

**Bliss v Roll Holdings Pty Ltd t/as Advanced Hair Studio of
Parramatta (General) [2004] NSWCTTT 269 (19 May 2004)**

**CONSUMER, TRADER & TENANCY TRIBUNAL
General Division**

APPLICATION NO:	GEN 04/00634
APPLICANT:	C B Bliss
RESPONDENT:	Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta
APPEARANCES:	C B Bliss appeared in person. E Zieger, Assistant Manager, represented Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta.
HEARINGS:	Preliminary hearing: 5 February 2004 at Parramatta, before Member McDonell. Substantive hearing: 26 March 2004 at Parramatta, before Member Tearle.
LEGISLATION:	<i>Consumer, Trader and Tenancy Tribunal Act 2001, Consumer Claims Act 1998.</i>
ISSUES:	Claim arising under contract – terms of contract – interpretation – whether breach occurred.
KEYWORDS:	Claim arising under contract – terms of contract – interpretation – whether breach occurred.

ORDER

The Tribunal orders the Respondent, Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta, to pay the Applicant, C B Bliss, six thousand eight hundred dollars (\$6,800.00) on or before 4 June 2004.

REASONS FOR DECISION

BACKGROUND TO THESE PROCEEDINGS

The Applicant, C B Bliss, entered into a contract with the Respondent, Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta. The contract relates to treatments for hair regrowth and replacement. The Applicant contends that the Respondent guaranteed him a full head of hair after participating in the Respondent's Advanced Laser Therapy Program and Hair Replacement Program. The Applicant paid the Respondent \$7,150.00 for these treatments, as well as further sums for products associated with the Respondent's services. Mr Bliss claims that, despite participating in these treatments, he does not have a full head of hair.

The Respondent to these proceedings denies liability entirely. It relies on a term of its contract with the Applicant, in which the Applicant acknowledged that some users of the Respondent's Advanced Laser Therapy will not experience hair regrowth, or will experience minimal hair regrowth only.

In November 2003, Mr Bliss commenced proceedings in this Tribunal seeking an order that the Respondent pay him \$7,200.00. Mr Bliss' application originally came before the Tribunal as matter GEN 03/48097. Following a hearing before the Tribunal on 4 December 2003, the Tribunal ordered the Respondent to pay the Applicant \$7,200.00.

Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta successfully applied for a rehearing of that earlier decision. This is the decision following the rehearing of that earlier decision. During the current proceedings, the Tribunal heard the evidence and submissions of both parties.

CONDUCT OF THESE PROCEEDINGS

The substantive hearing took place in Parramatta on 26 March 2004. The hearing began at 2.15 pm. It soon became evident that hearing would require rather longer than the one hour allocated to it.

It emerged that the Applicant was to leave Sydney in early April to join the Navy. Rather than put the Applicant and the Respondent to the inconvenience of returning to Parramatta at some later date for an adjourned hearing, the presiding Member extended the hearing time, and the proceedings continued, with one break, until 5.50 pm. The

presiding Member then reserved the Tribunal's decision.

APPLICANT'S SUBMISSIONS

The Applicant, C B Bliss, is a young man. He was 20 years old when he first heard of the Respondent from television advertising. It appears that Mr Bliss had, at the time, less hair on his head than he would have preferred. He took particular notice of the Respondent's television advertising. According to the Applicant, the advertising showed balding men who, after receiving the Respondent's treatment, were shown (in Mr Bliss' words) "playing sport, with beautiful women, having fun". Mr Bliss seems to have been persuaded that the prospect of men "playing sport, with beautiful women, having fun" is in some way associated with having a full head of hair.

On 20 February 2002, Mr Bliss entered an agreement with Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta, under which he was to receive the Respondent's Advanced Laser Therapy Program. Mr Bliss testified that he had hoped that this would grow his hair back, but this did not work. He then agreed to participate in the Respondent's "upgrade" program, known as its Hair Replacement Program.

Under the 20 February 2002 contract, the Applicant was to receive a consultation, a particular prescription medication, and laser treatment of his scalp. Among other things, the Respondent was to provide the Applicant with a 6 month course of 18 laser treatments of his scalp.

The contract contains the following term in its printed text:

In signing this Contract, the Customer acknowledges that he has been informed that:

- a) Some users of Advanced Laser Therapy will not experience hair regrowth, or will experience minimal hair regrowth only.*
- b) Both [the medication] and laser treatment of the scalp have effect only while treatment is maintained.*
- c) . . .*

However, the following additional term has been hand-written into the contract at the foot of the page:

If at the end of the program if [sic] Chris isn't satisfied with his results, than [sic] an upgrade program into full hair replacement is optional, at a further \$2,200. Guaranteed full head of hair.

