

CITATION: *McDonald v Kenmore Podiatry Pty Ltd* [2012] QCAT 126

PARTIES: Ms Karen McDonald
(Applicant/Appellant)
v
Kenmore Podiatry Pty Ltd
(Respondent)

APPLICATION NUMBER: MCDO3706-11

MATTER TYPE: Other minor civil disputes matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Kate Buxton, Adjudicator**

DELIVERED ON: 22 March 2012

DELIVERED AT: Brisbane

ORDERS MADE: **1. Application struck out.**

CATCHWORDS: Definition of “Trader” – whether podiatry a discipline not normally associated with trade or commerce

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act).

REASONS FOR DECISION

- [1] Ms McDonald filed an “application for minor civil dispute – consumer dispute” with this Tribunal on 15 November 2011. The respondent, Kenmore Podiatry Pty Ltd, provided podiatry services to Ms McDonald. In this application Ms McDonald seeks a refund of a total of \$541.00 paid for podiatry consultations and orthotics.
- [2] This Tribunal has jurisdiction to deal with disputes between a consumer such as Ms McDonald and a “trader”. The question referred to me by the Registrar of this Tribunal is whether Kenmore Podiatry Pty Ltd is a “trader” and therefore whether the matter can proceed for determination by QCAT.

[3] The QCAT Act defines a trader as follows:

1 A trader—

(a) means a person who in trade or commerce—

- (i) carries on a business of supplying goods or providing services; or
- (ii) regularly holds himself, herself or itself out as ready to supply goods or to provide services of a similar nature; and

2 However, a person is not a trader in relation to goods or services if in supplying the goods or providing the services—

(a) the person acts in the exercise of a discipline that is not ordinarily regarded as within the field of trade or commerce; or
(emphasis added)

[4] This definition of “trader” was considered by the Tribunal Appeal division in *Early Property Group Pty Ltd trading as Early Group Valuers v Cavillario* [2010] QCATA 65 where her Honour Judge Kingham stated:

“the definition of trader in the QCAT Act is both inclusive and exclusive. It is inclusive in that it encompasses activities carried out in trade or commerce, but then excludes such activity when the person acts in a discipline not normally associated with trade or commerce. The exemption ... is directed to the person and their discipline, rather than fixing on the nature of the activity” (at [12]).

[5] Her Honour Judge Kingham determined that the definition of a trader “must operate to exclude professionals whose disciplines are not ordinarily regarded as within the fields of trade or commerce” (at [17]).

[6] That decision recognised that valuers were professionals undertaking a discipline not normally associated with trade or commerce by reference to the decision of *Santow J in Prestia v Anknar* (1996) 40 NSW LR 165. His Honour stated that a “profession” is one that:

*“... would embrace intellectual activity, or manual activity controlled by the intellectual skill of the operator, whereby services are offered to the public, usually though not inevitably for reward and requiring professional standards of competence, training and ethics, typically reinforced by some form of official accreditation accompanied by evidence and qualification.”*¹

[7] In her application and in the documents attached to it Ms McDonald described the treatments provided by the clinic as not having been delivered with reasonable care and skill. She described the clinic as having undertaken an assessment of her condition with which a doctor subsequently disagreed. She described the conduct as having gone “beyond a reasonable difference in professional opinion and enters into the realm of incompetence.” It seems plain from Ms McDonald’s own words that she regarded the respondent as providing professional medical services or para-medical, or holding itself out as doing so. Although she

¹ Supra at 186E.

later refutes this conclusion in her written submissions filed on 27 January 2012, it is difficult to come to a view other than that podiatry is:

- An intellectual activity;
- Undertaken for reward; and
- Requiring accreditation.

- [8] In the written submissions of the respondent filed 9/2/12 it is asserted that the practice of podiatry requires a university degree, registration with the appropriate Board and adherence to a code of conduct. I accept that those factors support the conclusion that the respondent's podiatry practice involves the exercise of a discipline not ordinarily associated with trade or commerce.
- [9] The respondent is not, therefore, a trader and this is not a dispute which can be adjudicated by QCAT as a "consumer dispute". It should therefore be struck out on that basis.