

AUSTRALIA / JUDGMENT

Lotus Constructions Pty Ltd v. Staunton [2015] NSWCATAP 154

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Lotus Constructions Pty Ltd v. Staunton [2015] NSWCATAP 154

Hearing dates: 23 April 2015

Date of orders: 29 July 2015

Decision date: 29 July 2015

Jurisdiction: Appeal Panel

Before: S. Westgarth, Deputy President

P.M. Wass SC, Senior Member

Decision: (1) On grounds 1 and 2 the appeal is allowed.

(2) The order of the Tribunal made on 2 April 2014 is set aside.

(3) On grounds 4 and 5, leave to appeal is refused.

(4) On grounds 3, 4 and 5, the appeal is otherwise dismissed.

(5) The proceedings are remitted to the Tribunal for a hearing according to law in respect of the calculation of quantum due by the appellant to the respondent as a consequence of the appellant not having performed all of the work the subject of the consent order made on 17 October 2013 in proceedings HB 13/17764.

Catchwords: APPEAL – Civil and Administrative Tribunal (NSW) – home building – failure to afford procedural fairness – expert evidence – appeal allowed – costs

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

Cases Cited: Annetts v McCann [1990] HCA 57; (1990) 170 CLR 596 at 598; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651

Mraz v. The Queen [1955] HCA 59; (1955) 93 CLR 493

Collins v. Urban [2014] NSWCATAP

Kioa and Ors v West [1985] HCA 81; (1985) 159 CLR 550 at 585 and at 612-615; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28.

Category: Principal judgment

Parties: Lotus Constructions – Appellant

Mark and Bernadette Staunton – Respondents

Representation: Counsel: Not applicable

Solicitors: Snelgrove Partners (Appellant)

Not applicable (Respondent)

File Number(s): AP 14/46341

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Decision under appeal Court or tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 2 April 2014

Before: D Turley, General Member

File Number(s): HB 13/ 56853

REASONS FOR DECISION

1. The Appellant seeks to appeal a decision of the NSW Civil and Administrative Tribunal, made in the Consumer and Commercial Division ("the Tribunal") on 2 April 2014 ("the Decision"). For the Reasons that follow, the Appeal Panel has determined to otherwise allow the appeal in respect of Grounds 1 and 2 in respect of the issues of quantum not the subject of agreement before the Tribunal.

Introduction

1. The Respondents are homeowners of a house in Mount Annan ("the Property"). The Appellant is a building company that had been engaged by the Respondents to perform work at the Property. Relations between the parties broke down, with the Respondents alleging defects in the work performed.

2. On 17 October 2013, Senior Member Thode made orders in the Tribunal by consent for certain rectification works to be performed (the Consent Order). That order identified details of the work to be done in these terms: "the six items contained in the scope of works as set out in the MC Southern Consulting Report signed by the parties". Delays and difficulties alleged by the Respondents in performing that rectification work resulted in the Respondents refusing the Appellant access to the Property on or about 31 October 2013.
3. On 1 November 2013, the Respondents filed a renewal application in the Tribunal and the matter was listed for renewal on 2 April 2014. It is that hearing that is the subject of this appeal.
4. A major issue on the renewal application was regarding the method of rectification to be employed in relation to the garage floor. A related issue was whether or not removal of a dividing fence was required and whether or not access was required through a neighbouring property.

The Tribunal's Decision

1. Both parties brought their own experts to the hearing, who after a consultation process regarding excavation, reduced the rectification costs in issue for that item from \$13,464 to \$6,124.80: page 2 Decision.
2. As to the issue of the denial of access by the Respondents, the Appellant submitted before the Tribunal that this was not fair and equitable and that "once the method of rectification was resolved he would be willing to return and complete the rectification works". The Respondents contended that since "the problem had become apparent it has been a constant battle to get these problems rectified": page 2 Decision.
3. In the event, the Tribunal ordered that a money order ought be made: Page 2 Decision.
4. Relevantly, as to quantum the Tribunal held as follows:

Of the three quotations that the applicants [Respondents on appeal] submitted, I reject the Admark quotation as it does not include a fixed sum to rectify the chipped brickwork and opts for a cost plus price. I accept the quotation from J A Neumann Pty Ltd as it is the lower of the two remaining quotations. With the reduced sum as agreed by the experts to rectify the garage floor the Neumann quotation is reduced to \$18,070 to which is added \$2860 for the cost of the applicant's original expert's report, then the expert's report in reply, the cost of the experts attendance today and the cost of inspection of the remedial works when completed. The total order then was \$20,930.80 which I order to be paid by 26 May 2014.

