

AUSTRALIA / JUDGMENT

Barefoot Timber Pty Ltd v Wright [2024] NSWCATAP 252

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Civil and Administrative Tribunal New South Wales Medium Neutral Citation: Barefoot Timber Pty Ltd v Wright [2024] NSWCATAP 252 Hearing dates: 11 October 2024 and 3 December 2024 Date of orders: 11 December 2024 Decision date: 11 December 2024 Jurisdiction: Appeal Panel Before: Balla ADCJ Principal Member L Andelman, Senior Member Decision: (1) The appeal is allowed.

- (2) The order of the Tribunal made on 18 June 2024 in 2023/00366694 is set aside.
- (3) The proceedings are remitted to the Tribunal for reconsideration in accordance with these reasons and otherwise according to law. Catchwords: APPEAL – procedural fairness
Legislation Cited: Competition and Consumer Act 2010 (Cth), Sch 2 Civil and Administrative Tribunal Act 2013 (NSW) Home Building Act 1989 (NSW) Cases Cited: Dokas v Gallagher (No 2) [2024] NSWCA 236 My Fashion Republic Pty Ltd trading as Cosette v Ho [2024] NSWCATAP 191 Nathanson v Minister for Home Affairs [2022] HCA 26; 276 CLR 80 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Stevanovski v CLK Plumbing Pty Ltd [2017] NSWCATAP 180 Category: Principal judgment Parties: Barefoot Timber Pty Ltd (Appellant) Russell Wright (Respondent) Representation: Appellant (self-represented) Respondent (self-represented) File Number(s): 2024/00260219 Publication restriction: None Decision under appeal Court or tribunal: Civil and Administrative Tribunal Jurisdiction: Consumer and Commercial Division Date of Decision: 18 June 2024 Before: D Goldstein, Senior Member File Number(s): 2023/00366694

REASONS FOR DECISION

1. In 2023 the parties entered into an agreement for Barefoot Timber to install wooden flooring in Mr Wright's kitchen.
2. Mr Wright was unhappy with the work done by Barefoot Timber and sought an Order in this Tribunal for cost of removing and replacing the kitchen floor together with his costs.
3. Mr Wright's claim was heard on 24 January 2024.

4. On 18 June 2024 the Tribunal member found, after taking into account the expert evidence, that Barefoot Timber had not carried out the work with due care and skill and had breached s 60 of the Competition and Consumer Act 2010 (Cth), Sch 2 – Australian Consumer Law (the "ACL"). The Tribunal member set a timetable for the parties to make submissions in relation to a costs order.

Appeal

1. Barefoot Timber has appealed from that decision. That appeal was heard by us on 11 October 2024 and 3 December 2024.
2. Barefoot Timber relies on the following Grounds:
 1. The Tribunal member made an error of law in concluding that Barefoot Timber was in breach of the ACL because the member had not provided proper reasons and there was no evidence supporting the claim that Barefoot Timber had not carried out the work with due care and skill. The Tribunal erroneously accepted Mr Wright's expert's report.
 2. The Tribunal made an error of law in making a money order against Barefoot Timber under either s 236 or s 267(4) of the ACL. Mr Wright is not entitled to recover losses attributable to his own unreasonable conduct being the termination of the contract without notifying Barefoot Timber, and engaging a third party to complete sanding and polishing. Barefoot Timber could have rectified the work at little cost. The Tribunal had failed to consider the principle that the consumer should act reasonably in the ordinary course of business and is not entitled to recover losses attributable to its own unreasonable conduct.
1. Barefoot Timber seeks leave to appeal on the grounds that the decision was not fair and equitable, the decision was against the weight of evidence, and significant new evidence is now available that was not reasonably available at the time of the hearing.

Legal Principles

1. Under s 80 of the Civil and Administrative Tribunal Act 2013 (NSW) (the "NCAT Act"), a party to a decision in the Tribunal has a right to appeal on any question of law and, otherwise, any error for which leave to appeal should be granted.
2. In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 (*Prendergast*) at [12] the Appeal Panel noted that where an appellant is not legally represented, it is necessary for the Appeal Panel to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations that might arise for the respondent. It may be appropriate to adopt "a more generous or benevolent approach" in assessing whether the grounds of appeal identify a question of law or a basis for leave to appeal where the parties are self-represented; *Dokas v Gallagher (No 2)* [2024] NSWCA 236 at [66]

3. Having regard to the guiding principle in s 36 of the NCAT Act, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance. Pursuant to s 38(2) the Tribunal is obliged to afford both parties procedural fairness.

