



Civil and Administrative Tribunal

New South Wales

Case Name: Lane v Bloc Constructions (NSW) Pty Ltd

Medium Neutral Citation: [2021] NSWCATAP 114

Hearing Date(s): 27 April 2021

Date of Orders: 5 May 2021

Decision Date: 5 May 2021

Jurisdiction: Appeal Panel

Before: G Curtin SC, Senior Member
S Goodman SC, Senior Member

Decision: Appeal dismissed.

Catchwords: BUILDING AND CONSTRUCTION - Home Building Act 1989 (NSW) - residential building work - statutory warranty - proceedings for breach – damages – claimed loss of rent cause by breach of statutory warranty – no evidence to support claim – claim dismissed – no error in Tribunal rejecting evidence not previously served – fresh evidence rejected on appeal as not established that evidence not reasonably available at the time of the Tribunal hearing

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW), s 36(3), Sch 4 cl 12(1)(c)

Cases Cited: Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown [2015] NSWCATAP 111
Cominos v Di Rico [2016] NSWCATAP 5
Malouf v Malouf [2006] NSWCA 83
Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69

Texts Cited: Nil

Category: Principal judgment

Parties: Roger Lee Lane (Appellant)
Bloc Constructions (NSW) Pty Ltd (Respondent)

Representation: Appellant (Self-Represented)
Respondent (Self-Represented)

File Number(s): 2021/00056118 (AP 21/07782)

Publication Restriction: Nil

Decision under appeal:

Court or Tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 3 February 2021

Before: S Hausfeld, General Member

File Number(s): HB 20/28841

REASONS FOR DECISION

- 1 This is an appeal by the appellant against the dismissal by the Tribunal of his claim for loss of rent said to have been caused by the respondent's breach of statutory warranties in the construction of the appellant's apartment located in Newcastle, NSW.
- 2 In essence, the Tribunal found that there was no evidence to support the claim for loss of rent.
- 3 The appellant has not demonstrated that that conclusion was erroneous, nor that the Tribunal erred in refusing to accept evidence on that issue during the hearing (and which had not previously been served on the respondent). Accordingly, the appeal will be dismissed.

Background

- 4 The background to this appeal is adequately described in the Tribunal's reasons which follow. In those reasons the appellant is referred to as the

“Owner” and the respondent as the “Builder”. The emphasis given to part of [22] of the Tribunal’s reasons is ours, being the Tribunal’s reasons relevant to this appeal.

5 The Tribunal said:

“13. It is not contested that, in September 2018 the Builder contracted with Wyndam Developments to construct 206 apartments in (two) 19-storey buildings and one 5-storey building at ... Newcastle NSW.

14. It is not contested that the Builder completed the contracted constructions on about July 2019.

15. It is not contested that the Owner is a successor in title to the developer having purchased Unit number ... Newcastle in the strata development. This is in one of the 19-storey buildings. There is a single strata plan covering the 3 buildings.

16. I am satisfied and it is not contested that the work under the Contract constituted residential building work for the purposes of the *Home Building Act 1989* ("the Act").

17. The Owner is owner of the residence and is entitled to the benefits of implied warranties under the Act: s 18D of the Act.

18. The warranties include that work will be done with due care and skill.

19. The Owner applies for payment of certain money under s48O of the Act. The application is a building claim in terms of s48A of the Act.

20. The matter has been referred to investigation by Fair Trading without reaching a resolution: see s 48J the Act & correspondence on file.

CONSIDERATION OF THE CLAIMS

21. The Owner complains about the following defects in his lot (A2, app C).

- a. poor paintwork and edge sealer on cornices, wardrobes, and bathroom shelving;
- b. cracking in gyprock;
- c. damage to glass surface in double glazed panels;
- d. carpet worn;
- e. scratches on glass panels on balcony balustrade;
- f. problem with balcony top rail end cap;
- g. scratched glass on 3 bedroom outer glass panels;
- h. incorrect colour match to bathroom shower stem fittings;
- i. safety stoppers missing from bathroom shower doors;
- j. air conditioning units require QA testing and certification;
- k. some patio tiles have uneven edges, and one is incorrectly laid;
- l. certification required re non-carcinogenic materials in the lot.

CONSIDERATION OF THE CLAIMS (sic)

22. At the hearing, the Owner said that it was not necessary for the Tribunal to consider each of the defects because he wanted to work directly with the Builder in terms of correcting them. **The remaining issue is a claim for loss of rent for some periods including from 1/11/2019 to 24/1/2020. In the absence of any documentary evidence concerning rent valuations, the likely vacancy rate and costs which would be offset against rent, and an accessible chronology, I consider that the owner has not provided sufficient evidence to make out his claim, which is dismissed. While the Owner said at hearing that he could get the evidence in due course, I consider that he has had more than adequate time to put on the evidence he wished to rely on and that he should have done so in time for today's hearing.**

37. (sic) **Additional oral reasons given at hearing.**”

