

AUSTRALIA / JUDGMENT

## Jackson v N K Tiling Pty Ltd [2017] NSWCATAP 106

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Jackson v N K Tiling Pty Ltd [2017] NSWCATAP 106

Hearing dates: 5 April 2017

Date of orders: 16 May 2017

Decision date: 16 May 2017

Jurisdiction: Appeal Panel

Before: A P Coleman SC, Senior Member

J T Kearney, Senior Member

Decision: (1) Appeal allowed.

(2) Set aside the orders made by the Tribunal on 6 December 2016.

(3) Remit the matter to the Tribunal to be determined according to law.

Catchwords: PROCEDURAL FAIRNESS: rejection of documents not served in accordance with directions and for which no extension of time sought; where party did not understand requirement to seek extension; whether adjournment should have been offered by Tribunal.

Legislation Cited: Civil and Administrative Tribunal Act (NSW) 2013

Cases Cited: Allesch v Maunz (2000) 203 CLR 172

Clements v Independent Indigenous Advisory Committee (2003) FCAFC 143; 131 FCR 28

Courtatos t/as Surf City Motors v Willis [2016] NSWCATAP 249

Hood t/as UR Place Landscape v Rutten [2016] NSWCATAP 250

Italiano v Carbone [2005] NSWCA 177

Johnson v Lukeman [2016] NSWCATAP 272

Mesiha v Murrell [2017] NSWCATAP 1

Prendergast v Western Murray Irrigation [2014] NSWCATAP 69

Russo v Brack and Ors [2016] NSWCATAP 261

Wilson v Chan & Naylor Parramatta Pty Ltd as trustee for Chan & Naylor Parramatta Trust [2016] NSWCATAP 236

ZCA v NSW Trustee & Guardian [2016] NSWCATAP 192

Category: Principal judgment

Parties: Sophie & Ken Jackson – Appellants

N K Tiling Pty Ltd - Respondent

Representation: Counsel:

In Person (Appellant)

Mr Jahshan, Director (Respondent)

File Number(s): AP 16/55111

Publication restriction: Nil

Decision under appeal Court or tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer & Commercial Division

Date of Decision: 06 December 2016

Before: C Marzilli, General Member

File Number(s): GEN 16/37558

Reasons for decision

## Background

1. This is an internal appeal from a decision of the Consumer and Commercial division of the Tribunal made on 6 December 2016.
2. At that time the Tribunal made the following orders:
  1. N K Tiling Pty Ltd (address) is to pay Sophie Jackson & Ken Jackson (address) the sum of \$180 immediately.
  2. Otherwise than as set out in order 1 above, the application is dismissed because having considered the material before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established.

1. Mr and Mrs Jackson, the appellants, appeal that decision asserting in their Notice of Appeal that the decision of the Tribunal was not fair and equitable in that the Tribunal refused a request made on their behalf for an adjournment to tender relevant evidence "relating to the quantum of damages and submissions". The appellants also assert that significant new evidence has arisen being relevant evidence going to the quantum of damages which "has now been obtained".
2. For the reasons that follow, we would allow the appeal and remit the matter to the Tribunal for rehearing.

