions. The Tribunal's paramount concern is always to ensure procedural fairness including a reasonable opportunity to call and give evidence and to make submissions in relation to the issues in the proceedings: see, particularly, *section 35* of the *Consumer Trader and Tenancy Tribunal* Act 2001. Within the necessary time constraints under which the Tribunal must always conduct its hearings, the parties were given a fair opportunity during the formal hearing to state their cases and to address the relevant issues in dispute. At the conclusion of the formal hearing, the Tribunal took the view that a direction for further submissions from the parties would facilitate procedural fairness and allow the parties a chance to make submissions as to the findings of fact and law for which each party contended in their respective cases.

26. Pursuant to such direction, the parties provided their further submissions including in the case of the applicant, submissions from her counsel, Mr J Donnelly to supplement written submissions and oral submissions given and made at the formal hearing on 18 March 2013.

27. Accordingly, the Tribunal has reached this decision following due and careful consideration of the evidence presented and the submissions made by the parties before during and after the formal hearing.

Applicant's case

28. The applicant's principal submission is that on 16 March 2008 she entered into a contract with the respondent for the supply of a product (specifically, the PCL), that the respondent did not deliver the product in accordance with the contract and that she is entitled to damages for breach of contract. The contract price was $20,000 paid in two instalments: $5,000 on 16 March 2008 and the balance ($15,000) on 8 April 2008: see paragraphs 11 and 12 of the Statement of Sharon Bethel made on 14 January 2013.

29. Ms Bethel relies on an email of 8 April 2008 sent to her by Liana Walker of Empowernet which lists 15 items (via bullet points) of services to be provided to the applicant in Texas, USA. It is submitted that the email evidences the true character of the legal relations between the parties; that is, the respondent was *not* agent for Mr Pierce or SPI, in fact, Empowernet was the principal who provided its contractual services to the applicant through Mr Pierce and SPI. It follows from such submission the relationship between Empowernet, on the one hand, and Mr Pierce and/or SPI, on the other hand, was that of contractor and sub-contractor, respectively.

30. As to services performed under the contract, the general allegation of the applicant is that she received either little or inadequate service or nothing at all in respect of the 15 items: see, for example, the table with headings 'Item/Service Promised with Product' and 'Item/Service that

was provided by Respondent' in paragraph 27 of Ms Bethel's Statement dated 14 January 2013. The statement became part of the applicant's sworn evidence on 18 March 2013. It is submitted, therefore, that there was a total failure of consideration and that the applicant is entitled to a full refund because she received no value for the product. In particular with regard to the respondent, it is contended that Empowernet had promised the development of a product which could be both marketed and sold as a commercial product. In further support of all of these contentions, the applicant relies on her sworn oral evidence to the Tribunal on 18 March 2013, when Ms Bethel stated, among other things:

"I have not used anything they have given me. I have not been able to apply any of the knowledge".

"The recordings that they gave me when I went to Texas, no one has ever heard them. They are worthless".

"They reassured me when I was there this was only the starting process and they would be holding my hands. I didn't pay just to go to Texas. I paid for the whole development of the product on my return home as well which they also failed to deliver."

"Stephen did not assist me with an outline and development of my product, consistent with what was stated would occur from the email of Liana Walker from Empowernet".

"I got nothing to market".

31. Ms Bethel's statement of 14 January 2013 and Mr Donnelly's submissions were provided pursuant to a direction made on the first day of the hearing (Orders, 6 November 2012, paragraph 3) for the applicant to provide further documents: *"to address the issue of whether the respondent entered into the contract of March 2008 with the applicant as an agent of a disclosed principal, Mr Stephen Pierce of Texas USA, or as a partner of Mr Pierce. In this respect the applicant is at liberty to provide documents to the Tribunal and the other party which were previously furnished by the respondent to the applicant on a without prejudice basis as regards the issue of agency or partnership, as the Tribunal notes that the respondent no longer objects to the production of such documents and waives any claim for privilege"*.

