QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Swagman Australia Pty Ltd v Kennedy* [2011] QCATA 98
PARTIES:	Swagman Australia Pty Ltd (trading as Swagman Motor Homes) v Mr William Kennedy
APPLICATION NUMBER:	APL295-10
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Richard Oliver, Senior Member Andrew McLean Williams, Member
DELIVERED ON:	8 April 2011
DELIVERED AT:	Brisbane
ORDERS MADE:	**Leave to Appeal Refused.** **The Appeal is otherwise dismissed.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL – MINOR CIVIL DISPUTE – CONTRACTUAL WARRANTY DISPUTE – where original warranty assigned in writing to subsequent owner of motor-home – where manufacturer attempted to repair cosmetic cracking and subsequent refusal to attempt same again – where owner sought to recoup costs of those repairs affected elsewhere – where the manufacturer now seeks leave to appeal on grounds the Member made errors of fact and law – whether leave to appeal should be granted *Queensland Civil and Administrative Tribunal Act* 2009; s 142

APPEARANCES and REPRESENTATION (if any):

This matter was heard on the papers, pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (QCAT Act).

REASONS FOR DECISION

Senior Member Richard Oliver:

[1] In this matter the Appeal Tribunal consisted of Mr McLean Williams, QCAT Member and me. I have had the benefit of reading his reasons in draft. I agree with his reasons, and his conclusions, and the order he proposes.

Member Andrew McLean Williams:

[1] Swagman Australia Pty Ltd (hereinafter "Swagman") trade under the name "Swagman Motor Homes". As that name suggests they are the manufacturers of motor-homes. Not just any motor-homes, but opulent ones that far exceed in value a great many modest residential houses. Evidence put before QCAT suggests that the motor-home that is at the heart of this dispute – a "Swagman RV3301" was, when new, worth $574,236.96.

[2] In mid 2007, Trevor and Jan Harris, the former owners of this motor-home contracted with Swagman to have it constructed on their behalf. Given the opulence of the vehicle, construction time was protracted. By the time that it was eventually ready for delivery around 12 months later, Mr and Mrs Harris had undergone a change of circumstances and no longer had any use for it. It was never registered in their name and it remained in the yard at Swagman, up for sale by consignment. Swagman was not the consigning agents. The motor-home remained in the yard at Swagman, purely for reasons of convenience.

[3] The agents for sale was initially a business called "Motorhome World", (with whom Swagman had a retail dealership relationship). During the time that the motor-home sat at Swagman it was never registered for use on the States roads, although over the duration of that time Motorhome World did incur something in the order of 724 kilometres on the odometer, by their taking the motor-home out on test drives and to camping & outdoor shows, apparently with the consent of the then owner, Mr Harris.

[4] In about March of 2009, the Respondent on this appeal, Mr William Kennedy went to Swagman with every intention of purchasing one of their grand motor homes. Whilst in their yard he became aware of the "nearly new" Swagman RV3301 owned by Mr Harris.

[5] After a test drive facilitated by employees of Swagman, Mr Kennedy purchased the motor-home from Mr Harris in late March 2009, for an undisclosed price. It is perhaps worthwhile to record that Swagman did not play any other part in the sale, and Mr Harris paid an agents commission on the sale of about $5,000 to a Mr Gary Sweeting, whom had been previously involved with Motorhome World.

[6] It is not factually disputed that the Swagman RV3301 had never been registered for use on the States roads, not at least until after it had been acquired by Mr Kennedy. This is a factor that became important to the decision that is now under appeal, for reasons that will herein be revealed.

[7] It is also important to record that around the time of the sale of the motor-home the balance of the manufacturer's "new motor-home" warranty was transferred from the vendor (Mr Harris) to the purchaser (Mr Kennedy), and that fact was acknowledged, in writing by Swagman, on 30 March 2009.

