Civil and Administrative Tribunal

New South Wales

Case Name:	Woolaston t/as AAA Z Prop Maintenance v Robertson
Medium Neutral Citation:	[2021] NSWCATAP 382
Hearing Date(s):	5 October 2021 and on the papers
Date of Orders:	25 November 2021
Decision Date:	25 November 2021
Jurisdiction:	Appeal Panel
Before:	R C Titterton OAM, Senior Member J McAteer, Senior Member
Decision:	1. Time is extended pursuant to s 41 of the Civil and Administrative Tribunal Act 2013 to lodge the appeal. 2. A hearing is dispensed with. 3. The application for leave to appeal is refused. 4. The appeal is otherwise dismissed.
Catchwords:	APPEAL – consumer contract – home building – unlicensed works – no issue of principle.
Legislation Cited:	Australian Consumer Law Civil and Administrative Tribunal Act 2013 (NSW) – ss 50(2), 41, 80; cl 12 of Sch 4 Fair Trading Act 1987 (NSW) Home Building Act 1989 (NSW)
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
Texts Cited:	Nil

Category:	Principal judgment
Parties:	Jordan Bruce Woolaston trading as AAA Z Home and Property Maintenance (Appellant) Janine Robertson (Respondent)
Representation:	Appellant: self-represented Respondent: self-represented
File Number(s):	2021/00202268
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	17 June 2021
Before:	H Smith, General Member
File Number(s):	HB 21/17768

REASONS FOR DECISION

Introduction

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NCAT Act) against a decision made in the Consumer and Commercial Division of the Tribunal on 17 June 2021. The respondent is a consumer and the appellant is a supplier of goods and services for the purpose of the Australian Consumer Law (ACL). For ease we shall refer to the parties as the Supplier (appellant) and the Homeowner (respondent to the appeal). For reasons which will become clear we refrain from referring to the appellant as the builder.

2 The Homeowner and the Supplier entered into an agreement for building works in the nature of replacement of internal fit out of the homeowner's bathroom and internal laundry. The Homeowner applied to the Tribunal for orders of payment of a sum of money that she had paid to the Supplier under the

agreement. This was on the basis that the work had not been completed in accordance with the agreement and with due care and skill, and that the Supplier had breached the warranties of the ACL and the *Home Building Act* 1989 (NSW) (HB Act).

3 The reasons in the application for requesting an order were as follows:

> Rodney and Jordan Woolaston (T/A AAA home and property maintenance) were recommended to me by an old school friend (friend of their family). She told me that they specialise in bathrooms. Rodney told me he had 25 years experience in the building trade so I agreed to go ahead with the job. I paid them a wage of $500 a day for labour for an unspecified period of time (ceased work after 3 weeks due to concerns raised) and then pay for products on top of that which were purchased from Bunnings. In total I transferred $14,000. to Jordan via Bank Transfer. I also purchased the vanity myself on top of that for $700. which they cut. I am asking for $13,700. Which is a total refund of products and services minus the bath as this is the only usable product that can go in the new bathroom. My marble feature tiles are drawn on with permanent marker and the tiles are chipped. The toilet and tiles cannot be salvaged. I have received a quote from someone else who has advised that it needs to be gutted and completely redone. I've since learned that they are not licensed builders as first thought. I cannot live there at the moment as it was unlicensed work, unsafe and not to code, and I would not be covered by the strata building insurance plan. I need to have this rectified as soon as possible so that I can pay someone to fix it and move back home with my son. I have tried coming to an agreement with them but they only offered $2,500.back and a new vanity. It's going to cost me over $25,000. To have fixed.
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> ..

4 The Tribunal heard the application on 17 June 2021 and made orders that the Supplier pay the Homeowner $18,348.00 for the cost of rectifying the bathroom and laundry, and the sum of $737.00 for the preparation of the expert report in support of the claim. The Tribunal made a finding that the Supplier failed to complete the work with due care and skill and had breached the warranties and guarantees of the HB Act and the ACL.

5 The Supplier appeals against the order for payment of a sum of $19,085.00 on the basis that only $14,000.00 was paid by the Homeowner and the building report was done by a friend of the Homeowner, and presumed completed work.

Notice of Appeal, history of appeal proceedings and submissions

6 The appeal was commenced by Notice of Appeal filed 19 July 2021. The appeal was a few days out of time. At the commencement of the hearing the Homeowner pressed the lateness of the appeal and we advised that we would consider that matter when we determined the appeal.

7 The Supplier did not include any orders sought in his Notice of Appeal, however from the grounds and submissions we infer the following orders were sought:

> Set aside the order for payment to the respondent of the sum of $18,348.00 + $737.00
>
> A rehearing of the application as the Tribunal needs to re-examine the matter due to the discrepancies in the homeowner's evidence.

