

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Belomark Pty Ltd v Robinson (No 2)* [2020] QCATA 112

PARTIES: **BELOMARK PTY LTD T/AS AUTOBARN
COOMERA UPPER COOMERA**
(applicant/appellant)

v

DION ROBINSON
(respondent)

APPLICATION NO/S: APL141-19

ORIGINATING APPLICATION NO/S: MCDO Beenleigh Q25-19

MATTER TYPE: Appeals

DELIVERED ON: 11 August 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS: **Application for leave to appeal refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – where the respondent claimed the applicant had damaged his vehicle in the course of providing mechanical services – where the applicant denied liability – where the respondent had the damage rectified at another repair shop – where an Adjudicator found the respondent liable – whether the Adjudicator took photographic evidence tendered by the applicant into account - where the cost of rectification far exceeded the costs of the initial service – whether the costs of rectification were reasonable – whether the applicant’s warranty had effect to deny the respondent’s claim

Competition and Consumer Act 2010 (Cth) Schedule 2
s 60, s 267

Belomark Pty Ltd v Robinson [2020] QCATA 110
Murphy v Overton Investments Pty Ltd [2004] HCA 3
Pickering v McArthur [2005] QCA 294

REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

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] Mr Robinson is the owner of a Subaru motor vehicle. The respondent (‘Autobarn Coomera’) owns an auto repair shop at Coomera. Mr Robinson engaged Autobarn Coomera to install certain additional features to his vehicle, including a new stereo system and a reversing camera.
- [2] Autobarn Coomera installed the equipment but the reversing camera did not work properly. Mr Robinson returned the vehicle and he was told the problem was with a reverse switch sensor in the gearbox.
- [3] Autobarn Coomera replaced the switch sensor but that did not fix the camera problem. He was told to take the vehicle away but bring it back and let them do more work on it. He drove away but a warning light came on. He returned the vehicle and Autobarn Coomera could not diagnose the problem. He was told the car could be taken away and they would look again when he brought it back. He drove away but then discovered the car was leaking oil from the gearbox.
- [4] He returned the car and after inspecting it Autobarn Coomera told him there was a hole in the gearbox housing. The hole was immediately adjacent to the reverse switch sensor which they had replaced. Autobarn Coomera denied being responsible for making the hole, however.
- [5] Mr Robinson commenced minor civil dispute – consumer dispute proceedings in the tribunal claiming the cost of repairing the hole plus the cost of inspecting the internals of the gearbox for additional damage and fixing the reversing camera done by other mechanics.
- [6] The claim was heard by an Adjudicator who found in favour of Mr Robinson. The Adjudicator concluded Autobarn Coomera had damaged the gearbox in replacing the sensor. He awarded Mr Robinson his claim save for costs claimed by him for his lost time and trouble.
- [7] Autobarn Coomera seeks leave to appeal that decision.
- [8] Given this is an appeal from a decision made in the Tribunal’s minor civil dispute jurisdiction, leave to appeal must first be obtained. If leave is granted then the appeal may proceed.¹
- [9] 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

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142(3)(a)(i).

² *Pickering v McArthur* [2005] QCA 294.

- [10] Autobarn Coomera sought leave to adduce fresh evidence in the hearing of the application for leave to appeal. That has been refused for the reasons given there.³
- [11] The parameters of an appeal are unclear to many self-represented litigants. An appeal is not an opportunity to have the matter heard again and perhaps allow the party to do better a second time round. An appeal focuses on the error or errors claimed to have been made in the decision at first instance. Any appellant, including a self-represented party, is expected to identify the errors claimed to have been made with some degree of precision.
- [12] The grounds of appeal attached to the application for leave to appeal here are broad. In large part it simply asserts again the submissions made below.
- [13] As best as I am able to discern, the following appear to be complaints about claimed errors made by the Adjudicator below as distinct from general re-agitation of the issues in dispute:
- (a) The photo evidence of the pieces of cast alloy found inside the gearbox was not considered.
 - (b) The Adjudicator relied on the evidence of Scorpion All—Wheel Drive Pty Ltd but they were not experts in the field of cast alloy.
 - (c) The cost of repairs were excessive.
 - (d) Mr Robinson had removed wiring from the vehicle which avoid Autobarn Coomera’s warranty policy.