According to Mr Bliss, the Respondent's Assistant Manager, Mr Zieger, added that extra clause to the contract. The Applicant also told the Tribunal that Mr Zieger had assured him that Mr Bliss would get good hair growth from the Respondent's treatments.

When the first treatment did not produce the results that Mr Bliss had hoped for, he paid the Respondent \$2,200.00 for its Hair Replacement Program. During this treatment, he received what the parties to these proceedings referred to as a "hair unit". The term "hair unit" apparently means a wig. Mr Bliss testified that, after two weeks, the wig became loose, did not sit properly on his head, and hair began falling out, leaving a bald patch. Mr Bliss also testified that this was a source of embarrassment to him, and he experienced some teasing from friends and colleagues. The Applicant produced photographic evidence of a bald patch still visible while he was wearing his wig.

According to Mr Bliss, the wig was also itchy and the wrong colour. Although the Respondent did try to fix the colour, Mr Bliss complained that the wig was left with a red tinge. This was not entirely appropriate, because Mr Bliss has dark hair.

Mr Bliss testified that he did all that was required of him under his contract with the Respondent.

The Applicant's sister, Robyn Lowe, appeared as a witness in these proceedings. Ms Lowe testified that the Respondent's treatment made little difference to the hair on the Applicant's head. Ms Lowe also told the Tribunal that the wig was quite obvious, and was the wrong colour.

RESPONDENT'S SUBMISSIONS

The Respondent denies liability entirely. It relies on a term of its contract with the Applicant, in which the Applicant acknowledged that some users of the Respondent's Advanced Laser Therapy will not experience hair regrowth, or will experience minimal hair regrowth only.

The Respondent claims that the Applicant did receive some benefit from its treatments, and relied on photographs to show this. The Respondent also asserted that Mr Bliss did not attend some follow-up appointments.

The contract between the Applicant and the Respondent for the Hair Replacement Program contains an acknowledgment that Mr Bliss understands that it is necessary to return to a studio associated with the Respondent for a maintenance program. However, Mr Zieger told the Tribunal that the Respondent charges its customers for attending these follow-up sessions.

FINDINGS AND REASONS

The Tribunal has carefully considered the evidence presented by the parties, including photographs, a video, and the written material presented to the Tribunal.

At the heart of these proceedings are these questions:

what were the obligations that the Respondent undertook under the terms of its contract with the Applicant?

did the Respondent perform those obligations?

may the Respondent rely on the term of the contract in which the Applicant acknowledged that some users of the Respondent's Advanced Laser Therapy will not experience hair regrowth, or will experience minimal hair regrowth only?

What were the obligations that the Respondent undertook under the terms of its contract with the Applicant?

The first task for the Tribunal is to determine what were the Respondent's obligations under its contract with the Applicant. The Respondent relies heavily on the printed (as against hand-written) terms of the document signed by the parties on 20 February 2002.

That document is somewhat curious in its effect. On one view, the Respondent promised to provide services (a consultation, some medication and 18 laser treatments). The customer, Mr Bliss, acknowledged, in effect, that those services might not work. Specifically, the printed form required Mr Bliss to acknowledge that some users of the Respondent's Advanced Laser Therapy will not experience hair regrowth, or will experience minimal hair regrowth only.

The Tribunal finds that, properly interpreted, the contract required the Respondent to provide Mr Bliss with a full head of hair, as long as:

Mr Bliss undertook the Respondent's Advanced Laser Therapy Program; and

Mr Bliss was not satisfied with the results of that first program; and

Mr Bliss paid the Respondent a further \$2,200.00; and

Mr Bliss undertook what the Respondent described as its "upgrade program into full hair replacement".

The Tribunal has reached this conclusion after considering the uncontested evidence that the Respondent's representative, Mr Zieger, wrote an additional term into the contract. The parties specifically added to the printed terms of their contract. The Tribunal will give effect to the agreement evidenced by the added text. The hand-written terms, containing both an agreement as to price and the guarantee, had the effect of bringing two stages of the Respondent's services (the Advanced Laser Therapy Program and the Hair Replacement Program) within the one contractual arrangement.

In short, the Tribunal finds that it was an express term of the contract that the Applicant would receive a full head of hair if the above conditions were satisfied.

Did the Respondent fulfil the terms of its contract with the Applicant?