32. In the applicant's submission, her contract with the respondent was contained in, and evidenced by, not only the email of 8 April 2008, but also the Order Form signed by Ms Phoebe Chin, who it is said represented herself as an employee of the respondent. This is because the Order Form bears the name, address and contact details (telephone, facsimile and website) of Empowernet. Further, the applicant submits that it was represented to her during the UYMG Sydney 2008 event that she was purchasing the product (PCL) from

the respondent. Ms Bethel relies on the fact that the Order Form provided for a 30 day money back guarantee from the respondent and also contends there is no reference on the Order Form to the fact that the respondent was a mere introducer of business to Mr Pierce and/or SPI or indeed that the respondent was contracting as agent for a disclosed principal, Mr Pierce and/or SPI. The latter contention is fundamental to the applicant's case. Mr Donnelly of counsel (Written Submissions 17 March 2013) at paragraph 19(c) puts it this way:

"The document fails to either expressly or implicitly demonstrate the nature of any agency relationship between it and Stephen Pierce or Stephen Pierce International Inc. The formidable conclusion, it is submitted, is that no such agency relationship existed".

33. In further support of such fundamental contention, the applicant relies on Ms Bethel's statement, which states (at paragraph 10):

"At no time did the respondent expressly or implicitly represent orally that it was acting as agent for Stephen as a pre-disclosed principal. No documents ever shown or provided to me by the respondent have ever indicated that they were acting an agent for any pre-disclosed principal".

34. In her sworn oral evidence on 18 March 2013, Ms Bethel said:

"I understood that I had paid money to Empowernet. They had instructed me to seek Stephen Pierce to fulfil that contract. I paid my money to Empowernet. They were the ones who sent me all the correspondence after I had paid. On their initial letter it had said deal with Stephen Pierce after we had received your money and that's what I did".

Such evidence is said to be consistent with this proposition: the applicant was of the view that the respondent had entered into a sub-contract with Mr Pierce, whereby Mr Pierce or his company, SPI, would discharge the contractual obligations which the respondent owed to the applicant in accordance with the contract entered into at the UYMG Sydney 2008 event.

35. It is also submitted that no formal agreement has been adduced into evidence by the respondent proving the existence of an agency agreement between Mr Pierce and/or SPI as principal and the respondent as agent. Moreover, the applicant's submissions point out that the purported principal (Mr Pierce or SPI) denies the existence of any agency relationship with the respondent: annexure N to Ms Bethel's statement is a Complaint Activity Report from the BBB, which says, among other things: *"Stephen Pierce Inc (SPI) wasn't a part of that transaction. Their explanation indicates SPI was not a party, but their contract was with Empowernet. They need to seek restitution from Empowernet. Stephen Pierce did not get paid by Empowernet but in*

good faith Stephen worked with his client anyway to attempt to get them started".

36. In the application lodged on 25 July 2011, it appeared that the substance of the applicant's complaint was Mr Pierce and his staff did not spend enough time with Ms Bethel, that any work and services performed by Mr Pierce and his team in respect of the PCL fell well short of what Ms Bethel had been promised and that without any value for the product she had purchased in March 2008, there was a total failure of consideration which entitles her to a full refund of the $20,000 paid in March/April 2008.

37. However, further to that complaint, it would appear the applicant also contends that the respondent breached the contract because the respondent did not pay SPI but Mr Pierce worked with her anyway in good faith. The evidence of Mr Warrand refers to a transfer of funds to Impulsive Profits Inc., *not* Mr Pierce or SPI. In his Supplementary Submissions dated 30 March 2013, Mr Donnelly of counsel argues (at paragraph 37) that there is no evidence Impulsive Profits Inc. was a bank account linked to SPI.