The photo evidence of the pieces of cast alloy found inside the gearbox was not considered.

- [14] The learned Adjudicator was referred to the photographic evidence by Autobarn Coomera’s representative at the hearing. That is made clear from the transcript of the proceedings.⁴
- [15] In giving his reasons for decision the Adjudicator said:

I am invited by Ms Belovari to look at the photographs, which I have, and find that there is scraping on the inside, and I accept that, to my eyes, that appears to be the case.⁵

- [16] The Adjudicator went on to talk about the gearbox being removed and that from his observations the hole in the gearbox was immediately adjacent to the reversing switch:

It is wholly proximate to the reversing switch, and when I say “proximate”, it appears to me that but for millimetres at most, or fractions of millimetres, it actually adjoins the switch.⁶

- [17] It was that immediate proximity that persuaded the Adjudicator that the damage done to the gearbox was most probably done by Autobarn Coomera when Autobarn Coomera changed the reversing switch.

³ *Belomark Pty Ltd v Robinson* [2020] QCATA 110.

⁴ Transcript 1-18 Line 24; T1-19 L 12 and 40; T1-16 L 31-43.

⁵ T1-18 L23.

⁶ T1-19 L 34.

- [18] What the Adjudicator also found compelling was that the entire gearbox was removed to permit inspection for possible internal damage after the hole was discovered but no damage was discovered inside. Autobarn Coomera had claimed it was metal, such as a gear tooth coming loose from inside, which had caused the hole.
- [19] The Adjudicator did refer to the photographic evidence tendered by the applicant at hearing but was simply not persuaded by it that the damage to the gearbox had been caused by internal metal fragments and more likely than not Autobarn Coomera was responsible for holing the gearbox.
- [20] The applicant has no prospect of succeeding on this potential ground of appeal.
- The Adjudicator relied on the evidence of Scorpion All—Wheel Drive Pty Ltd but they were not experts in the field of cast alloy.*
- [21] After Autobarn Coomera refused to rectify the damage to the gearbox Mr Robinson took it to Scorpion All—Wheel Drive Pty Ltd to have the damage inspected and the problem fixed. That company appears to also trade under the corporate identity of Scorpion Subaru Pty Ltd (collectively referred hereafter to as ‘Scorpion’). The former invoiced for the work done and the latter provided a report for Mr Robinson about the damage that was found.
- [22] Mr Robinson gave evidence that he took it to that company because they specialised in Subaru motor vehicles.
- [23] After the gearbox was removed by Scorpion Autobarn Coomera was invited to inspect the gearbox but they refused the opportunity.
- [24] The report by Scorpion attributed the damage to the gearbox to incorrect tool use by Autobarn Coomera in replacing the reversing switch. That report was the only report by any mechanical expert made available to the Adjudicator.
- [25] Ms Belovari appearing for Autobarn Coomera repeated something she was told by a mechanic working at Autobarn Coomera to the Adjudicator but Autobarn Coomera filed no direct evidence from any mechanic or engineer or other expert.
- [26] It was therefore not unreasonable for the Adjudicator to attribute little if any weight to the hearsay statements made by Ms Belovari and prefer and rely instead on the written report by Scorpion.
- [27] There was no evidence about the metallurgical qualities of cast metal gearboxes presented by either party. Despite that the Adjudicator had to reach a decision on the available evidence. He did so, and that evidence was the Scorpion report.
- [28] There is small prospect of success in this ground of appeal.
- The cost of repairs were excessive.*
- [29] Autobarn Coomera refused to repair the hole in the gearbox because they claimed the damage had been caused by a gear tooth or some other metal fragment breaking off inside the gearbox and impacting the case from the inside, holing it.
- [30] Given that was asserted by Autobarn Coomera from outset, it was clearly reasonable (three small pieces of the gearbox casing was found by Autobarn Coomera in the gearbox oil pan) that the gearbox be fully inspected. To do that it had to be removed and stripped, then refitted.

