



## Précis Paper

### Civil Litigation: Proceeding in the Absence of a Party

An important discussion for practitioners about procedural fairness considerations when a Tribunal or Court proceeds in the absence of a party.

#### **Discussion Includes**

- Background and material facts
- Supreme Court decision
- Court of Appeal decision
- Procedural fairness arguments
- A party's obligations to appear absent notification

## Précis Paper

### Civil Litigation: Proceeding in the Absence of a Party

1. In this edition of BenchTV, Stephen Stanton (Barrister, Seven Windeyer Chambers, Sydney) and Michael Holmes (Consulting Principal, Nexus Law Group, Sydney) discuss the recent decision of the NSW Court of Appeal in *Souleles v Todd* [2016] NSWCA 91.

#### Background and Material Facts

2. On 14 December 2012, Georgina Todd made an application to the Home Building Division of the Consumer Trader and Tenancy Tribunal ("CTTT", now NCAT) seeking costs against Mr Souleles to rectify and complete works in the amount of \$54,229.44 plus the loss of rent claimed at \$700 per week totalling \$55,224.73. This application nominated two addresses for service of Mr Souleles, the first c/- Legal Grounds Café and an email address. Mr Todd, Ms Todd's father, served Mr Souleles with the application together with the notice of directions hearing that was to occur on 8 February 2014. Mr Souleles was served at the Legal Grounds Café, which is owned by Mr Souleles' brother-in-law.
3. Both Ms Todd and Mr Souleles appeared before the CTTT at a first directions hearing on 8 February 2013. A number of directions hearings were held after this date, and some notices were sent to the café address and some to the email address.
4. On 14 June 2013, the CTTT issued a notice of hearing, advising that a hearing had been listed for August. This was posted to the café address. On 7 August 2013, Ms Todd appeared but there was no appearance by Mr Souleles. The Tribunal was satisfied that the notice had been sent to Mr Souleles, and accordingly, it proceeded in his absence. The result of the hearing was that Mr Souleles was ordered to pay approximately \$60,000. This was registered as a judgment, which Ms Todd sought to enforce.
5. It was not until June 2014, when Mr Souleles was served with a creditor's petition in relation to bankruptcy proceedings in the Federal Court, that Mr Souleles claims he first became aware of the proceeding. After an application for review was rejected in NCAT, Mr Souleles filed a summons in the Supreme Court seeking review of the decision of the CTTT.

#### Supreme Court Decision

6. In the Supreme Court, Mr Souleles submitted that on 7 June 2013, when the matter was listed for hearing and Mr Souleles did not appear, the Tribunal Member should have made further enquiries as to whether Mr Souleles had been advised of the hearing date by

checking the CTTT file or requesting Ms Todd's solicitor or the registry staff to telephone Mr Souleles.

7. The Court dismissed the application for review, finding that Mr Souleles was aware that the application and notice of the first directions hearing recorded an address, namely the café address, that was not in fact his residential address. Despite his evidence to the contrary (that was not accepted by the Court), he took no steps to advise the CTTT of his actual residential address. The CTTT complied with its obligation to post the notice of hearing to the café address. The Tribunal Member therefore acted in accordance with his statutory duties and he has afforded procedural fairness.

#### The Court of Appeal Decision

8. Mr Souleles sought leave to appeal to the Court of Appeal. As the amount involved was less than \$100,000, leave was required.
9. The Court of Appeal was reticent to interfere with the factual findings at first instance and upheld the findings of fact of Harrison AsJ, namely that the applicant's evidence about giving his residential address to the officer at the CTTT was a "recent invention".
10. In relation to the natural justice argument, the applicant submission was based on the proper construction and operation of cl 30 of the *Consumer, Trader and Tenancy Tribunal Regulation 2009* (NSW), which required the Tribunal to be satisfied that notice of the hearing was duly served, and that that justice required that the matter be dealt with in the absence of the party concerned. Mr Souleles contended that cl 30 requires the decision-maker to take positive steps to ensure that the party is notified and to make enquiries to ascertain whether it is appropriate to proceed in the party's absence: see *Blue Haven Pools & Spas Ltd v Cunningham* [2011] NSWSC 1435.
11. The Court of Appeal did not agree that there is a positive obligation on the Tribunal to make factual enquiries of the kind or extent that appeared to be indicated in *Blue Haven*. The applicant did not establish any arguable basis for contending Harrison AsJ erred in law in finding that the Tribunal Member had acted in accordance with her statutory duties and had afforded procedural fairness.
12. In addition to the matters upon which the primary judge relied, and in considering the prospects of success on appeal, the Court of Appeal noted that the Tribunal Member also relied on the fact the applicant had failed to file any evidence, thus indicating his non-participation in the hearing. The applicant was before the Tribunal when the directions concerning the filing of evidence were made.

13. The presenters noted that significance of this decision was that the Court of Appeal imposed an obligation on parties involved in litigation to keep abreast of developments in the litigation, even in circumstances where they receive no notification from the Court or Tribunal. The onus is not on the decision-maker, but on the party itself to ensure that they are informed of the proceedings. Moreover, in a case in which a party is placed on notice of proceedings, it will be difficult to establish that they are not aware of a hearing and therefore that procedural fairness was not accorded.

## **BIOGRAPHY**

### Stephen Stanton

Barrister, Seven Windeyer Chambers, Sydney

Stephen Stanton is a highly experienced barrister with over 35 years experience within the legal industry. He was admitted as a barrister in 1979 and currently maintains a wide range of practice areas, from alternative dispute resolution, constitutional law, equity, industrial and employment Law to professional negligence. He has been admitted to the Kingdom of Tonga and Fiji for matters concerning overseas jurisdictions.

### Michael Holmes

Consulting Principal, Nexus Law Group, Sydney

Michael is a highly experienced commercial lawyer, having spent 8 years in private practice and 10 years as a barrister. Michael is experienced in all aspects of commercial work including drafting/reviewing agreements, providing advice and dispute resolution. He has appeared in in all major jurisdictions including the Federal Court, Supreme Court (including Court of Appeal), District Court, Local Court, tribunals (NCAT) and commissions of inquiry (eg. ICAC).

## **BIBLIOGRAPHY**

### Focus Case

*Souleles v Todd* [2016] NSWCA 91

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/construction/benchmark\\_10-05-2016\\_construction.pdf](https://benchmarkinc.com.au/benchmark/construction/benchmark_10-05-2016_construction.pdf)

### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/57229f0ee4b05f2c4f04d7ca>

### Cases

*Blue Haven Pools & Spas Ltd v Cunningham* [2011] NSWSC 1435

### Legislation

*Consumer, Trader and Tenancy Tribunal Regulation 2009* (NSW)