38. Alternatively (see Supplementary Submissions of Mr Donnelly, paragraph 38.6), it is submitted that if the Tribunal finds the respondent was an agent for Mr Pierce and/or SPI, then nonetheless it must find the circumstances of the case warrant that the respondent is personally liable under the contract.

Respondent's case

39. The respondent submits the findings of fact and law for which the applicant contends are not supported by the evidence and having failed to discharge her onus of proof (i.e. on the balance of probabilities) the applicant's claim must be dismissed. The respondent's principal submission is that it was not a party to any contract with the applicant and that at all material times, it acted as agent for a disclosed principal, Mr Pierce and/or SPI.

40. It is further submitted that the conduct of the parties following UYMG Sydney 2008 is consistent with the principal submission in that the applicant did not notify the respondent of any alleged breach of contract, the applicant did not demand the respondent remedy any alleged defective performance of the contract and the applicant brought this application against the respondent only after recourse against Mr Pierce and SPI via the Texan regulator, the BBB, had proved ineffective, apparently because Mr Pierce had denied liability on the basis the contract was between the applicant and the respondent.

41. As regards the Order Form, the respondent says that it was completed, under direction from the applicant, and then signed by Phoebe Chin, the Sales Director of SPI, on behalf of Mr Pierce. In respect of the email

of 8 April 2008 from Empowernet which listed the 15 items as bullet points, the respondent submits that the email is not a document forming part of the contract as the contract was made on 16 March 2008 (when the Order Form was completed), and that in any event, the said email is unequivocal evidence the applicant purchased a product called 'Product Creation Laboratory' being a three day one-on-one product development and internet marketing experience with Mr Pierce (and his wife, Alicia) at Mr Pierce's home in Texas USA. Before it lists the 15 items to be supplied *during* the three day Product Creation Laboratory, the email states:

"You'll soon be jetting off to the US to spend three days with Stephen and Alicia at their home in Whitney, Texas, ***where you'll****: ..."*

(emphasis added)

42. The respondent points to the sworn oral evidence of Ms Bethel on 18 March 2013 when she said:

"If I had known the quality of service I would have received **when I attended (Mr Pierce's) residence** I would never have gone to be honest. It is something that could have been done from Australia."

(emphasis added)

In the premises, the respondent submits there is no evidence to support an assertion that the respondent 'promised' the development of a product which could be marketed and sold as a commercial product and that there is no evidence the applicant was promised further product development after she returned home from Texas.

43. Further, the respondent contends that by reason of the facts matters and circumstances of the UYMG Sydney 2008 event the applicant was aware, or at least ought to have been aware, that the rights and obligations arising under the contract for purchase of the PCL were between the applicant, on the one hand, and Mr Pierce and his company, SPI, on the other hand.

44. As regards the parties' conduct, but particularly in regard to the applicant's complaint to the BBB on 21 April 2011, the respondent relies on an estoppel. The contention is the applicant is precluded now from claiming that she purchased the PCL from the respondent and not Mr Pierce and/or SPI. This is because the tenor of her complaint (see Complaint Activity Report, which is annexure N to Ms Bethel's statement dated 14 January 2013) was that the party responsible for promising and then not delivering on a contract for services, was Mr Pierce and his company, SPI. The Complaint states:

"On 16th March 2008 I was at a seminar in Australia run by Empowernet International in which Stephen Pierce was presenting at.

He did a Pitch for a Product (he called Product Creation Lab) in which he would hold our hand to create and launch a product. *I subsequently paid $20,000 by direct deposit to Empowernet International plus travel expenses to Texas where I attended his home from 18 - 20th April 2008 to have Stephen Pierce help me develop a product that would be launched to 300,000 subscribers plus 5,000 affiliates to help sell the product ... I have lost faith in Stephen Pierce and his teams (sic) ability to meet their obligations on this contract and respectfully request a refund"*.

