QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Anderson & Anor v iFactory Pty Ltd* [2020] QCATA 111
PARTIES:	**MAX ANDERSON** (first applicant/appellant) **JEAN ANDERSON** (second applicant/appellant) **v** **IFACTORY PTY LTD** (respondent)
APPLICATION NO/S:	APL001-20
ORIGINATING APPLICATION NO/S:	MCDO21-19 Brisbane
MATTER TYPE:	Appeals
DELIVERED ON:	7 August 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Member Howe
ORDERS:	**Leave to appeal refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – where the respondent was engaged to create a website for the second applicant – where the applicants commenced proceedings in the tribunal to recover the money paid for the website – where the claim was refused on the basis the work done was in accordance with the contract and was not lacking in due care and skill – where the grounds of appeal were unclear *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 43, s 142(3)(a)(i) *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404. *Hutchins v Touchstone Private Wealth Pty Ltd* [2019] QCATA 56 *Pickering v McArthur* [2005] QCA 294
REPRESENTATION:	
Applicants:	Self-represented
Respondent:	Self-represented by J Drake

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

[1] The second applicant ('the applicant') engaged the respondent to develop a webpage for her business.

[2] A number of written proposals were presented by the respondent and the applicant accepted the third and final. A contract was signed between them.

[3] The project took months to complete. The applicant was not satisfied with numerous aspects of the work throughout the project and unhappy with the final product. The respondent claimed the applicant constantly changed her mind and asked for things beyond the scope of the contract.

[4] The applicant commenced minor civil dispute – consumer application proceedings in the tribunal seeking to recover all the money she had paid to the respondent, $13,680.

[5] The matter was heard before an Adjudicator on 30 October 2019. The Adjudicator dismissed her application. She now seeks leave to appeal that decision.

[6] Given this is an appeal from a decision made in the Tribunal's minor civil dispute jurisdiction, leave to appeal must first be obtained before any appeal proceeds.[1]

[7] Leave to appeal will usually only be granted where an appeal is necessary to correct a substantial injustice to the appellant and where there is a reasonable argument that there is an error to be corrected.[2]

[8] The contract between the parties was only between the second applicant and the respondent. The first applicant, the son of the second applicant, was in any case initially named as a party to the proceedings below. During the hearing he was removed as a party to the action by the Adjudicator.

[9] Also during the hearing the learned Adjudicator made comment about the large amount of material filed by the applicants which included approximately 10 hours of recordings made by the applicants of discussions had with employees of the respondent during the project.

[10] Despite the large volume of material filed below the applicant now seeks to adduce yet further material as fresh evidence in the appeal. Leave to adduce fresh evidence will usually only be granted in limited circumstances:

> The classic statement of what amounts to "special grounds" for reception of further evidence upon an appeal was approved recently by Lord Bridge in *Langdale v. Danby* [1982] 3 All E.R. 129 at 137–138. Three conditions must be fulfilled. "First it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the

---

1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 142(3)(a)(i).
2 *Pickering v McArthur* [2005] QCA 294.

> evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."[3]

[11] Leave will not be given to simply allow a party an opportunity to improve its performance at the trial:

> The appeal is not to be seen as an opportunity to address deficiencies in a party's case with new evidence that might have been available at the time of the original hearing. It is generally the case that an application for leave to appeal will only be considered on the evidence before the original decision maker.[4]

[12] All of the proposed new material was available for the hearing below. The applicants say they did not present it because they did not think it was necessary because they expected the evidence that was led would be sufficient and accepted by the tribunal.

[13] Volume of material will not alone make a case for a party. If it is not relevant to the issues in dispute unnecessary material usually hinders comprehension and reduces the effectiveness of a party's case.

[14] The evidence now proposed to be adduced is not fresh evidence within the requirements set out above. Leave to adduce fresh evidence is refused.

[15] Turning to the applicants' appeal material, in the application for leave to appeal the grounds of appeal are required to be set out. There are no true grounds of appeal set out in the application by the applicants. Instead there is a list of matters of complaint commonly raised in appeals before the Tribunal and courts. They are unhelpful and are in the most general of terms - not applying the law to the facts, breach of the rules of natural justice, taking into account irrelevant considerations and failing to take into account relevant considerations. These are not grounds of appeal.