1. It is accepted by both parties that there is an error in the Tribunal's orders (the error being that the order requires the applicant to pay the respondent a sum of money whereas the reasons clearly show that it was decided that the respondent should pay the applicant) and that whatever the outcome of the appeal, the existing orders will need to be amended. However, as the Appeal Panel has determined to allow the appeal in part, there will be no requirement to otherwise amend the Tribunal's earlier orders.

The Appeal

1. The Appellant by its Notice of Appeal seeks to appeal the decision and seeks orders: that the matter be remitted to the Tribunal to be heard according to law; allows the Appellant to complete the works in accordance with the Tribunal's order on 17 October 2013; and set aside the orders made on 2 April 2014.
2. The Appellant in its Notice of Appeal dated 16 April 2014 relies on the following grounds of appeal:

The member erred in:

Failing to allow the appellant to cross-examine the respondents' expert.

Failing to permit the appellant to lead evidence from its own expert.

Not setting aside the Consent Order made on 17 October 2013

Not finding that the respondents had unlawfully denied access to the appellant to perform work as per the Consent Orders of the Tribunal on 17 October 2013

Finding that rectification was delayed for 18 months. The major defect occurred on 29 January 2013 and the builder was denied access on 3 April 2013.

1. Of these grounds, Grounds 4-5 do not raise questions of law but rather seek to assert that the Tribunal erred in consideration and assessment of the evidence. In these circumstances, under s 80(2)(b) of the Civil and Administrative Tribunal Act 2013 (the Act), the Appellant requires leave to appeal in respect of Grounds 4-5. The Appellant sought such leave in section 12B of the notice of appeal and submitted that the decision was not fair and equitable on the basis that the appellant was not given procedural fairness in the hearing before the tribunal on 2 April 2014 and the Tribunal did not hear the appellant's expert evidence.
2. Grounds 1-3, however, raise a question of law and accordingly leave to appeal is not required under s 80(2)(b) of the Act in respect of those grounds.
3. The Respondents, in their Reply to Appeal dated 8 May 2014, responded to the Appellant's grounds of appeal, relevantly to the following effect:

1. Both experts were in court and were available for questioning and cross-examination by the parties.
2. The experts had the Consent order and the three quotations. They did not request any further information before handing their presentation to the Tribunal Member on 17 October 2013 [presumably holding the Appellant to the Consent Order].
3. The Consent Order was breached by the Appellant. There is no need to set aside the Consent Order.
4. When the Consent Order was made, Member Thode clearly explained to both parties that any breach would entitle the affected party to stop work or have the work stopped. The Appellant breach the orders and refused a request to comply with them.
5. The Appellant refused to do the all the rectification work.
1. Ultimately, when the matter was argued before the Appeal Panel, the Appellant submitted that it was no longer complaining about the fact of the money order, just the quantum, as both parties now accepted that the orders for rectification could not be complied with by the parties and where the access sought was unavailable for either method of rectification. Obviously this has affected the grounds originally raised, which will be dealt with below.