45. As to payments made to Mr Pierce and SPI, Mr Warrand gave evidence, on behalf of the respondent, to this effect: the funds ($20,000) for purchase of the PCL were received in two instalments, a deposit of $5,000 at the UYMG Sydney 2008 event and the balance ($15,000) on 8 April 2008 from the applicant, 25% of the funds were retained by Empowernet as an agency fee, and the balance was remitted to Impulsive Profits Inc. (a company associated with SPI) by an offshore telegraphic transfer via ANZ Bank on 11 April 2008: see paragraphs 21 – 28 of the Statutory Declaration of Mr Warrand made on 8 March 2013. The respondent submits that it makes no sense at all to characterise the funds paid by the respondent to Mr Pierce as a subcontractor's fee since the respondent transmitted the funds to Mr Pierce before the applicant travelled to Texas and therefore, *before any performance of the contract*. Further, the respondent submits that it goes against all commercial common sense for an applicant who believed she had a contract with the respondent and that the respondent had a subcontract with Mr Pierce, to take action (the BBB complaint) against a subcontractor before any action against the alleged head contractor.

46. The respondent says the applicant's submission about payment to another entity, Impulsive Profits Inc., and not Mr Pierce or SPI, is disingenuous. This is because there is evidence that Impulsive Profits Inc. is a corporation linked to Mr Pierce: see, for example, annexure D to Ms Bethel's Statement dated 14 January 2013, where, in an email of 21 March 2008 from Alicia Pierce to Ms Bethel, Mrs Pierce signs off as the project manager of Impulsive Profits Inc. The respondent further points out that the applicant's submission is completely inconsistent with the tenor of Ms Bethel's application lodged 25 July 2011, and also elsewhere in her statement at paragraph 27, which assert that the respondent, whether by itself or its representative, Mr Pierce, only partially performed the contract in Texas and failed to deliver on most of the promises during the three (3) day workshop.

47. On 30 July 2010, Mr Warrand became a director of the respondent, then known as Indopac Holdings Limited. Prior to receipt of the applicant's application in June 2011, the respondent received no notification of complaints or requests for refund from Ms Bethel in respect of her purchase of the PCL. Any attempts, including attempts to contact a different company (Superwoman), which Ms Bethel may have

made on or shortly before she lodged her application with the Tribunal in July 2011, are of no moment, in the respondent's submission. The principal thrust of the respondent's submission is that the relevant time to have demanded that the respondent (if Ms Bethel, in fact, thought the respondent was the party with whom she had contracted and that it was the respondent which must remedy any alleged defective performance of the contract), was during 2008, and not as late as mid 2011 after a complaint to the BBB against SPI and Mr Pierce had proved ineffective.

48. Regardless of how the Tribunal determines the issue of whether the respondent was a party to the contract, the respondent further submits that the evidence of the applicant (who, of course, bears the onus, on the balance of probabilities) does not establish that there was a total, or even partial, failure of consideration. In particular, it is submitted there is no basis for any allegation of total failure of consideration because the evidence establishes that the applicant stayed at Mr Pierce's home for 3 days and was provided with meals etc., spent time (irrespective of how much time) with Mr Pierce developing the product 'Strata Keys: Seven Keys to Success', received recordings of product content and was taught by Stephen and Alicia Pierce about internet marketing.

Issues for Determination

49. The parties have adduced evidence and made submissions principally on the basis that this is a case of damages for breach of contract, with a preliminary issue involving whether the respondent is a party to the contract or has personal liability to the applicant. Given the evidence before it on this application, but particularly the evidence of Mr Warrand of the respondent, which the Tribunal accepts, as regards the respondent's payment to SPI in April 2008 of funds received from the applicant, the Tribunal finds that there is no case against the respondent based on some tortious or other liability under general law negligence or under the *Trade Practices* Act 1974 (Cwth) or the *Fair Trading* Act 1987 NSW.