8 The grounds of appeal are set out as follows:

> Orders Challenged on Appeal:
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> "The sum of $18,348 plus the $737.00 for reports. The amount that was paid in full at the time was only $14,000. The building report that was done was carried out by a friend we believe and the work was never stated that it was at completion, so we believe it was unfair.
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> Grounds of Appeal:
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> No evidence provided of bathroom gutted and redone. No chance given to rectify things stated in complaint. Bathroom only: Laundry and separate toilet added after first Tribunal hearing. Multiple discrepancies in statements and figures of money amounts.

9 The Supplier relied upon 40 pages of material in support of his appeal in addition to the Notice of Appeal. This material consisted of email exchanges and text messages between the parties, copies of material provided by the Homeowner in her claim to the Tribunal, copies of quotes, invoices and receipts for materials, as well as written submissions of the Supplier. Some of this material was duplicated having been attached to the Notice of Appeal.

10 The following background facts are not controversial:

(1) The parties entered into a verbal agreement on 22 March 2021 for the completion of bathroom works at the Homeowner's property.

(2) The agreement reached between the parties was for the Supplier to undertake works in the Homeowner's bathroom and laundry and the

agreed payment was for the amount of $500 per day for labour and for the Homeowner to pay for all products and materials.

(3) The parties believed that there was no need for a written contract as the labour costs were estimated to fall below the $5,000.00 limit for a written contract.

(4) During the hearing the Supplier did not dispute the findings of the Building Inspector regarding the 'fall' of the floor and agreed that the fall was less than recommended.

(5) During the hearing the Supplier agreed that they damaged the vanity.

(6) The Supplier does not have a licence to undertake bathroom work (under the HB Act).

11 The Homeowner relied on a 33 page bundle of material which included written submissions dated 30 August 2021, copies of orders and reasons for decision of the Tribunal, a copy of the Building Inspector's report dated 28 April 2021 and Tax Invoices for same as well as a Reply to Appeal.

12 In her Reply to Appeal the Homeowner relied on her evidence before the Tribunal and referred to the money order registered in the Local Court for the amount ordered by the Tribunal.

13 During the hearing of the appeal the parties confirmed that they were content for the matter to be finally determined without the need for a further hearing. The Appellant (Supplier) initially sought an order that his son Mr Jordan Woolaston represent him as Agent (under s 45 of the NCAT Act). However, after the Agent explained his personal circumstances concerning a family medical matter the Appellant agreed that no Agent was needed and requested that the Appeal Panel determine the matter without the need for the parties to put anything else to the Panel. In essence, there was a request for the matter to be finalised without a hearing. Other than the issue of pressing the lateness of the appeal, the Homeowner consented to the matter being dealt with without the need for a hearing.

14 Section 50 of the NCAT Act relevantly provides:

50 When hearings are required

…

(2) The Tribunal may make an order dispensing with a hearing if it is satisfied that the issues for determination can be adequately determined

in the absence of the parties by considering any written submissions or any other documents or material lodged with or provided to the Tribunal.

(3) The Tribunal may not make an order dispensing with a hearing unless the Tribunal has first—

(a) afforded the parties an opportunity to make submissions about the proposed order, and

(b) taken any such submissions into account.

15 Having considered the parties submissions under s 50(3) in the preliminary hearing, the Appeal Panel was satisfied that the issues for determination can be adequately determined in the absence of the parties and we made an order under s 50(2) of the NCAT Act.

Consideration

16 In considering the appeal, having set out the background and context we will consider the disposition of the Appeal.

17 Put plainly, an appeal is not a rehearing of a matter, but a reconsideration of the matter in first instance to examine whether the Tribunal erred in its approach to the evidence and material before it, and to determine whether in that approach and the conclusions that flow, the Tribunal fell into error. It does not matter whether, on the same evidence, we might reach a different conclusion to the Tribunal. We set out the legal basis of appeals of this nature below.

18 This is an appeal brought under s 80 of the NCAT Act. By that section the appellant is able to bring an appeal as a right on any question of law or with the leave of the Appeal Panel on any other ground. The other grounds are set out in the provisions of cl 12 of Sch 4 of the NCAT Act. Clause 12 provides as follows:

12 Limitations on internal appeals against Division decisions

(1) An Appeal Panel may grant leave under section 80 (2) (b) of this Act for an internal appeal against a Division decision only if the Appeal Panel is satisfied the appellant may have suffered a substantial miscarriage of justice because:

(a) the decision of the Tribunal under appeal was not fair and equitable, or

(b) the decision of the Tribunal under appeal was against the weight of evidence, or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

Note. Under section 80 of this Act, a party to proceedings in which a Division decision that is an internally appealable decision is made may appeal against the decision on a question of law as of right. The leave of the Appeal Panel is required for an internal appeal on any other grounds.