### The Proceedings below

1. The proceedings below concerned a claim by the appellants that the respondent had failed to properly undertake tiling work in the bathroom at their premises. The work was to repair a leaking shower. The work to be done was detailed in a quote from the respondent dated 1 June 2016. The total sum to be paid for work was \$1850 plus GST.
2. The respondent completed the work on or about 27 June 2016. The appellants were not satisfied with the work and notified the respondent of their concerns by letter dated 3 July 2016. They subsequently contacted Fair Trading complaining the work was defective. The appellants alleged that after the work was completed by the respondent, amongst other things, the shower recess was shorter and narrower, the tiling was unsatisfactory including with cracks filled by sealant with the possibility of leakage, that the shower screen was cracked, that the "fall" was inadequate such that the drainage was unsatisfactory and that the soap dish was in the wrong position. The amount sought by the appellants was \$2400, being \$1800 paid to the respondent and \$600 for a new shower screen.
3. The respondent denied that the work was faulty as alleged although it was accepted that a tile was cracked. The respondent offered to return and replace that tile.
4. On 15 September 2016, in preparation for the hearing, the Tribunal made directions that the appellants serve on the respondent and file with the Tribunal any document on which they intended to rely at the hearing by 30 September 2016. Apparently, the directions also indicated that the appellants should, if necessary, seek an extension of time to file any documents after 30 September 2016 and notified them of the possible consequences of failing to comply with the directions. We did not have a copy of the directions before us.
5. At the hearing of the matter on 5 December 2016, the appellants appeared in person. The respondent was represented by its director Mr Jahshan.

### The Tribunal's Reasons

1. In its written reasons the Tribunal set out various unchallenged findings of fact which need not be repeated here. The Tribunal noted that soon after the appellants began to present their case, they sought to tender a further bundle of documents ("the Documents") which

the Tribunal itemised in [2] of the reasons. Included in the Documents were some photographs and two tax invoices issued by a plumber dated 5 and 18 October 2016 which went to the cost of that plumber undertaking tests of the shower water proofing and other matters related to the allegedly defective work of the respondent.

2. The Tribunal observed that none of the Documents had been filed with the Tribunal and served on the respondent prior to the hearing in accordance with the pre-hearing directions.
  3. The Tribunal observed that the appellants stated that as the work undertaken by the respondent had deteriorated further after 30 September 2016 (being the date by which the appellants were required to file and serve their evidence) they called in plumbers who examined the works. The appellants said they were not aware that they had to file with the Tribunal and serve on the respondent any material that came into existence after 30 September 2016. At the hearing, and on appeal, the appellants said they did not understand the directions to mean they could not rely on any additional evidence and they thought that they could simply hand any new evidence to the Tribunal on the day.
  4. The respondent, after being given the opportunity of reviewing the Documents, objected to the Tribunal receiving them. At the appeal, the director of the respondent said that he did not read the Documents in detail but quickly reviewed them and objected to them as he had not seen them before and they were not served in accordance with the Tribunal's directions. The Tribunal accepted his objection and refused to allow the appellants to rely on them. It said that it would "be grossly prejudicial to the respondent to allow [the Documents] to be used in support of the applicants' case".
  5. The Tribunal then dealt with each of the items of the work said to be defective. The Tribunal, on reviewing and considering the evidence before it, at [8]-[17] rejected the claims with respect to the size of the shower, the leaks from the shower, the position of the soap dish in the shower recess, the shower hob, damage to the shower screen, inappropriate tiling to the base of the shower, damage to one tile on the bathroom floor, the complaint about the shower tap installation, the allegation that there was fiberglass at thereby causing flooding and the applicant's assertion that the shower did not drain properly. In essence, the reasons for the Tribunal rejecting the appellants' claims was that the evidence put before it by the appellants did not prove their allegations. It said:
20. The appellants alleged that:(a) materials supplied by the Respondent are not of acceptable quality; and,
- (b) the work done by the Respondent was not performed with due care and skill.

However, as set out in paragraphs 8-18 above the [appellants] have not put forward any probative evidence that support their allegations. The [appellants] have not proved their claims through evidence and as a consequence their Application should be dismissed with respect to the matters set out in the paragraphs last mentioned.

1. The Tribunal noted that the respondent accepted responsibility for the one cracked tile. It observed that no work order was sought and the acrimony between the parties made one inappropriate. It awarded \$180, being 10% of the value of the whole of the work as compensation.
2. Nowhere in the Tribunal's reasons is reference made to the appellants making an application for an adjournment so as to enable them to rely on the Documents, or on any other basis.