- 6 On 22 July 2020 the parties were directed to lodge with the Tribunal and to serve upon the opposing party all of the evidence upon which they intended to rely. The appellant was directed to do so by 5 August 2020, the respondent was to do so by 19 August 2020 and the appellant was to have the opportunity to lodge and serve any evidence in reply by 26 August 2020.
- 7 The basal purpose of those directions was fairness. That is, those directions were made to ensure that all parties were given adequate notice of the evidence the opposing party was going to provide the Tribunal and thus allow them an adequate and fair opportunity to gather any evidence in response and to prepare their arguments for the hearing of the case.
- 8 The appellant submitted a large number of documents in accordance with those directions. None went to the issues identified by the Tribunal at [22] of its reasons which we have quoted above.
- 9 The hearing by the Tribunal took place by telephone in accordance with the Tribunal's temporary changes to hearing arrangements brought about by the COVID-19 pandemic. The appellant complained about this on the appeal and submitted to us that the hearing should have been in person so he could have handed a document (identified later in these reasons but not previously served by the appellant upon the respondent) directly to the Tribunal.
- 10 This last-mentioned matter is relevant because the appellant says the Tribunal erred in failing to accept the document he wanted to email to the Tribunal during the hearing. We shall return to this matter later below.

11 Suffice to say that his complaint about telephone hearings has no substance. Telephone hearings were brought in to contain the spread of the virus, and whilst telephone hearings sometimes encounter difficulties, none adversely impacted the appellant being provided with a fair opportunity to present and prove his case. Further, there is no reason to believe that if the hearing had been in person the Tribunal would have accepted the document.

12 On 5 March 2021, and in preparation for this appeal, the Appeal Panel made the following directions:

“2. The Appellant is to lodge with the Appeal Panel and give to the Respondent by 27 March 2021:

(a) All the evidence given to the Tribunal below on which it is intended to rely;

(b) Any evidence not provided to the Tribunal in making the decision under appeal, on which it is intended to seek leave to rely;

(c) The Appellant's written submissions in support of the appeal; and

(d) The sound recording or transcript of the hearing at first instance, if oral reasons were given and/or what happened at the hearing is being relied on and a typed copy of the relevant parts.

...

6 NOTE:

(1) If a party does not lodge with the Appeal Panel and give to the other parties documents, sound recordings and submissions as directed above, that party may not be allowed to rely on those documents, sound recordings and submissions at the hearing of the appeal.”

13 The appellant did not comply with Order 2 set out above. He was wrong to do so. Compliance with the Tribunal's orders is mandatory and not voluntary – see s 36(3) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the “NCAT Act”), which provides that parties to proceedings in the Tribunal are under a duty to comply with directions and orders made by the Tribunal

14 The appellant said that he didn't comply with Order 2 because the Tribunal has “all the files”. By “Tribunal” we understood him to mean the Tribunal at first instance and the Civil and Administrative Tribunal as an institution. Whilst it is true that the appellant lodged documents upon which he relied with the Tribunal for the purpose of his hearing, such documents are not routinely provided by the Tribunal to the Appeal Panel but instead are provided to the

Appeal Panel by parties in compliance with directions and orders that they do so. Accordingly, we do not have those “files”.

- 15 In any event it remained the appellant’s legal obligation to comply with the Appeal Panel’s directions. As we have said, compliance is mandatory, not voluntary.
- 16 Such directions serve at least two purposes.
- 17 The first and most important is fairness. By serving the material upon which an appellant relies on his, her or its appeal (as distinct from all of the material which may have been relied on at the hearing at first instance) the respondent is thereby given a fair opportunity to know exactly what material is being relied upon on the appeal. The respondent may then make an informed and considered decision as to what evidence, if any, from the hearing at first instance it should also lodge and serve for the appeal; and where an appellant seeks to introduce new evidence on appeal to decide whether to seek leave to introduce new evidence in response.
- 18 Further, by being put on notice of the particular evidence relied upon on the appeal, the parties are provided a reasonable opportunity to prepare their submissions for the appeal on a fully informed basis.
- 19 The second purpose is to efficiently allow Appeal Panels to decide appeals. The Tribunal is publicly funded and has much work to get through. In the 2019-20 year some 69,735 applications and 643 appeals were lodged. It is not unreasonable to require parties, particularly appellants, to supply the documents upon which they wish to rely in pursuit of their rights of appeal rather than to expect the Tribunal to collect, store, retrieve and manage documents from such large numbers of cases and appeals.
- 20 In any event, this appeal may be decided notwithstanding the appellant’s failure to comply with the directions of the Appeal Panel.

The Appeal

- 21 The appellant submitted that the Tribunal erred in dismissing his claim for loss of rent (the Tribunal’s reasons for which are emphasised in the Tribunal’s reasons at [22], quoted above).