Question of Law

19 Where an appellant is not legally represented, it is appropriate for the Appeal Panel to consider whether the grounds of appeal raise a question of law: *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69. In Prendergast, the Appeal Panel set out a non-exhaustive list of questions of law that might arise from Tribunal decisions. In summary, the questions of law identified are whether there has been a failure to provide proper reasons; whether the Tribunal identified the wrong issue or asked the wrong question; whether a wrong principle of law had been applied; whether there was a failure to afford procedural fairness; whether the Tribunal failed to take into account relevant considerations; whether the Tribunal took into account an irrelevant consideration; and whether there was no evidence to support a finding of fact; and whether the decision is so unreasonable that no reasonable decision-maker would make it.

20 The Supplier has not identified any arguable error of law. We have examined the grounds of appeal and the attachments. We address the sufficiency of reasons of the Tribunal in the paragraphs below. The issue before the Tribunal was a payment of money for rectification of poor building work performed. In the absence of the Transcript we have not identified any lack of procedural fairness to the Supplier nor was any identified in the appeal. It appears that the Supplier asserts that his version of events should have been preferred over that of the Homeowner. On the substantive issue in the application the evidence of the Building Inspector was before the Tribunal who could give weight to it. We have not identified any arguable error of law. Accordingly, in

our view, the Supplier requires leave to appeal in respect of any other claimed error.

21 Having considered the decision of the Tribunal dated 18 June 2021, in our view it complies with the requirements of s 62 (3) of the NCAT Act.

> **62 Tribunal to give notice of decision and provide written reasons on request**
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> (1) The Tribunal (including when constituted as an Appeal Panel) is to ensure that each party to proceedings is given notice of any decision that it makes in the proceedings.
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> (2) Any party may, within 28 days of being given notice of a decision of the Tribunal, request the Tribunal to provide a written statement of reasons for its decision if a written statement of reasons has not already been provided to the party. The statement must be provided within 28 days after the request is made.
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> (3) A written statement of reasons for the purposes of this section must set out the following—
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> (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
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> (b) the Tribunal's understanding of the applicable law,
>
> (c) the reasoning processes that lead the Tribunal to the conclusions it made.

22 The Tribunal provided reasons the day after the hearing and orders were made on 17 June 2021. The reasons for decision set out the applicable law, being the HB Act which deals with residential building work being the nature of the work under the agreement, and the Fair Trading Act 1987 (NSW) which grounds the jurisdiction of the Tribunal in respect of consumer claims. The Tribunal also refers to the ACL in respect of the guarantees afforded to consumers of goods and services.

23 Neither party provided a copy of the transcript or sound recording of the hearing of the matter by the Tribunal, as directed if they wished to rely on anything said at the hearing. In that regard we only have the material before the Appeal Panel (including the reasons) to determine the appeal.

24 In respect of the substantive finding by the Tribunal that the Supplier was not licensed to undertake the nature of the work subject to the claim, no submission was made to the Appeal Panel.

25 The Supplier submitted that there were discrepancies in the Homeowner's statements that were put to the Tribunal. Other than attempting to provide his own evidence which the Supplier said refuted aspects of the Homeowner's claim, nothing of significance was before the Appeal Panel. Whist the Supplier submitted that, for example, the presence of a door mat, pot plants and toys in the back yard of the Homeowner's residence were evidence that she had not moved out and been deprived of the premises for a period of time, nothing was provided by way of evidence before the Appeal Panel which was before the Tribunal on this point. We note that no finding (or award) was made in respect of this issue, other than a finding by the Tribunal that they accepted the evidence that the bathroom and laundry were unable to be used and required rectification.

Decision against the weight of evidence

26 No evidence was submitted on appeal that establishes how the Tribunal fell into error. Whilst the Supplier claims that the amount ordered exceeds the amount paid to them, albeit conceding only the cost of replacement of the damaged vanity, the Tribunal dealt with the matter as a claim for rectification providing that the entire cost of rectification be ordered. The evidence before the Tribunal supported the damage to materials or the need to remove materials already in situ as part of the rectification process. Having made the finding that the appellant was not licensed or otherwise authorised to undertake the work in question, and having accepted the conclusions of the Building Inspector that the work required rectification as it was not of an acceptable standard, it remained for the Tribunal to make a finding that they had failed to complete the work with due care and skill. As a result a finding was made that the Supplier had breached the warranties and guarantees of the HB Act and the ACL.

27 The Supplier made a submission that neither the Homeowner nor the Tribunal gave them an opportunity to rectify the works done at their own expense. Without a copy of the transcript or sound recording we infer that the Tribunal did not consider this issue as practical as the appellant was not licensed to do the relevant type of Home Building work (including similar work by way of rectification).