## The Notice of Appeal

1. By Notice of Appeal filed 20 December 2016, the appellants challenge the Tribunal's decision on two grounds. The first ground is that the decision of the Tribunal was not fair and equitable in that the Tribunal "refused the request made on behalf of the Applicant, who was not legally represented at the time, for an Adjournment to tender relevant evidence relating to the quantum of damages and submissions". The second ground is that significant new evidence has arisen being "the relevant evidence going to quantum of damage [which] has now been obtained".
2. The appellants seek orders varying the order of the Tribunal or remitting the matter to be heard and decided again with the further evidence.
3. The respondent disputes that there has been a denial of procedural fairness. It says that the appellants did not ask for an adjournment in order to be able to rely on the Documents. Further, it says that the appellants had an opportunity to present their case to the Tribunal and should not now be allowed to rely on the additional evidence.

## Is Leave to Appeal Required?

1. Whilst the appellants have described ground 1 in the notice of appeal as being a complaint that the decision of the Tribunal was not fair and equitable, it can be seen from the particulars of that ground as set out in the Notice of Appeal, that the basis of complaint is that the appellants were not granted an adjournment they requested in order to be able to rely on the Documents and evidence not served in accordance with the Tribunal's pre-hearing directions.
2. In fact, during the hearing of the appeal, the appellants conceded that they did not specifically ask the Tribunal for an adjournment. Rather, from their oral submissions at the hearing of the appeal, it is apparent that their complaint is that on becoming aware that they wished to rely on additional evidence which had not been served in accordance with the pre-hearing directions, and on the basis that the Tribunal was aware that they didn't understand that they had to serve additional evidence but could just rely on it at the hearing, the Tribunal ought to have offered them an adjournment. They submitted that had that occurred, any prejudice to the respondent in not having seen that evidence (if any existed) would be removed. They said that it was unfair of the Tribunal not to offer them an

adjournment for that purpose and that consequently they did not get a proper opportunity to present their case.

3. Subject to any issue so fairness to the respondent, where the Appeal Panel determines that an error of law is raised from the material before it, even if not identified by an unrepresented appellant in the Notice of Appeal, the Appeal Panel ought to deal with that identified error on the appeal: see *Prendergast v Western Murray Irrigation* [2014] NSWCATAP 69 at [12]. We would regard the appellants' complaint in ground 1 as explained at the hearing, as a complaint that the appellants say fairness dictated that the Tribunal ought to have offered them an adjournment so that they could rely on the material not served in accordance with the earlier directions so as to have a proper opportunity to present their case. When viewed this way, ground 1 is a complaint of a denial of procedural fairness. As such it raises a question of law and leave to appeal is therefore not required (see for example *Clements v Independent Indigenous Advisory Committee* (2003) FCAFC 143; 131 FCR 28 at [8] and *Italiano v Carbone* [2005] NSWCA 177 at [5]).
4. In respect to ground 2, however, as no question of law is raised and the appellants seek to rely on what they assert is substantial new evidence, leave is required (see s 80(2)(b) Civil and Administrative Tribunal Act (NSW) 2013 ("CAT Act") and Cl 12 of SCH 4 of that Act).
5. At the hearing of the appeal the appellants sought to rely on the Documents rejected by the Tribunal and also additional "significant new evidence" which they had obtained after the hearing below. Because of the conclusion that we have reached in respect to ground 1, it is unnecessary to determine ground 2.