[8] The terms and conditions of that warranty found their way into evidence. Because it is a matter to which I will also return later in these reasons, clause one (1) of the terms and conditions provides:

> 1. Swagman (Aust) Pty Ltd ABN 74 111 944 506 of 245 Brisbane Road, Biggera Waters Q 4216 warrants the Motor home described on the Warranty Registration form for a term of 3 years, or 60,000 kilometres (whichever occurs first**) from the date of first registration** any items of our manufacture or Appliances and/or Equipment fitted by Swagman (Aust) Pty Ltd are free from defects under normal use. Any defect in any of these items which occurs during the Warranty Term will be repaired or replaced without charge to the Purchaser
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> [the **emphasis** is not in the original, and has been included here, by me]

[9] Shortly after purchase Mr Kennedy and his wife took the motor-home on a trip to central western Queensland. During that trip a number of defects in the motor home became evident to Mr and Mrs Kennedy, and these were raised with Swagman upon their return.

[10] It appears that most of the areas of defect identified at that stage were satisfactorily rectified. However, a dispute remained regarding cracking on the "slide out" edges. I interpose that the "slide outs" are those parts of the motor-home that can be - once the motor-home has first been parked and made ready for occupation - extended out, beyond the "as driven" dimensions of the motor-home, in order to increase its internal habitable space. It appears that it was accepted by the learned Member below that this cracking was a purely cosmetic, rather than structural problem.

[11] Evidence taken before the learned Member below from representatives of Swagman[1] (apparently uncontroversial and accepted) was to the effect that the cracking was the result of an election having been made, for aesthetic reasons, not to incorporate an aluminium moulding on the edges of the slide outs – as is the apparent wont of many other motor-home manufacturers – but to do something unique and have moulded Kevlar composite edges, instead. This design election appears to have resulted in edge cracking, as a result of the more pliable polyurethane core material then bulging and flexing against the Kevlar composite shell, each time the slide outs were activated. In evidence, Mr Searlee, from Swagman, likened the problem to what might happen if one were to squeeze a 'Maxibon' ice-cream, such that the soft ice-cream centre extrudes beyond the outer biscuit layer.

[12] Having identified the problem, Swagman then set about attempting to rectify it. Indeed, Swagman tried to fix it on two occasions, yet never to the satisfaction of

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[1] Transcript, pp. 18 - 23.

Mr Kennedy. In an e-mail[2] addressed to Mr Kennedy dated 13 November 2009, Mr Neil Ingram, on behalf of Swagman said, in part:

> "….The repair work done by Swagman is of a cosmetic nature. As I have said, Swagman considers that it has done more than it is required to do. Swagman is not prepared to undertake any more work of a cosmetic nature. If you require any work of this type to be done, you are free to do so at your own expense."

[13] After that, Mr Kennedy made his own arrangements to have the cracking on the slide out edges rectified. A quote for same was obtained by him on 4 February 2010 from Coomera River Smash Repairs Group, for $5,858.60. This quote was used by Mr Kennedy to quantify his application for compensation which was filed with QCAT in the Southport Registry, on 8 February 2010.

[14] Ultimately, before the matter came on for a determination before QCAT, Mr Kennedy had these repairs affected by an alternate smash repairer, Royans Brisbane Pty Ltd ("Royans"), who quoted a slightly lesser sum of $5,349.45. Mr Kennedy also explained that he understood there had been some kind of falling out between Swagman and the Coomera River Smash Repairs Group, such that he elected to have his problem fixed by Royans, instead.

[15] The learned Member accepted that the repairs had been affected by Royans, and that there had been no recurrence of the edge cracking problem since that time, despite the Kennedy's having said in evidence that the motor-home had been used extensively, since then.

[16] On 27 September 2010 Swagman brought a counter-application seeking a dismissal of Mr Kennedy's claim on the basis that the sum of $5,858.60 had *not* been incurred by Mr Kennedy and by reason that the rectification works "were not carried out by Coomera Smash Repairs as per the application dated 8/2/2010".

[17] The matter was determined by a QCAT Member sitting as an adjudicator on 22 October 2010. The learned Member found on behalf of Mr Kennedy, allowing the amount of the Royans repair quote, plus the $90 QCAT filing fee. It is this decision that is now appealed against.