Threshold Question

1. Mr Wright's claim was filed in the Tribunal on 14 November 2023 under the Home Building Act 1989 (NSW) (the "HBA"). The expert evidence relied on by Mr Wright was directed to whether the work complied with the warranties provided by the HBA.
2. The Tribunal member said in his Reasons:
7. I find that the work carried out by the respondent was not 'residential building work' as referred to in the Home Building Act 1989 ('HBA'). It follows that the Tribunal has no jurisdiction to hear and determine the applicant's claim under the HBA. The reason why the work carried out by the respondent was not 'residential building work' as referred to in the HBA is to be found in Schedule 1 to the HBA, section 2(3)(k) which states: 'Each of the following is excluded from the definition of residential building work- 'any work involved in the installation of any material that forms an upper layer or wearing surface of a floor (even if installed as a fixture) and that does not involve any structural changes to the floor, but not including work involved in the installation of floor tiles unless the regulations otherwise provide,'
8. I find that the work the respondent contracted to carry out was as described in s2(3)(k) and that because the respondent was supplying and installing select grade solid blackbutt flooring there was no installation of floor tiles.
9. Despite the fact that the Tribunal has no jurisdiction to hear and determine these proceedings under the HBA, I find that the Tribunal does have jurisdiction under the Australian Consumer Law ('ACL'), either under section 54 or 60. I will deal with the applicant's case under the ACL by applying s38(4) of the Administrative Tribunal Act 2013.
1. Section 38(4) of the NCAT Act says:
- (4) The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.
1. Nothing in the Tribunal member's decision suggests that the parties were informed during the hearing that the Tribunal intended to determine the matter under the ACL and not the HBA. We did not find any reference to the issue in the sound recording of the hearing. We are satisfied that the parties were not given the opportunity to consider their respective positions under the ACL.

2. This issue was not raised in the Notice of Appeal. However we consider that a denial of procedural fairness should be considered by us, even if it not raised by the parties, who have not been legally represented.
3. Precisely the same issue was considered in the decision of *My Fashion Republic Pty Ltd trading as Cosette v Ho* [2024] NSWCATAP 191. The Appeal Panel found that at the initial hearing the Tribunal member had indicated that the issue requiring determination at the final hearing would be whether there had been a breach of s 56 of the ACL. However, the decision was based on s 54. The transcript of the hearing did not reveal any reference to s 54. The Appeal Panel concluded at [23]: As a result, neither party was able to make submissions in relation to the statutory provision upon which the decision was based. In those circumstances, there was a denial of procedural fairness in that the parties, and the supplier was unable to address the case that had to be met. As Prendergast clearly indicates, a denial of procedural fairness is a question of law. It must follow that there has been an error on a question of law and the appeal must be allowed.
1. In *Stevanovski v CLK Plumbing Pty Ltd* [2017] NSWCATAP 180 the Appeal Panel held:
 29. The question whether there had been an abandonment of the contract was not a question raised by the home building application nor was it raised during the hearing of that application. The parties had not been given notice that the Tribunal Member was giving consideration to the question whether the contract had been abandoned. In basing his decision on the finding of abandonment of the contract, which was not a ground relied upon by any of the parties nor raised at the hearing, the Tribunal Member denied the parties procedural fairness (*Kioa v West* (1985) 159 CLR 550 at 587, Mason J; [1985] HCA 81).
 30. That there has been a denial of procedural fairness does not necessarily mean that the appellant succeeds on this appeal. If it were to be concluded by the Appeal Panel that the denial of procedural fairness made no difference to the outcome of the proceedings, the appeal on that ground would be dismissed...
 31. All that the appellant needs to show in order to succeed on the appeal because of a denial of procedural fairness is that the denial deprived him of the possibility of a successful outcome. In order to negate that possibility it would be necessary for the Appeal Panel to find that a properly conducted application could not possibly have produced a different result (*Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145 and 147; [1986] HCA 54)....
 41. We do not express a view as to what may be the ultimate findings on any reconsideration of the case. However we are of the view that the evidence and the information before the Tribunal Member do not permit us to find that a properly conducted application could not possibly have produced a different result...

42. We are therefore of the view that the appeal should be allowed. It will be necessary for the case to be reconsidered by the Tribunal and we are of the opinion that it is appropriate that it be reconsidered with further evidence.
1. We are satisfied that this reasoning applies to these proceedings.
2. The failure to inform the parties that the decision was to be made pursuant to the ACL and not the HBA was a denial of procedural fairness which is an error on a question of law as it was material to the Tribunal member's decision. As stated in *Nathanson v Minister for Home Affairs* [2022] HCA 26; 276 CLR 80 at [2]: Materiality is established if the error deprived the appellant of a realistic possibility of a different outcome. The appellant bore the onus of demonstrating that the denial of procedural fairness was material in this sense (footnotes not cited). The appellant satisfied its onus of demonstrating that the denial of procedural fairness was material to the claim.

Other Grounds

1. In view of our findings, it is not necessary for us to consider the other Grounds of Appeal.

Orders

1. In accordance with s 81(1)(e) of the NCAT Act, we will remit the matter back to the Consumer and Commercial Division to reconsider the application.
2. We make the following orders:
 1. The appeal is allowed.
 2. The order of the Tribunal made on 18 June 2024 in 2023/00366694 is set aside.
 3. The proceedings are remitted to the Tribunal for reconsideration in accordance with these reasons and otherwise according to law.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales. Registrar DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated. Decision last updated: 11 December 2024

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Prepared on 29 October 2026 · Esheria