- 22 To succeed on an appeal, it is necessary for an appellant to demonstrate that the Tribunal has made an error of law, or that it is appropriate to grant leave to review the Tribunal's decision on other grounds: s 80(2) of the NCAT Act. Where, as in the present case, an appellant is not legally represented it is appropriate for the Appeal Panel to look at the grounds of appeal generally and to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations in favour of the respondent: *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [12]; *Cominos v Di Rico* [2016] NSWCATAP 5 at [13].
- 23 We have adopted that approach to the grounds of appeal and have considered the appellant's oral submissions. Having done so, we have formed the view that the nub of the appeal is that the appellant complains that the Tribunal made an error of law in failing to afford him procedural fairness. As the appellant put it, he wasn't given a 'fair go'.
- 24 In his oral submissions the appellant submitted that the Tribunal erred in refusing to accept evidence on his claim which the appellant desired to email to the Tribunal during the hearing.
- 25 The Tribunal said (at [22] of its reasons) that it refused this request because the appellant had been given more than adequate time to put on the evidence he wished to rely on and that he should have done so in time for that hearing. There is no appeal from the finding that the appellant had had adequate time to lodge and serve that evidence before the hearing.
- 26 The Tribunal also said (at [37] (sic) of its reasons), that further oral reasons were given. The appellant did not provide to the Appeal Panel a sound recording or transcript of the hearing at first instance as directed and so we do not know what further reasons were given orally. However, it is reasonable to infer that an additional reason was the perceived unfairness to the respondent in allowing the appellant to rely upon material not previously served by him.
- 27 That inference is reasonable to draw because the respondent said, on appeal, that it had evidence available to it that:

"Mr Lane intended to live in the unit and in fact occupied the unit in 2019. He also had other persons stay in the unit in December 2019 and January 2020. I

personally witnessed soap, shampoo and towels in the bathroom and have a number of witnesses that would corroborate that fact.”

28 Had the respondent been on notice of the material the appellant desired to tender during the hearing the respondent may have gathered the evidence referred to in the quote above and given it to the Tribunal in response. What the outcome of any disputed facts arising out of that respective material would have been is, of course, not known. But the relevant point is the unfairness visited upon the respondent by the appellant wishing to rely upon material at the hearing which he could have, but failed to, serve a reasonable time before the hearing and to which the respondent may have had an answer. It is reasonable to infer that the Tribunal was satisfied that the appellant’s failure to serve that material beforehand occasioned prejudice to the respondent.

29 As was said in *Malouf v Malouf* [2006] NSWCA 83 by the Court of Appeal in the headnote (which is accurate) and which is applicable here:

“The new material was presented on the first day of the trial and rejected as being unfair to the respondents in having to meet new material so late in the proceedings, particularly in view of (the appellant’s) disregard of earlier directions, which, if followed, would have cured the defect. The case failed for want of evidence.”

30 Therefore, we can see no error in the Tribunal refusing to accept that material at the hearing.

31 The document the appellant says he desired to send the Tribunal was a letter dated 17 July 2019 from a real estate agent saying that market rental for the appellant’s apartment would have been in the vicinity of \$800 – \$850 per week. However, that document does not plug all of the gaps in the appellant’s case for lost rent.

32 There was no evidence elsewhere, and the letter is not evidence of the fact, that the alleged defects were responsible for the appellant being able to rent out his apartment. For example, there was no evidence of local vacancy rates, or efforts to let the apartment with those defects, or feedback from prospective tenants (to the effect they would not rent the apartment with those defects) or any other evidence from which the Tribunal could conclude that the defects were the cause of the loss of rent.

- 33 The defects described by the Tribunal (see [5] above) were not serious or significant and could not reasonably be thought to have had the effect that no person would have rented the apartment at any price.
- 34 Therefore, the proper measure of damages (assuming damages were payable) was the difference between the market rent of the apartment in the state it was, and the market rent for the apartment assuming the defects were rectified. No such evidence was given.
- 35 On this appeal the appellant also seeks to rely upon a letter from another real estate agent dated 16 February 2021 and an undated flyer advertising the appellant's apartment for sale and containing handwriting from an unknown author.
- 36 The letter dated 16 February 2021 post-dates the hearing and is not receivable on appeal unless it satisfies the requirements for the introduction of new evidence on appeal, including that it was not reasonably available at the time the proceedings under appeal were being dealt with.
- 37 As to what "not reasonably available" means the Appeal Panel said in *Al-Daouk v Mr Pine Pty Ltd t/as Furnco Bankstown* [2015] NSWCATAP 111 at [23] that it means that:
- "... the evidence in question was unavailable because no person could have reasonably obtained the evidence."
- 38 The appellant did not give any evidence to the effect that this letter was not reasonably available at the time of the hearing at first instance, and we would not so find. Self-evidently such a letter could have been obtained before the hearing. Accordingly, we do not admit this letter on appeal.
- 39 The remaining document is undated and contains no information relevant to the issues on the appeal. If it does contain relevant information which is not apparent to us, then the document either falls into the same category as the letter dated 17 July 2019, or the letter dated 16 February 2021, and must be rejected for the same reasons the other documents were rejected.
- 40 A second possible basis for a denial of procedural fairness suggested in the appeal grounds and in oral submissions, is that the appellant was unable to

properly present his case before the Tribunal because of the conduct of the Tribunal member and the limited time allowed for the hearing. We are unable to assess this possible basis in the absence of a sound recording or transcript of the hearing before the Tribunal which, as noted above, the appellant was directed, but failed, to provide to the Appeal Panel.

41 In those circumstances the appellant's appeal fails.

Orders

42 We make the following order:

(1) Appeal dismissed.

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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