This Appeal

[18] Pursuant to s 142(3) of the QCAT Act, this appeal may only be commenced with the leave of this appeal tribunal.

[19] The question whether (or not) leave should be granted is usually one to be addressed in accordance with established principles. Is there a reasonably arguable case of error in the primary decision?[3] Is there a reasonable prospect that the applicant will obtain substantive relief?[4] Is leave necessary in order to correct a substantial injustice to the applicant caused by some error?[5] Is there

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2 'Attachment C' to the Respondent's initial application to QCAT, dated 08 February 2010.
3 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
4 *Cachia v Grech* [2009] NSWCA 232 at [13].
5 *QUYD Pty Ltd v Marvass Pty Ltd* (supra).

some question of general importance upon which further argument, and a decision of the appellate court or tribunal, would be to general public advantage?[6]

[20] Leave to appeal will ordinarily only be obtained in circumstances wherein there is some question of general importance upon which further argument, and a decision of the appellate tribunal would be to the public advantage; or, where there is a reasonably arguable case of error in the decision at first instance, and a reasonable prospect that the applicant for leave would obtain further substantive relief. For reasons that will be revealed in the following paragraphs this case is however not one that falls under any of these criteria.

[21] As was recognised by the High Court in *Fox v Percy* ([2003] HCA 22 at [32] per Gleeson CJ, Gummow and Kirby J) the duty of this appellate tribunal is solely to determine whether there is some error in the primary decision. It is not our task to decide where the truth lay as between the competing versions given by the parties.

[22] Over 26 sequentially numbered paragraphs the appellant has set out a number of grounds for leave to appeal, as well as grounds of appeal. Many of these are repetitive. Those specified as grounds for *leave* to appeal also essentially traverse the same terrain as those specified as *grounds* of appeal. For reasons of convenience I here attempt to distil all these down to their essence:

(a) The learned Member relied on evidence that was "inconsistent, untested and, on its face incorrect" – namely a cost assessors report from Australian Accident Management Commercial (AAMC), which was based on the Coomera River Smash Repairs quote, when the repairs were performed by Royans.

(b) The Appellant was denied natural justice by it not having sufficient time to consider the AAMC report beforehand, and if need be, to then obtain contrary evidence of its own.

(c) The AAMC report was infected by factual error, having referred to the motor home being at Coomera River Smash Repairs on 19 May 2010, when it had already been taken to, and repaired at Royans, by that time.

(d) The learned Member relied upon a repair quote from Royans, which the Appellant had not had a chance to read or respond to, thereby giving rise to another denial of natural justice.

(e) The learned Member below failed to give any weight to the Appellant's counter-claim.

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[6] *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388 at 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577 at 578, 580.

(f) The learned Member below failed to consider the full terms of the Appellant's warranty, which did not, for a variety of alleged reasons, cover the work that the Applicant sought to have covered by warranty.

(g) The evidence of the repairer Royans should not have been accepted, on the basis that they have no known expertise in fibreglass or motor-homes, and is not a repairer approved by Swagman.

[23] I will address each of those listed as (a) – (g) (immediately above):

(a) The learned Member relied on inconsistent, untested and incorrect evidence – being the cost assessors report from Australian Accident Management Commercial (AAMC).

[24] The Respondent's application to QCAT was filed on 8 February 2010. The Claim at that time was for the full amount of the Coomera Rivers Smash Repairs quote, being $5,858.60, and that quote was attached as part of the Respondent's QCAT Claim. Later, at the hearing of the matter, the Respondent relied upon a report from a repair cost assessor Australian Accident Management Commercial (AAMC) to assert that the repair quote from Coomera Rivers Smash Repairs was fair and reasonable. It is the case that the actual repairs were effected by Royans, and at a slightly lower cost to that which AAMC had assessed (in May 2010) as being reasonable.