- [31] Most of Scorpion's costs was referable to this work.
- [32] The welding of the hole was done off-site at a cost of \$136.36.
- [33] Given the significant oil leak, making driving the vehicle impossible without potentially causing even greater damage, it was reasonable to have the car towed to Scorpion's workshop at a cost of \$220.
- [34] Scorpion rectified the original problem with the reversing camera that was never fixed by Autobarn Coomera at a cost of \$220. Autobarn Coomera had told Mr Robinson they wanted nothing more to do with the car which made the repair necessary by someone else.
- [35] Mr Robinson tendered copies of invoices evidencing these amounts charged and paid by him.
- [36] The only evidence about costs led by Autobarn Coomera at hearing was a quote of \$400 to fix the hole (presumably by welding) which was far more than the actual cost for that arranged by Scorpion.
- [37] By s 267 of the *Competition and Consumer Act 2010* (Cth) Schedule 2 ('ACL'):
- Action against suppliers or services
- (1) A consumer may take action under this section if:
- (a) a person (the supplier) supplies, in trade or commerce, services to the consumer; and
- (b) a guarantee that applies to the supply under Subdivision B of Division 1 of Part 3-2 is not complied with...
- (3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:
- (a) terminate the contract for the supply of the services; or
- (b) by action against the supplier, recover compensation for any reduction in the value of the services below the price paid or payable by the consumer for the services.
- (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.
- (5) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).
- [38] Mr Robinson bore the legal burden of establishing the existence and amount of the loss or damage claimed to have been suffered. He did that by providing evidence from a mechanic linking the damage to the gearbox with the work done by Autobarn Coomera. He paid for the work and tendered the paid invoices supporting the loss and damage alleged.
- [39] As pointed out in *Murphy v Overton Investments Pty Ltd*⁷ the reference in the ACL to loss or damage should not be given a narrow meaning:

⁷ [2004] HCA 3 - when that case was decided the consumer protection provisions were to be found in the *Trade Practices Act 1974* (Cth).

This Court has now said more than once that it is wrong to approach the operation of those provisions of Pt VI of the Act which deal with remedies for contravention of the Act by beginning the inquiry with an attempt to draw some analogy with any particular form of claim under the general law.⁸

- [40] Section 267(4) allows a person who suffers a major failure of a guarantee to claim not only compensation for any reduction in the value of the services but additionally to claim damages for any loss or damage suffered if that loss or damage was reasonably foreseeable from the failure.
- [41] The catastrophic holing of the gearbox was clearly a major failure of guarantee of the exercise of due care and skill.
- [42] The legislation does not limit the costs able to be claimed by a consumer who suffers a major failure of guarantee to only reasonable costs. That limitation only applies where the failure was a minor failure of a guarantee.⁹
- [43] Where there is a major failure of guarantee the issue is whether the loss or damage claimed to flow from the breach was reasonably foreseeable. Given the finding by the Adjudicator that Autobarn Coomera was responsible for holing the gearbox, and given all parties recognised that there could have been internal damage caused to the gearbox after the fragments from the casing were found, the costs of removal, inspection and re-fitting the gearbox, together with the other sundry costs were all reasonably foreseeable loss and damage consequences flowing from the failure of guarantee by Autobarn Coomera.
- [44] The applicant has limited prospect of succeeding on this ground of appeal.
- Mr Robinson had removed wiring which voided Autobarn Coomera's warranty policy.*
- [45] Though not specified, the claim by Mr Robinson was clearly a claim for breach of guarantee implied by the ACL.
- [46] By s 60 of the ACL there is a guarantee by a person supplying services to a consumer in trade or commerce that the services will be rendered with due care and skill.
- [47] Guarantees under the ACL cannot be contracted away by the parties. They continue to apply regardless of any limitation express or implied in the contract between the parties.
- [48] Autobarn Coomera cannot succeed on this ground of appeal.
- [49] There is no reasonable prospect of Autobarn Coomera succeeding in an appeal. Leave to appeal is therefore refused.

⁸ Ibid, [44]-[45].

⁹ ACL, s 267(3).