On the evidence before the Tribunal, the Tribunal finds that the Respondent did not fulfil the terms of its contract with the Applicant.

The Tribunal finds, on the balance of probabilities, that:

- the Applicant fulfilled his own obligations under the contract; and
- the Applicant met the conditions required to call into operation the guarantee that the Tribunal has found to be an express term of the contract; but
- the Respondent did not provide the Applicant with a full head of hair.

Accordingly, the Tribunal finds that Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta broke its contract with Mr Bliss.

May the Respondent rely on the term of the contract in which the Applicant acknowledged that some users of the Respondent's Advanced Laser Therapy will not experience hair regrowth, or will experience minimal hair regrowth only?

The Respondent seeks to rely on the term of the contract in which the Applicant acknowledged that some users of the Respondent's Advanced Laser Therapy will not experience hair regrowth, or will experience minimal hair regrowth only.

Giving evidence before the Tribunal, Mr Zieger conceded on behalf of the Respondent that the Respondent did not tell the Applicant how many people would experience minimal hair regrowth. The Respondent did not tell Mr Bliss how many people would not experience hair regrowth at all.

The contract is silent as to whether customers of Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta may receive a refund if they experience no hair regrowth, or only minimal hair regrowth.

The Tribunal does not need to consider what the effect of this particular term, if it stood alone, might be. The Tribunal finds that the express term of the contract guaranteeing Mr Bliss a full head of hair has precedence over the term on which the Respondent relies.

Accordingly, the Respondent may not rely on this term of the contract to avoid liability to Mr Bliss for breach of contract.

The appropriate order

The Respondent broke its contract with the Applicant by not providing the full head of hair it had guaranteed to provide. This breach entitles the Applicant to a remedy.

Section 13 of the *Consumer Claims Act* 1998 requires this Tribunal to make such orders as, in its opinion, will be fair and equitable to all of the parties to the claim.

Although many of the factors set out in section 13(2) of the *Consumer Claims Act* 1998 might be relevant to its decision in this matter, it is to section 13(2)(d) that the Tribunal looks first for particular guidance. This, in turn, involves considering whether or not, and when, independent legal or other expert advice was obtained by the Applicant. The evidence before the Tribunal shows that the Applicant did not obtain any independent legal or other expert advice (such as medical advice) before entering into the contract with the Respondent.

The Tribunal also finds that nobody explained to the Applicant the provisions of the contract and their legal effect. This, too, is a relevant factor under section 13(2)(g)(v) of the *Consumer Claims Act* 1998.

The Tribunal records that it was very clear, from Applicant's testimony, that the Respondent's television advertising influenced him considerably in his decision to purchase the services offered by the Respondent. As noted earlier in this decision, Mr Bliss seems to have been persuaded that the prospect of men "playing sport, with beautiful women, having fun" is in some way associated with having a full head of hair. It is irrelevant whether Mr Bliss acted wisely or otherwise in allowing himself to be influenced by such advertising.

The Tribunal accepts that Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta will have incurred some expense in its failed attempt to perform its contract with Mr Bliss. The Respondent has indicated that its expenses included the manufacture of medication, staff wages, freight and certain administrative costs. The Respondent did not produce evidence quantifying these costs.

The Tribunal does not find it necessary to establish the exact costs that the Respondent incurred. The Respondent broke its contract with the Applicant. It is not entitled to a payment from the Applicant that would meet all of the Respondent's costs. Nevertheless, the Tribunal accepts that the Respondent is entitled to some contribution towards some of its costs, despite its failure to perform its contract with Mr Bliss.

After considering all of the circumstances identified in the evidence and submissions on behalf of each party, the Tribunal finds that:

- a fair and equitable contribution towards some of the costs incurred by Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta is \$350.00; and
- a fair and equitable order in the circumstances of these proceedings is one requiring the Respondent to refund \$6,800.00 to the Applicant.

The Tribunal will order accordingly.

NO SETTLEMENT

Before making an order, the Tribunal must use its best endeavours to bring the parties to the proceedings to a settlement acceptable to all of them [*Consumer, Trader and Tenancy Tribunal Act 2001*, section 54(1)].

The Tribunal records that it attempted to do so at the substantive hearing. The parties were unable to reach settlement.

ORDER

The Tribunal orders the Respondent, Roll Holdings Pty Ltd t/as Advanced Hair Studio of Parramatta, to pay the Applicant, C B Bliss, six thousand eight hundred dollars (\$6,800.00) on or before 4 June 2004.

W J Tearle
Member
Consumer Trader and Tenancy Tribunal

19 May 2004