[25] It is clear from correspondence on the QCAT file that the Appellant was aware of the Coomera Rivers Smash Repairs quote amply prior to the date of the hearing of this matter.

[26] As was recently recognised by the Queensland Court of Appeal in *GO & MJT Nominees Pty Ltd v Hollywells Homewares Pty Ltd & Anor,*[7] QCAT is a jurisdiction that is not encumbered by either pleadings or the rules of evidence, and is one charged with disposing of disputes within its jurisdiction in a cost effective and timely manner (QCAT Act, see ss 3-4).

[27] The requirements for procedural fairness in a case such as this one must then be adjusted to the statutory framework governing the tribunal in question.[8] Rather than pleadings defining the case that must be met by an opponent at trial (as would be the case in litigation before the courts), the case that is required to be met by an opponent in a matter before QCAT is revealed instead from the filed evidence.

[28] At all times Swagman knew the *quantum* of the claim brought against it (on the basis of the Coomera Rivers Smash Repairs quotation filed by the Respondent/Applicant), and it was always at liberty to adduce contrary evidence of its own to show that the quantum of that claim was unreasonable. Swagman did not adduce any such evidence before the learned Member below that tended to show that that the costs of repair claimed by the Respondent were

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7 [2010] QCA 368, (Margaret McMurdo P, Chesterman JA and McMeekin J).

8 *GO & MJT Nominees*, ibid, at [22]; *Kioa v West* (1985) 159 CLR 550 at 584-585, per Mason J.

unreasonable. Instead, Swagman adduced evidence (in the form of correspondence) from both a firm of naval architects ("Seatransport") and from yacht builders, ("Oceanic Yacht Design") that was only directed towards another issue (ultimately a "red herring") showing that the cracking was cosmetic, rather than structural. Those reports also do not help in any way to demonstrate that the repairs were unnecessary. Moreover, the fact that, ultimately, the repairs were affected by Royans (at a lesser cost) rather than Coomera Rivers Smash Repairs is not a factor that is in any way relevant to this appeal.

[29] In my view, it is clear on the face of the record that the learned member below relied upon the Royans quote, rather than the AAMC report.

(b) The Appellant was denied natural justice by it not having sufficient time to consider the AAMC report.

[30] For reasons already traversed in response to (a), above, this appeal ground is of no substance. The AAMC report was only ever supplementary evidence, tending to show that the quantum of the claim was not unreasonable. Ultimately, the learned member accepted that the repairs had been effected by Royans, and that was the proper quantum of the claim. It cannot now be reasonably asserted that the appellant was 'taken by surprise' regarding the quantum or nature of Mr Kennedy's claim. The nature of the claim was always known to them in relation to the costs of repair to the slide out edges. They were sufficiently alerted as to the likely quantum of it by the Coomera River Smash Repairs quote.

(c) The AAMC report was infected by factual error.

[31] The Appellant contends that the AAMC report erroneously puts the motor-home as being situated in the yard at Coomera Rivers Smash Repairs on 19 May 2010, and this error undermines the credibility of the AAMC evidence. With respect, the AAMC report does no more than state that that the author of it had visually inspected the vehicle; considered the 'Coomera Rivers' quote; and examined photographs of the cracking on the slide outs, prior to their repair by Royans. In all events the Appellant has now attributed a level of significance to the AAMC report that was not ever ascribed to it by the learned Member below.

(d) The learned member relied upon a repair quote from Royans. This was unfair to the Appellant.

[32] For reasons already elaborated in response to (a) above, the Appellant was put on sufficient notice of the case that it was required to meet. The fact that the repairs were ultimately undertaken by Royans, at a slightly lesser cost, and that the Appellant did not see the Royans quote until 20 October 2010 is not a factor that might now be said to have caused any injustice to the Appellant.

(e) The learned Member below failed to give any weight to the Appellant's counter-claim.