### Ground 1 – Denial of Procedural Fairness

1. There have been several recent Appeal Panel decisions that have considered the applicable principles concerning whether a party has been denied procedural fairness in circumstances where they have not been granted an adjournment or otherwise assert that they have not had a reasonable opportunity to present their case. These include: *Hood t/as UR Place Landscape v Rutten* [2016] NSWCATAP 250 at [13]-[18]; *Courtatos t/as Surf City Motors v Willis* [2016] NSWCATAP 249 at [41]-[54]; *Russo v Brack and Ors* [2016] NSWCATAP 261 at [36]-[47] and *Johnson v Lukeman* [2016] NSWCATAP 272 at [18]-[23].
2. It is a fundamental requirement that the Tribunal applies the rules of natural justice and is required to ensure that parties have an opportunity to be heard and to present their case. This fundamental requirement has its roots in both the common law (see for example *Allesch v Maunz* (2000) 203 CLR 172 at [35] per Kirby J) and statute (see ss38(2) and 38(5) of the CAT Act).
3. Further, it is well established in authority that a failure to grant an adjournment of proceedings can constitute a failure to give a party the opportunity of adequately presenting their case (see, for example *Italiano v Carbone & Ors* [2005] NSWCA 177 at [175]; *ZCA v NSW Trustee & Guardian* [2016] NSWCATAP 192 at [40]). Usually, in such circumstances, to

demonstrate a breach of procedural fairness it is necessary to show that a party lost an opportunity to put any information or argument to the decision maker or suffered detriment (see *Italiano v Carbone*, *ibid* at [88] per Basten J applying *Re Minister for Immigration and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [36]).

4. Of course, each matter must be considered in the context of its own particular factual circumstances. Not every loss of opportunity to put information before the Tribunal, even if it could be said that that loss of opportunity may have caused a party detriment, would necessarily amount to a breach of procedural fairness.
5. In *Mesiha v Murrell* [2017] NSWCATAP 1 the Appeal panel was considering whether the Tribunal had erred in rejecting evidence sought to be relied upon by an appellant and where the Tribunal had rejected the appellant's application to extend time by which to serve that evidence. At [36] and following it said:
36. Section 36(1) of the NCAT Act requires the Tribunal to give effect to the guiding principle which is "to facilitate the just, quick and cheap resolution of the real issues in the proceedings". The Tribunal is required to exercise the powers given to it in order to give effect to this principle: S36(2). The parties are under a duty to cooperate with the Tribunal to give effect to this principle "and, for that purpose, to participate in the processes of the Tribunal and comply with directions and orders of the Tribunal": S36(3). In doing so the "practice and procedure of the Tribunal should be implemented so as to facilitate the resolution of the issues between the parties in such a way that the costs to the parties and the Tribunal is proportionate to the importance and complexity of the subject-matter of the proceedings": s36(5).
37. Section 38 of the NCAT Act provides that:
  1. while the Tribunal is not bound by the rules of evidence, it is to observe the rules of natural justice: s38(2);
  2. the Tribunal is to act with as little formality as the circumstances of the case admit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms: s38(4);
  3. the Tribunal is to take such measures as are reasonably practicable to ensure that the parties to the proceedings:

understand the nature of the proceedings: s38(5)(a);

have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings: s38(5)(c).

38. These requirements make clear that in giving effect to the guiding principle the Tribunal is to have regard to the interests of both parties as well as issues of proportionality which include issues of cost and the impact upon the Tribunal in meeting its obligations in respect of other applications which it is required to determine.
39. The Tribunal must also have regard to the fact that in cases such as the application to which the present appeal relates, ordinarily each party has the carriage of their own case and must pay their own costs: see ss 45(1)(a) and 60 of the NCAT Act. This is so even where a party has leave to be represented, by a lawyer or an agent.
40. It is now accepted that these factors, the obligations imposed upon the parties to comply with directions and issues of case management mean that where there has been a failure to comply with directions there is no absolute right to an adjournment, even where an explanation is provided for any non-compliance. Rather, the Tribunal is required to weigh up all relevant considerations in exercising its discretion about whether or not an application to extend time should be granted.
1. In *Wilson v Chan & Naylor Parramatta Pty Ltd as trustee for Chan & Naylor Parramatta Trust* [2016] NSWCATAP 236 the Appeal Panel considered a case very similar to the present. In that case, despite directions for service of evidence pre-hearing, the appellant sought to rely on material served only the day before the hearing. The Tribunal rejected that evidence. The Appeal Panel said:

### Rejection of Mr Wilson's late material

18. Clearly, the Tribunal had a discretion to admit or reject the material provided by Mr Wilson to the Tribunal on 18 January 2016. As a matter of law, exercise of the discretion needed to take account of relevant considerations, including the question of fairness to Mr Wilson in having his case determined with regard to all available and relevant evidentiary material and submissions.
19. However, the Tribunal took an inflexible stance that only took account of Chan & Naylor's interests and, implicitly, the desirability that the hearing proceed on the day fixed for hearing, and without any consideration of the nature of the material Mr Wilson was seeking to rely upon. This was a too rigid approach and the Tribunal erred in law in dealing with the matter in this way. One illustration of the inadequacy of that approach was that the Tribunal did not have regard to reply submissions that were included within the material Mr Wilson wished to rely upon.

20. In the circumstances, in view of Chan & Naylor's position that it could not adequately respond to the additional material on the day of the hearing, in our opinion, in the exercise of its discretion, the Tribunal should have had regard to the question whether an adjournment of the hearing was warranted. Fairness to Mr Wilson favoured an adjournment so as to enable the additional material to be considered in the determination of the claim, as did the following matters:
  1. Mr Wilson's claim involved some complexity and had only been commenced in November 2015.
  2. The Tribunal made directions for the filing and service of documentary material ten days after the application was filed and the parties were not before the Tribunal again until the hearing just over two months later.
  3. Chan & Naylor had only served its material on the Friday before the hearing the following Tuesday and it was reasonable to expect that this might provoke some reply material from Mr Wilson.
  4. there was a significant amount of additional material that Mr Wilson was seeking to rely upon consisting of some 80 pages and it would be difficult and, potentially problematic, for the Tribunal to rule upon the relevance of the material in advance of hearing the matter as a whole. Some of this material consisted of documents prepared by Chan & Naylor or by persons associated with Chan & Naylor and appeared to bear upon relevant issues concerning the nature of Chan & Naylor's engagement, the responsibilities it assumed and the roles of others connected with the matters about which Mr Wilson complained.
  5. an adjournment would facilitate the joinder of Mr Nelson, which was a step Mr Wilson wished to take (see further below).
  6. Neither Mr Wilson nor Chan & Naylor were legally represented.
21. Mr Elliott submitted for Chan & Naylor that the Tribunal's failure to grant an adjournment of the hearing was not in error, as no adjournment was requested. As to this, we first make the point that the error we have identified is an error in failing to consider an adjournment as part of giving consideration to the interests of Mr Wilson in having the additional material considered by the Tribunal. Secondly, the Tribunal's obligation to "take such measures as are reasonably practicable ... to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings" (NCAT Act, s 38(5) (c)) means that the Tribunal is bound to offer a self-represented party an adjournment, if it is appropriate to do so: *Italiano v Carbone and Ors* [2005] NSWCA 177, Basten JA at [105]; *Sullivan v Department of Transport* (1978) 20 ALR 323, Deane J at 342-343 (Federal Court); *ZCA v NSW Trustee and Guardian* [2016] NSWCATAP 192 at [39]; *Tiwari v Champion Homes Sales Pty Ltd* [2016] NSWCATAP 73 at [4]. For this reason, and those already referred to, in our opinion, the Tribunal should have raised the issue of an adjournment with the parties even though no adjournment had been requested.