50. Therefore, having regard to the evidence in the parties' respective cases, these are the issues for determination by the Tribunal:
    - The proper parties to the contract for purchase of the PCL product, including consideration of whether the respondent was agent for a disclosed principal;

    - If the respondent was an agent, whether, nevertheless, in the particular circumstances of the case and in the events which occurred, the respondent assumed personal liability under the contract;

    - Whether in the particular circumstances of the case, there was any breach, or breaches, of contract;

- Whether any breach, or breaches, of contract amounted to a total, or partial, failure of consideration and if so, the amount of the damages.

51. The doctrine of privity of contract means a person cannot enforce rights under a contract to which he, she or it is not a party, a person who is not a party to a contract cannot have contractual liabilities imposed on it, and contractual remedies are designed to compensate parties to the contract, not third parties: *Trident General Insurance v McNiece Bros Pty Ltd (1988) 165 CLR 107*.

52. If an agent enters into a contract on behalf of a disclosed principal, only the principal can sue or be sued on the contract. The principal is the true party to the contract, the agent having acted merely as an instrument on behalf of the principal. This is because agency is a relationship between two legal entities in which one, the principal, gives authority to the other, the agent, to act on behalf of the principal so as to affect the principal's rights and duties towards one another: *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldere Pastoral* (1958) 100 CLR 644.

53. There is authority for the proposition that a party who is characterised to have been a mere *"introducer of business, even if characterised as an agent"*, is not necessarily treated by law as an agent: *NMFM Property Pty Ltd v Citibank Ltd (2000) 107 FCR 270; [2000] FCA 1558 at [1021] – [1023]*. Whether agency is constituted in a particular case depends not on the terminology adopted by the parties, but on the true nature of the agreement and the circumstances of the relationship between the principal and the agent. Accordingly, the question of whether a party is acting as an agent for a disclosed principal is decided by reference to the intention of the parties (objectively determined), and by construing the terms of the particular contract as a whole and in their context with regard to the surrounding circumstances including post - contractual conduct: see, for example, *White v Holloway [2003] NSWCTTT 680 (7 October 2003),* particularly at [38].

54. If, however, the agent does not disclose a principal is being acted for, the principal may later disclose the agent's authority and both the agent and the principal can then be sued on the contract.

55. Generally, when an agent makes a contract on behalf of a principal, the agent is not liable to the third party provided that the agent contracted as an agent and the third party knew that he or she was contracting with an agent. The contract formed is that of the principal and the third party, and the principal is the only person who can sue or be sued on the contract.

56. However, rights and obligations may arise between the agent and a third party where it can be established that the agent was contracting personally. This is a question of intention, objectively assessed, taking

into account all relevant circumstances. As Brandon J observed in *Bridges & Salmon Ltd v The Swan [1968] 1 Lloyd's Rep 5 (at 12)*:

"The intention for which the court looks is an objective intention of both parties; based on what two reasonable businessmen making a contract of that nature, in those terms and in those surrounding circumstances must be taken to have intended".

Where the agent is regarded as having contracted personally, there appear to be two possibilities – either the agent is liable instead of the principal or the agent is liable in addition to the principal. For example in *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd [1968] 2 QB 53*, Donaldson J, at first instance, said there were three possible interpretations of the contract: either the principal alone was liable, or the agent alone was liable, or both principal and agent were liable. In the case of an undisclosed principal both agent and principal are liable, but in cases where the principal is disclosed a court is likely to accept that the agent's liability is additional to that of the principal and the third party must elect which party to sue.

57. The English Court of Appeal in *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 rejected the existence of a separate rule or presumption of an agent contracting personally where there is a foreign principal. It is a question of interpretation of the contract generally to see if it was intended that the agent contracted personally; see also *Cheong v Lohmann* [1907] VLR 571 where it was accepted that an agent for a foreign shipping line had no intention of undertaking personal liability to the passenger concerned.