Grounds 1 and 2 – Failure to Accord Procedural Fairness

The Appellant's Contentions – Failure to Accord Procedural Fairness

1. The Appellant contends in its written submissions that it was intended that substantive evidence would be given at the Tribunal regarding quantum. It points to the fact that the respective parties' experts were available to give evidence and did in fact give limited evidence before the Tribunal.
2. The Appellant notes also that the Respondents and the Appellant's sole director (Mr Chand) were sworn in and gave evidence.
3. Relevantly it is contended that, given the way the matter had proceeded which ultimately led to the Consent Orders, there was no proper basis upon which all controversies regarding the quantum of any money order could be made without the calling of further evidence: [15] written submissions.
4. It is submitted that the need for further evidence was also demonstrated by the presentation by the Respondents of the three quotations, ultimately the subject of the Tribunal's findings: [17] written submissions.
5. The Appellant submitted that, having found that the Appellant had been given the opportunity to carry out work which it had failed to do (which must have been a finding made in light of the money order made), it was then incumbent upon the Tribunal to determine quantum and to do so in a way that accorded procedural fairness to the parties.

6. Transcript of the proceedings was tendered before the Appeal Panel.

The Respondents' Contentions – Failure to Accord Procedural Fairness

1. It is contended by the Respondents that both experts gave evidence as to what work was required and that the experts conferred and agreed so as to reduce the builder's quotation to \$6,124.80 in respect of the garage.
2. The Respondents also contended that the Tribunal Member did not have to take into consideration the reduction of the quotation for the work on the garage and the calculation by the two experts, but did so as "an act of fairness". The Appeal Panel takes this as a being reference to allowing only the lower quotation in making the money order.
3. As to the specific evidence given before the Tribunal, the Respondents contend that both experts "spoke freely", were available to answer any questions and assisted the Tribunal Member. They contend that the Tribunal Member refused no one an opportunity to ask and answer questions.

The Appeal Panel's Findings - Grounds 1-2 – Failure to Accord Procedural Fairness

1. If established, a failure to allow a party to cross-examine a relevant witness or to lead evidence or make submissions is a failure to accord procedural fairness.
2. The duty to accord procedural fairness arises because the power involved is one which may "destroy, defeat or prejudice a person's rights, interests or legitimate expectations": *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596 at 598; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651. The content of the duty in a particular case depends upon the circumstances of the case and the nature of the power being exercised: *Kioa and Ors v West* [1985] HCA 81; (1985) 159 CLR 550 at 585 and at 612-615; (1985) 62 ALR 321; (1986) 60 ALJR 113; 9 ALN N28.
3. In *Kioa* Gibbs CJ stated that "if the rules of natural justice were applicable, the appellants were entitled to a fair opportunity to correct or contradict any relevant material prejudicial to them." Mason J also acknowledged that a fundamental rule of natural justice required that a party "is entitled to know the case sought to be made against him and to be given an opportunity of replying to it", and "if in fact the decision-maker intends to reject the application by reference to some consideration personal to the applicant on the basis of information obtained from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter". Brennan J similarly observed that "[a] person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters to his interests which the repository of the power proposes to take into account in deciding upon its exercise."

4. Although Kioa was determined in the context of the exercise of ministerial power, a fundamental requirement of procedural fairness is that a party subject to the possibility of an adverse determination to be made on the basis of particular documents or material, should know the case against it, and relevantly in this case, be afforded an opportunity to respond.
5. In *Collins v. Urban* [2014] NSWCATAP 17, the Appeal Panel comprising of Wright J, President, S Westgarth, Deputy President and M Harrowell, Principal Member, commencing at [40], held in respect of hearings before the Tribunal with respect to matters of procedural fairness, that s 38(5)(c) of the NCAT Act requires that the Tribunal "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": *Collins* at [40].
6. Both parties were unrepresented before the Tribunal.
7. In this case, a review of the transcript before the Tribunal reveals the following:
8. The Respondents tendered three quotations regarding the quantum of the work to be performed; Admark Constructions (\$25,344), JA Neumann Pty Ltd (\$25,410) and Ebeling Constrtuctions (\$31,100): T4.
9. The Tribunal Member was informed that the purpose of the experts at the hearing was to resolve issues as to quantification of rectification work required: T6.
10. The Tribunal Member ultimately determined to hear from the expert witnesses in respect of the methodology of performing the garage rectification work required: T8. Mr Craig, the Respondents' expert was sworn in first and gave his evidence: T8.
11. The Tribunal Member swore in Mr Capaldi (the appellant's expert): T9.
12. Mr Capaldi made it clear that there was no dispute as to the defect in the garage, but explained a different methodology required to rectify it: T10.
13. The Tribunal Member stated that he was not conducting a hearing as to the work order, only to ascertain why the work wasn't carried out and "what should now be substituted, which may take us back into Mr Craig's report": T11.
14. At this point, the Respondents commenced interjecting during the course of Mr Capaldi's evidence: T11, 12, 13.
15. Immediately thereafter, the Tribunal Member said to the Appellant's director, "Mr Chand, the ball's now in your court, and you can confer with your expert if you want to. Tell me why I shouldn't make a money order? In your opinion ... There's a strong issue before me that this has gone on now for two years and four months, and hasn't been resolved. You've had plenty of opportunity to resolve it and you haven't. So the logical thing now is a money order, so you need to tell me why I shouldn't make a money order. Okay?": T13-14.