[16] Subsequently, after directions were given as to the conduct of the application for leave to appeal, the applicants filed submissions. The submissions are unnecessarily voluminous and hard to comprehend. In large part they are simply reiterations of claims made in the hearing below with the rider that not accepting the assertions amounts to error on the part of the Adjudicator. There is no clarity about what is alleged to have been the errors, either of fact or law or both, made by the learned Adjudicator.

[17] Doing the best I am able however, within the bounds of their prolixity, I determine that the following are the broad grounds of appeal:

(a) The tribunal erred in finding on the evidence that the respondent did not engage in misleading and deceptive conduct;

(b) The tribunal erred in concluding a breach of the contract by the respondent was not a major failure of a guarantee under the Australian Consumer Law;

(c) The second applicant was not accorded natural justice because she was not permitted to have the first applicant assist her in the proceeding;

(d) The tribunal failed to take into account all the material filed by the applicant.

---

3 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408.

4 *Hutchins v Touchstone Private Wealth Pty Ltd* [2019] QCATA 56, [9].

The grounds of appeal

The tribunal erred in finding on the evidence that the respondent did not engage in misleading and deceptive conduct.

[18] The only mention of the respondent engaging in potentially misleading and deceptive conduct at the hearing concerned comments claimed by the applicants to have been made by one of the respondent's employees. However the claimed misrepresentation was made well after the contract had been entered into and after the first draft of the website had been produced for the applicants' approval. It appears that what is said to be misrepresentation by an employee of the respondent was nothing more than an exchange during the course of the project about what the product should be to comply with the terms of the contract.

[19] The Adjudicator asked for particulars of the misrepresentation and the applicants referred generally to the CD recording discussions. The Adjudicator explained the Tribunal did not accept electronic evidence at hearing and there was no transcript of what was recorded made available. The matter was not taken further.

[20] There was no issue of misleading and deceptive conduct raised at the hearing as a matter for decision by the Adjudicator.

[21] There is no prospect of success with respect to this newly raised issue on the application for leave to appeal.

The tribunal erred in concluding a breach of the contract by the respondent was not a major failure of a guarantee under the Australian Consumer Law

[22] The learned Adjudicator concluded there was no breach of contract or guarantee by the respondent. The applicants failed to persuade her on the balance of probabilities that the website was not constructed to the agreed contract specifications nor that the work was not done with due care and skill.

[23] The Adjudicator did go on to discuss the guarantee added to any contract between supplier and consumer of services by the Australian Consumer Law to the effect that services are to be provided with due care and skill, but simply to note that, if there had been a breach, the legislation in any case required the consumer to first try to have defective services remedied.

[24] Apart from the guarantee requirement, she concluded from the evidence given by the respondent that the defects forming the applicant's complaint would have been rectified pursuant to the 30 day warranty that applied to the work done by the respondent under the contract.

[25] The learned Adjudicator was entitled to conclude that there was no breach of any guarantee that the services would be provided with due care and skill. During the hearing the Adjudicator took pains to have the applicant identify with precision those parts of the work that were not in accordance with the contract or were defective. The following exchange occurred after a report provided by third party IT consultants engaged by the applicants was raised for consideration:

> ADJUDICATOR WALSH: This is not a report from the people who have given you the – this service to say that they've done anything wrong. This is just setting out what they've done. Now, where's the evidence that they didn't deliver what they said they would?

MR ANDERSEN (sic): The feedback document, the website feedback document, is the list of issues that iFactory was attending - - -

ADJUDICATOR WALSH: So why didn't you - - -

MR ANDERSEN: - - - attempting to address.

ADJUDICATOR WALSH: - - - give them the opportunity to remedy?

MR ANDERSEN: Ms Walsh, they had weeks and weeks - - -

ADJUDICATOR WALSH: You go back to them. As far as I understand, I've just heard that there was a warranty period of 30 days. You go back to them and set out, "Please come and fix this, otherwise we will go and get it fixed by someone else."

MR ANDERSEN: Ms Walsh, what they did was they were trying to fix up one thing, and they would break something else, and it was a revolving door.