58. While it is the case that the Order Form bears the name and details of Empowernet, such circumstance is not *per se* determinative of the Empowernet being a party to any contract with the applicant. The Tribunal finds that the Order Form was a standard form document and was not for products 'offered' by the respondent but for products offered by the eight (8) speakers, including Mr Pierce, at the UYMG Sydney 2008 event. In the case of seven of those speakers the product the subject of the Order Form was specified in type. In the case of the speaker, Mr Pierce, the proposed product was not specified but was left to be inserted (in the case of Ms Bethel, the words 'Product Creation' were inserted).

59. Moreover, the Tribunal is satisfied on the evidence (see, for example, the email of 25 March 2008, which is annexure G to Mr Warrand's Statutory Declaration, see also annexures H and P to Mr Warrand's Statutory Declaration) that the Order Form was signed by Phoebe Chin on behalf of Mr Pierce and/or SPI. Ms Chin was, at all material times, the Sales Director of SPI and not an employee of the respondent.

60. The applicant's counsel argues that the circumstance of Ms Bethel taking her complaint to the BBB against Mr Pierce should not, in itself,

preclude the applicant's case. Such submission is correct. The Tribunal must, of course, determine whether the respondent is independently and contractually liable to the applicant by reference to all relevant facts matters and circumstances. Nevertheless, in the Tribunal's opinion, the circumstance of the applicant making her complaint to the BBB in April 2011 is a material fact and matter, but particularly when it is put in the context of the respondent not receiving any demand from the applicant to remedy an alleged defective performance of the contract. The Tribunal is satisfied the applicant made admissions to the BBB in or about April 2011 to the effect that SPI, *not* Empowernet, was the party involved in the contract and that the role of Empowernet was to 'run' the seminar. The Tribunal finds that such admissions by Ms Bethel to the BBB were, and are, accurate statements of fact. In the BBB complaint, the applicant did not claim that the respondent was also a party to the contract nor did the applicant assert, as the applicant now asserts, that the respondent subcontracted Mr Pierce or SPI to perform the contract. In answer to the respondent's case, Ms Bethel, apparently, relies on her sworn oral evidence to the Tribunal on 18 March 2013; in particular, her statements of evidence such as: *"When I made a complaint to the BBB in the United States, I still believed I had a contract with Empowernet"*. The Tribunal finds such statements are self-serving and cannot be relied upon as a credible account of the circumstances.

61. The Tribunal finds that at all material times the respondent was agent for a disclosed principal. Additionally, the Tribunal is satisfied on the available evidence that Ms Bethel knew, or at the very least she ought to have known, her contract in respect of the PCL was with Mr Pierce and/or SPI. Further, other than its role as event organiser and arranging for SPI to receive the purchase money for the PCL (less the respondent's commission), the Tribunal finds that the respondent undertook no personal liability to the applicant.

62. The applicant's submission that there was clearly no intention to create an agency relationship between the respondent and SPI is untenable. The findings of the Tribunal as set out in these Reasons are supported by evidence of these facts matters and circumstances:

    (i) The respondent carried on the business of event promotion;

    (ii) The respondent was Mr Pierce's Australian promotional agent;

    (iii) The respondent was not present at the time the contract was formed (i.e. when the Order Form was signed) which occurred in a separate conference following the speakers' seminar;

    (iv) Mr Pierce made the pre-contractual representations to the applicant in order to induce her to enter into the contract to purchase the PCL;

(v) The form and content of the Order Form, as referred to earlier in these reasons, is consistent with a contract between the applicant and Mr Pierce or SPI;

(vi) The contract was signed by Phoebe Chin, the Sales Director of SPI, on behalf of Mr Pierce;

(vii) Mr Pierce made an offer accepted by the applicant to perform the contract in consideration for the contract price;

(viii) The name of the product purchased (i.e. 'Product Creation Laboratory') and its nature (a 3 day laboratory in Texas to create a product which the applicant could commercialise for profit) are indicative that the contract was with Mr Pierce and SPI not the respondent;