28 In summary, we are not satisfied that the Supplier has established that the finding was against the weight of evidence. There was no finding for general damages or loss of benefit of the residence, an issue that the appellant made significant submissions about. The Tribunal relied upon the independent report which was before it and available to both parties. The fact that the Supplier had an ABN was apparent to the Homeowner when the agreement was made. The Tribunal accepted her evidence that she later made inquiries and established that the appellant was not licensed to carry out works under the HB Act. As stated above, the fact that the Supplier was not licensed has never been a dispute in the matter whilst it was before the Tribunal.

29 Having considered this matter of being unlicensed, which was not contested by the Supplier, and the conclusions of the Building Inspector, the Tribunal applied this evidence to establish the outcome of the application and the amount to be paid. In respect of consideration of an amount for goods and chattels, the Tribunal adduced evidence that the vanity was damaged, and relied upon the Building Inspector's evidence concerning materials either damaged or necessarily replaced during rectification works and arrived at the total figure (plus the cost of the report).

30 We find that the Supplier has not established that the decision was against the weight of evidence.

31 In the case of *Collins v Urban* [2014] NSWCATAP 17 the Appeal Panel dealt with what constitutes a substantial miscarriage of justice on appeal. At [76] to [79] the Appeal Panel observed:

> 76. Accordingly, it should be accepted that a substantial miscarriage of justice may have been suffered because of any of the circumstances referred to in cl 12(1)(a), (b) or (c) where there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.
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> 77. As to the particular grounds in cl 12(1)(a) and (b), without seeking to be exhaustive in any way, the authorities establish that:
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> > (1). If there has been a denial of procedural fairness the decision under appeal can be said to have been "not fair and equitable" -

> Hutchings v CTTT [2008] NSWSC 717 at [35], Atkinson v Crowley [2011] NSWCA 194 at [12].
>
> (2). The decision under appeal can be said to be "against the weight of evidence" (which is an expression also used to describe a ground upon which a jury verdict can be set aside) where the evidence in its totality preponderates so strongly against the conclusion found by the tribunal at first instance that it can be said that the conclusion was not one that a reasonable tribunal member could reach - Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33 at 41-42, Mainteck Services Pty Limited v Stein Heurtey SA [2013] NSWSC 266 at [153].

> 78. If in either of those circumstances the appellant may have been deprived of a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved then the Appeal Panel may be satisfied that the appellant may have suffered a substantial miscarriage of justice because the decision was not fair and equitable or because the decision was against the weight of the evidence.
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> 79. In order to show that a party has been deprived of a "significant possibility" or a "chance which was fairly open" of achieving a different and more favourable result because of one of the circumstances referred to in cl 12(1)(a), (b) or (c), it will be generally be necessary for the party to explain what its case would have been and show that it was fairly arguable. If the party fails to do this, even if there has been a denial of procedural fairness, the Appeal Panel may conclude that it is not satisfied that any substantial miscarriage of justice may have occurred - see the general discussion in Kyriakou v Long [2013] NSWSC 1890 at [32] ff concerning the corresponding provisions of s 68 of the CTTT Act and especially at [46] and [55].

32 The Supplier has not established that the finding of the Tribunal was not open to it on the available evidence. The appellant was not licensed, there was unchallenged evidence that the work performed was substandard and required rectification and the cost of such rectification. The matter had moved on from being a matter concerning a refund or partial refund of monies paid, and was considered as a breach of the Australian Consumer Law by the supplier.

33 Nor has the Supplier established that the “evidence in its totality so strongly preponderates against the conclusion found by the Tribunal”. For these reasons we do not find an error in respect of the amounts orders to be paid. As noted above at [26] the Tribunal was unable to order that the appellant rectify the work, as the appellant was not licensed to carry out the work under the HB Act.

34 Consequently, leave to appeal should be refused: see cl 12(1) Sch 4 of the NCAT Act and *Collins v Urban* at [77].

35 As we have heard the appeal, we have decided to extend the time for lodgement of the appeal, as the matter is only a few days late. The Supplier provided an explanation for the delay being: stress, ignorance of the time frames, losing two days to preparing the appeal and sickness within the family. Without obtaining further evidence of these matters, but noting that no prejudice attaches to the Homeowner giving leave to extend time to lodge the appeal pursuant to s 41 of the NCAT Act, we extend time to the extent necessary.

Orders

36 The Appeal Panel makes the following order:

(1) Time is extended pursuant to s 41 of the Civil and Administrative Tribunal Act 2013 NSW) to lodge the appeal.

(2) A hearing is dispensed with.

(3) The application for leave to appeal is refused.

(4) The appeal is otherwise dismissed.

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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