ADJUDICATOR WALSH: I thought they only delivered the system to you in December.

MR ANDERSEN: Yes, but it was due much earlier than that. It was overrun by however long. So it was due weeks before. We had training before - - -

ADJUDICATOR WALSH: Okay. Where – sorry. I just go back to this. Where's the evidence that the system isn't working?

MR ANDERSEN: So the feedback document is – the feedback - - -

ADJUDICATOR WALSH: But why didn't you get your people who went and did all this work to write a report saying, "Look, the work done by other people" – as you said, it has some major – what did you say it has? Major - - -

MR ANDERSEN: Major oversights, yes.

ADJUDICATOR WALSH: - - - oversights and coding issues.

MR ANDERSEN: I've got an email - - -

ADJUDICATOR WALSH: Where's that evidence?

MR ANDERSEN: I have an email here which, again, I emailed the respondents this morning at 8 o'clock. I didn't - - -

ADJUDICATOR WALSH: Why did you wait till 8 o'clock this morning when - - -

MR ANDERSEN: Well, because we - - -

ADJUDICATOR WALSH: - - - this case has been pending for a very long time?

MR ANDERSEN: Because we weren't necessarily going to rely on – as part – IT in Brisbane is a small industry. Now, these guys were reluctant to put anything in writing, so - - -

ADJUDICATOR WALSH: Can I have a look at your email, please?

MR ANDERSEN: Absolutely. So I – we weren't necessarily going to rely on GO Creative, but we wanted to - - -

> ADJUDICATOR WALSH: What else can you rely on? You have to rely on something.
>
> MR ANDERSEN: The feedback document, Ms Walsh - - -

[26] The document referred to as the feedback document was a very long list of notes, observations and comments drawn by the applicant diarising the course of the project. According to Mr Drake who appeared for the respondent at hearing, it reflected the applicant's constantly changing requirements and the features she wanted regardless of the contract.

[27] Significantly the report from the independent IT consultants engaged by the applicant to remedy the respondent's work said nothing of any great moment about finding any major defects in the respondent's work as claimed by the applicant.

[28] Given that independent evidence the learned Adjudicator was entitled to conclude both that the work done by the respondent complied with the contract and the work was done with due care and skill.

[29] There is no reasonable prospect of success with respect to this complaint as a ground of appeal.

The second applicant was not accorded natural justice because she was not permitted to have the first applicant assist her in the proceeding

[30] By s 43(1) of the QCAT Act it is made clear that parties are expected to represent themselves in Tribunal proceedings. Representation is permitted in limited circumstances by right but otherwise, as here, only if granted leave for that by the Tribunal.

[31] But in any case, the second applicant was permitted to make submissions. He spoke for much of the first half of the hearing until the Adjudicator asked that his mother be permitted to speak for herself. She noted that the first applicant had not been granted leave to represent the second applicant.

[32] There was no breach of natural justice in requiring the second applicant to speak on her own behalf.

[33] There is no reasonable prospect of success with respect to this complaint as a ground of appeal.

The tribunal failed to take into account all the material filed by the applicant.

[34] As noted, the applicants filed a lot of material with their initial application. It was overly lengthy and hard to comprehend and generally confusing. A scattergun approach seems to have been adopted.

[35] The material included a CD with more than 10 hours of recorded conversations with the respondent's employees, apparently without advising them of that. There was no transcript of the recordings. The Adjudicator referred to the Tribunal's policy of not accepting electronic evidence handed up at hearing and did not consider the CD material further.

[36] In the instructions attached to the application for minor civil dispute – consumer dispute the following notation appears:

> You must print out all electronic evidence.

> Sometimes evidence (such as photos or receipts) may be stored in an electronic device, such as a mobile phone, tablet or computer. Sometimes evidence may be stored on a CD or DVD. You must provide a printed copy of this evidence with your application if you wish to use and rely on it at the hearing. The tribunal will not accept a CD or DVD for filing and will not consider evidence provided only in an electronic format.

[37] There is no error discernible here in the conduct of the proceedings by the Adjudicator in respect to the material filed by the applicants.

[38] There is no reasonable prospect of an appeal in this matter succeeding. Leave to appeal is therefore refused.