16. Discussion then ensued about the basis upon which the Respondents had excluded the Appellant from the site and approaches by the Respondents to the Tribunal. The Appellant sought to put a submission and was told to wait: T17. The Respondents then made further submissions. Shortly thereafter, when Mr Chand on behalf of the Applicant was making his submissions, Mrs Staunton started interrupting and ultimately left the hearing room: T21.
17. At the point at which the Tribunal Member was to make the money order, Mr Capaldi drew to Tribunal's attention the need to make an adjustment to the money order and the parties were given an opportunity to agree the amount: T25. The experts agreed certain of the costs of rectification, to the value of \$6124.80: T26, T28. The Respondents then took issue with the costs agreed: T28.
18. It was made clear to the Tribunal Member by Mr Capaldi and Mr Chand that there were costs that had not been agreed: T28-29.
19. The Tribunal Member then invited submissions from Mr Chand about what argument he wished to put in respect of matters remaining in dispute: T29. Mr Chand informed the Tribunal Member that there was to be argument about the costs of rectification claimed, claiming them to be "a bit exorbitant – like too high". Mr Chand went on to submit, referring the Tribunal Member to Mr Capaldi's report, as to the fairness of that quotation. At that point Mr Staunton again interjected and challenged Mr Chand as to the correctness of their expert, Mr Craig: T30.
20. At that point, the Tribunal Member stated, "you're arguing about something that I'll deal with". However, the Tribunal Member then went on to render his decision without regard to the submissions Mr Chand wished to make in respect to the amount of the money order by reference to Mr Capaldi's report.
21. It is clear from Mr Capaldi's report, tendered before the Appeal Panel, that there were issues in dispute regarding claims made by the Respondents as to some of the remaining costs of rectification. Before the Appeal Panel it became clear that there was a dispute as to the remaining items of work:
 1. Driveway
 2. Brickwork
 3. Front foyer
 4. Microwave cupboard
 5. Lipping to the entry floor foyer
1. In all the circumstances, the Tribunal has not, in the view of the Appeal Panel, taken appropriate steps to ensure that the Appellant had a reasonable opportunity to present its case in respect of the cost of rectification of all issues.

2. In doing so, a substantial miscarriage of justice may have been suffered as the Appeal Panel finds, that there is a "significant possibility or a chance which was fairly open" that the Appellant may have achieved a more favourable result in respect of those claims had the evidence of Mr Capaldi been properly considered.
3. Accordingly the Appeal Panel upholds the appeal in respect of Grounds 1 and 2 and finds that the matter ought be remitted to the Tribunal for a hearing according to law in respect of the remaining matters in dispute as referred to above.

Ground 3

1. The Appellant asserts in his Notice of Appeal that the Tribunal Member erred in not setting aside the Consent Order. However, there was no application by the Appellant before the Tribunal Member to do so and further, as already referred to no submissions were made on this ground before the Appeal Panel and it is understood that this Ground was not ultimately pressed.
2. Although the Appeal Panel does not need to come to a final view about this Ground, particularly in light of the decision the Appeal Panel has come to in respect of the matters now genuinely in the dispute in respect of Grounds 1 and 2, there appears to be no utility in allowing this ground of appeal in any event.