(ix) The respondent conducted itself as an agent and made this position clear to the applicant;

(x) The respondent received commission or payment consistent with agency;

(xi) The applicant's own evidence (the BBB complaint records) which assert that the respondent was merely the event's organiser and not a party to the contract;

(xii) Following the transfer of payment to SPI, the applicant had no further contact with the respondent with regard to the PCL product and performance of the contract;

(xiii) The respondent took no part in the performance of the contract which was entirely undertaken by Mr Pierce and SPI;

(xiv) Mr Pierce and the applicant were to become joint venture partners to develop and market a product for sale to Mr Pierce's client base;

(xv) In the determination of the Tribunal on 13 February 2012, the applicant's cause of action did not accrue for the purposes of *subsection 7(4)(a)* of the *Consumer Claims* Act until on and after April 2011 when the applicant (having for three years communicated with SPI and having sought part performance of the contract) formed the view that there would be no performance of the contract and that she required a refund of the purchase price of the PCL.

63. As a matter of law, privity of contract applies so that the respondent cannot be held liable for any breach of contract by Mr Pierce and/or SPI. Having regard to the law of agency, the respondent as agent for a disclosed principal cannot be held responsible for any breach of

contract by its principal. Nor can the Tribunal be satisfied that the applicant has made out a case, on the balance of probabilities, that the respondent was nevertheless personally liable under the applicant's contract with Mr Pierce and SPI.

64. However, even if the issues of whether the respondent was a party to the contract or was personally liable, had been decided differently; the Tribunal finds that there is no cogent evidence that the respondent, Mr Pierce or SPI breached the contract. Irrespective of her disappointment with the level of service she received from Mr Pierce and his team and as to the amount of time they spent with her during the three (3) day workshop in April 2008 and in the following three years, the Tribunal finds the applicant's statements of evidence at the hearing in and to the effect that she received nothing at all, very unconvincing. Further, the Tribunal observes that Ms Bethel provided no independent evidence that her product 'Strata Keys: Seven Keys to Success' was incapable of being marketed or sold.

65. To support a finding of law that there was a total, or even partial, failure of consideration on the contract, there would have to be evidence to persuade the Tribunal, on the balance of probabilities, that, objectively, the applicant received no value, or a reduced value, for the services performed under the contract. The Tribunal accepts the respondent's submissions, as outlined above, that the applicant has failed to do so. Moreover, the Tribunal places weight upon the applicant's evidence that Mr Pierce would have been entitled to 50% of the profits from product sales. The Tribunal infers from such evidence that the prospect of entering into a partnership or joint venture with Mr Pierce, who was known to Ms Bethel as a wealthy and very successful internet marketer, to develop and market a product for profit, was a material matter which influenced her decision to purchase the PCL in March 2008. The Tribunal also infers that the applicant must have remained hopeful of realising a profit from the joint venture for more than 3 years after she attended Mr Pierce's home, for there is no other credible explanation for her failure to make any formal complaint about performance of the contract until April 2011. In the circumstances the Tribunal is entitled to draw the inference that Ms Bethel did receive something of value from the three (3) day workshop in April 2008.

Conclusion

66. The Tribunal is required to consider, objectively, all of the evidence in order to make findings of fact and then apply the law, including relevant legislation such as the *Consumer Claims* Act (see, in particular, *section 13*) to those facts. Ultimately the Tribunal concludes as a matter of law that the respondent was not a party to the contract arising out of the UYMG Sydney 2008 event. Further, in the absence of credible evidence to establish relevant breaches of contract such as would support findings of a total, or even partial, failure of consideration, it is

neither fair nor equitable that the respondent be held liable for the amount now claimed by the applicant.

67. For the foregoing reasons the refund of money sought by the applicant must be refused and the application for orders of the Tribunal is dismissed.

D G Charles
Member
Consumer, Trader & Tenancy Tribunal

1 July 2013