[33] The appellants counter-application, filed on 27 September 2010 alleges that the respondent Mr Kennedy did not incur $5,858.60 as liquidated damages, as the

repairs were not carried out by Coomera Rivers Smash Repairs. Nothing of any consequence turns on who was the repairer. As was correctly identified by the learned Member below, it would not even have mattered if the repairs had not been undertaken as at the date of the hearing, providing there was a quote for same available at the hearing, and that quote was also accepted as fair and reasonable by the presiding adjudicator or member. In my view, it is pellucidly clear that the learned Member sufficiently dealt with the Appellant's cross-application, giving it all the weight that it warranted.

(f) The learned Member below failed to consider the full terms of the Appellant's warranty, which did not, for a variety of alleged reasons, cover the work that the Applicant sought to have covered by warranty.

[34] These matters are traversed in paragraphs 1(c), 1(d), 1(e), 4, 5, 6, 8, 9 and 15 of the Appellant's appeal submissions. In essence the Appellant contends that the cracking on the slide outs was not covered by the warranty, which had been rendered void by after-sales modification; and because the vehicle had not been inspected at intervals of every six months or 10,000 kilometres. There are a number of difficulties with these contentions.

[35] The balance of the new motor-home warranty was transferred to Mr Kennedy. This was acknowledged, in writing, by Swagman. Paragraph one of the warranty is set out in paragraph [9] (above), of these reasons for decision. On the face of it, paragraph one of the warranty indicates that the warranty did not even commence to run until the motor-home had been acquired by Mr Kennedy, by reason that it had never previously been registered by its former owner, Mr Harris. Irrespective as to whether the cracking in the slide-out edges was cosmetic or structural this is a defect in workmanship that is, *prima facie*, covered under the warranty.

[36] Until acquired by Mr Kennedy in March 2009 the motor-home had remained in the yard at Swagman, and there presumably able to be inspected by Swagman or its agents on an almost daily basis. At the time of acquisition by Mr Kennedy it had only done 724km, and the defects that are now at the heart of this claim were identified during its very first trip to central western Queensland. In light of that, it is not now possible to legitimately argue that the warranty was void by reason that the motor-home had not been inspected every six months and/or 10,000 kilometres, (whichever is the lesser) as neither event was yet to happen. Even more fundamentally, this point was not taken by the Appellant in the original proceedings before the learned Member below. Had it been, then no doubt it would not have succeeded.

[37] It appears true that the motor-home has had some minor after-sale modifications. The transcript reveals that an air horn has been installed; and that some cupboard hinges have been modified, so as to better facilitate access to an on-board washing machine. Although clause 7 of the warranty indicates that "any modification whatsoever" will void the warranty, the difficulty with the submission becomes that, by having originally accepted Mr Kennedy's complaints about cracking on the edges of the slide outs; and having then attempted to make

repairs on two (2) separate occasions, Swagman have waived the benefit of clause 7 of the warranty and cannot now raise it, in retrospect as a defence against the claim.

(g) The evidence of the repairer Royans should not have been accepted, on the basis that they have no known expertise in fibreglass or motor-homes, and is not a repairer approved by Swagman.

[38] I am wholly unpersuaded by the argument. It is clear from the e-mail sent to Mr Kennedy by Swagman – as is now reproduced, in part, at paragraph [13] of these Reasons for Decision, above – that Mr Kennedy was invited to go about securing repairs to his satisfaction by other means, which must be taken to include the use of any repairer, even one not "approved" in the ordinary course by Swagman.

[39] It is further clear, in my view, that the learned Member was always entitled to accept the repair costs specified by Royans, particularly in light of there being no contrary evidence adduced by the Appellant to undermine the cost of those repairs. In this sense it is not enough for the Appellant to now assert, without evidence (as it has at paragraph 20 of its appeal submissions) that the repair costs should have been no more than $1,056. This is a matter that should have been put into evidence by the Appellant before the learned Member below. The failure to adduce any evidence in support of this contention at the original hearing is now an error that the Appellant must just consign to experience.

Conclusions & Order

[40] As the Applicant has been unable to demonstrate any error on the part of the learned Member, and nor is any error apparent on the face of the record, leave to appeal must be refused.