Ground 4-5

1. The Appellant requires leave to appeal in respect of grounds 4 and 5.

Leave to Appeal from a Decision of the Consumer and Commercial Division

1. As the decision under appeal was made in the Consumer and Commercial Division of the Tribunal, under cl 12(2) of Schedule 4 of the Act, the Appeal Panel's discretion to grant leave is only enlivened if the Appeal Panel is satisfied that the Appellant may have suffered a substantial miscarriage of justice because:
 1. The decision of the Tribunal was not fair and equitable;
 2. The decision of the Tribunal was against the weight of the evidence; or
 3. Significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).
1. What constitutes a substantial miscarriage of justice was discussed, albeit in the context of s 6(1) of the Criminal Appeal Act 1912 (NSW), which is in similar terms, by the High Court in *Mraz v The Queen* [1955] HCA 59; (1955) 93 CLR 493 at 514.

It [the proviso] ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the Appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice.

1. Accordingly, a substantial miscarriage of justice refers to a failure in the way a matter was conducted or decided which deprived the Appellant of a chance, that was fairly open, of achieving an outcome more favourable than that which occurred: *Collins v Urban* [2014] NSWCATAP 17 at [71].
2. If the Appeal Panel is satisfied that the Appellant may have suffered a substantial miscarriage of justice on one of the grounds referred to in cl 12, the Appeal Panel may grant leave: s 80(2)(b) of the Act. Accordingly, once the discretion is enlivened, the Appeal Panel is to determine whether to grant leave. In deciding whether or not to do so, it must be established that something more than that the primary decision maker was arguably wrong in the conclusion arrived at or that there was a bona fide challenge to an issue of fact. Ordinarily it is appropriate to grant leave only in matters that involve:
 1. Issues of principle;
 2. Questions of public importance or matters of administration or policy which might have general application;
 3. An injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
 4. A factual error that was unreasonably arrived at and clearly mistaken; or
 5. The Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interest of justice for it to be reviewed

See *Urban* at [84].

Should Leave be Granted in respect of Ground 4?

1. The Appellant contends in its Notice of Appeal that the Tribunal Member ought to have found that the Respondents unlawfully denied access to the Appellant to perform work as per the Consent Orders.

2. However, no argument was put before the Appeal Panel on this ground and indeed, in argument before the Appeal Panel, Mr Snelgrove conceded, and properly so in the view of the Appeal Panel, that it was apparent to both parties after attempts were made to comply with the Consent Orders, that the orders "could not be complied with by the parties" and that there is now no complaint about a money order being made, but only the quantum of the money order.
3. In the circumstances, the Appellant's application for leave to appeal on this grounds is formally rejected.

Should Leave be Granted in respect of Ground 5?

1. The Appellant finally contended in its Notice of Appeal that it was not open to the Tribunal Member to find that the rectification was delayed for 18 months, when the major defect occurred on 29 January 2013 and the application to the Tribunal was on 3 April 2013 (being some 65 days). Again, no argument was put before the Appeal Panel on this ground and the matter proceeded on the basis, as contended for on behalf of the Appellant, that the only matter in issue was the quantum of the money order.
2. In the circumstances where this ground was not pressed, the Appellant's application for leave to appeal on this ground is also formally rejected.

Conclusion

1. Accordingly, on Grounds 1-2, the Appeal Panel allows the appeal. As grounds 3, 4 and 5 were not pressed those grounds are refused.

Orders

1. Accordingly, the Appeal Panel makes the following orders:
 1. On Grounds 1 and 2 the appeal is allowed.
 2. The order of the Tribunal made on 2 April 2014 is set aside.
 3. On grounds 4 and 5, leave to appeal is refused.
 4. On Grounds 3, 4 and 5, the appeal is otherwise dismissed.
 5. The proceedings are remitted to the Tribunal for a hearing according to law in respect of the calculation of the quantum due by the appellant to the respondent as a consequence of the appellant not having performed all of the work the subject of the consent order made on 17 October 2013 in proceedings HB 13/17764.

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

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