1. In the present case, there had been directions for the service of evidence pre-trial. The appellants do not deny receiving those directions. They complied with those directions by serving their evidence in chief as required. They say, however, that they did not understand the directions to mean that any additional evidence had to be served before the hearing, but that they could just rely on any further evidence at the hearing.
2. As we have stated, we did not have a copy of the directions before us on the appeal. The reasons of the Tribunal state that the directions made on 15 September 2016 in terms required the appellants to serve any evidence by 30 September 2016 and that they should seek an extension of time to serve any further evidence after that date. The Tribunal also noted that the directions made clear the "possible consequences of not complying" with them. However, those consequences are not spelled out in the Tribunal's reasons. We formed the clear impression that the appellants did not understand that they may be precluded from relying on additional material if it had not been served by 15 September or if they had not received an extension of time.
3. We accept as the Appeal Panel said in *Meisa v Murrell*, that in giving effect to the guiding principle of facilitating the just, quick and cheap resolution of the real issues in the proceedings, the Tribunal must have regard to the interests of both parties as well as the proportionality of the cost and the impact upon the Tribunal in meeting its obligations in respect of other applications which it is required to determine. It can also be accepted that the parties have a duty to cooperate with respect to the preparation for and hearing of the matter. This includes complying with the directions made by the Tribunal to prepare the matter for hearing.
4. However, here the appellants did not have an opportunity to put all of the evidence they wanted to rely on before the Tribunal. This was in circumstances where they had not understood that failure to seek an extension of time to serve additional evidence may have precluded them from relying on it. As was held in *Wilson v Chan & Naylor* we conclude that the Tribunal here took an overly rigid and inflexible approach in rejecting the Documents. In doing so it did not have proper regard to the interests of both parties.
5. It should be noted that it was not until 17 October 2016, after the appellants had served their material on 30 September, that the respondent visited their house and prepared its material. That material was served on the appellants after that date. Further, the appellants complained that the leaking in the shower had become worse since they had served the original material. Yet, they had no opportunity to put on additional material to meet that of the respondent or to deal with what they alleged was the worsening situation.

6. Additionally, the Tribunal's reasons do not record that it looked at the Documents to consider whether they were relevant to the appellant's case, or caused prejudice to the respondent. It simply rejected them because they were not served in accordance with the pre-hearing directions. Its conclusion that it would be "grossly prejudicial" to the respondent if the appellants were allowed to rely on the Documents is difficult to accept absent an analysis of the Documents.
7. The appellants were unrepresented. From observing them at the hearing of the appeal it was apparent to us that they did not have a good grasp of the procedures of the Tribunal. Indeed, it was difficult to get them to understand the relatively simple task of identifying the material they had sought to rely on but which had been rejected by the Tribunal. The appellants had told the Tribunal they did not understand that they had to serve any additional evidence before the hearing. The Tribunal did not accept their explanation. We do. We are of the view that in accordance with the principles referred to above, in order to comply with its obligations under s 38(5) of the CAT Act, the Tribunal ought to have offered the appellants an adjournment even though they did not ask for one.
8. Although we accept that there needs to be a consideration of the issue of proportionality, we consider that in this case the Tribunal ought to have offered the appellants an adjournment so that they could seek to rely on the additional material. The omission to do so constitutes a breach of procedural fairness and an error of law.

## Ground 2: Significant New Evidence

1. The second ground of appeal for which the appellants seek leave to appeal, is that there is significant new evidence on which they wish to rely. This does not raise a question of law and by reason of s 80(2)(b) and clause 12 of Schedule 4 of the CAT Act, leave will only be granted if the Appeal Panel is satisfied that the appellant may have suffered a substantial miscarriage of justice because, relevantly, significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings were being dealt with).
2. Because of the conclusion we have reached with respect to ground 1, it is unnecessary to decide whether the appellants would otherwise have succeeded on this ground. The issue of what evidence can be relied upon by them in a re-hearing will be a matter for the Tribunal which hears the matter.

## Orders

1. For the above reasons, the orders we make are:
  - (1) Appeal allowed.
  - (2) Set aside the orders of the Tribunal made on 5 December 2016.

(3) Remit the matter to the Tribunal to be heard 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

Amendments

23 May 2017 - Typographical errors corrected in paragraph 22, 32 and 35

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Decision last updated: 23 May 2017

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