COURT OF APPEAL

SOFRONOFF P
GOTTERSON JA
McMURDO JA

Appeal No 5454 of 2017
QCATA No 22 of 2017

KEVIN BOWN **Applicant**

v

DAVID GRANT LEE **Respondent**

BRISBANE

WEDNESDAY, 21 FEBRUARY 2018

JUDGMENT

SOFRONOFF P: This application originated as a minor civil dispute constituted by a claim for compensation by the respondent against the applicant for damages suffered as a result of his having bought a defective used car from the applicant, who is a used car dealer. The expression "minor civil dispute" is defined in the *Queensland Civil and Administrative Tribunal Act* 2008 to mean, relevantly, a proceeding in which an amount of money is claimed by a consumer and the amount is not more than the prescribed amount. Currently, that amount is $25,000. Such a claim is heard by an Adjudicator appointed under the Act.

The procedure for the determination of minor civil disputes is truncated and streamlined to reduce formality, delay and cost in accordance with the objects of the Act and the objects of the rules of the Tribunal expressed in r 3 of the *Queensland Civil and Administrative Tribunal*

Rules 2009. Thus, for example, the duty of disclosure is strictly limited by r 81 and so is the power to order costs pursuant to r 84. Rule 43 provides that no written response can be filed in answer to a claim but, rather, a respondent's answer is to be made at the hearing pursuant to r 95.

The speed and informality of such proceedings are reinforced because the Tribunal need not give written reasons for any decision. However, pursuant to s 122 of the *Queensland Civil and Administrative Tribunal Act* 2009, a party may request reasons in writing within 14 days of the decision taking effect or within such extended period as the President of the Tribunal allows.

In general, the statute provides that a decision takes effect when it is pronounced. Pursuant to s 142(3), a party to a minor civil dispute may appeal to the Tribunal only with leave of the Tribunal. That provision similarly limits the right of appeal against interlocutory decisions and costs decisions. The latter two classes of decisions have long been regarded in the law as instances in which an appellate Tribunal or Court will be very reluctant to intervene because appellate intervention in such cases is prone to stultify the administration of justice. Consequently statutes commonly provide that leave to appeal is required in such cases and leave is usually only granted when a point of principle is involved or there is arguably a substantial miscarriage of justice. It is not enough for an applicant to point to an error of law. The applicability of this principle of restraint is obviously apt in cases involving disputes about small sums of money such as this one.

Section 150 of the Act provides that an appeal to the Court of Appeal against a decision of the Appeal Tribunal to refuse an application for leave to appeal to that Tribunal may be made only with the Court's leave and only on a question of law. Assuming that a question of law arises for consideration and assuming that there is an argument that that question of law has been determined erroneously below, the discretion whether or not to grant leave to appeal will be exercised according to the principles that I have referred to.

Thus, in *ACI Operations Pty Ltd v Bawden* [2002] QCA 286 McPherson JA said of the discretion to grant leave to appeal conferred by s 118(3) of the *District Court of Queensland Act* 1967 that the mere fact that there has been an error or that an error can be detected in the judgment below is not ordinarily by itself sufficient to justify the granting of leave to appeal. Of the same provision, Keane JA said in *Pickering v McArthur* [2005] QCA 294 that leave under s 118(3) will usually be granted only where an appeal is necessary to correct the substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected. Later in *Pearson v Thuringowa City Council* [2006] 1 Qd R 416, Keane JA said the restriction imposed by s 118(3) of the *District Court of Queensland Act* 1967 serves the purpose of ensuring that this Court's time is not taken up with appeals when no identifiable error or injustice can be articulated by those litigants whose arguments have already been fully considered at two judicial hearings.

All of that reasoning is applicable to this application.

In this case, the respondent filed his claim for compensation as a minor civil dispute on 7 September 2016. On 21 December of the same year, an Adjudicator heard the parties and ordered the applicant to pay the respondent $6,113.48 within 28 days. The Adjudicator gave oral reasons as she was obliged to do. On 16 January 2017, the applicant applied for a stay of that order and for leave to appeal the decision. The stay was refused on 19 January 2017. On 6 April 2017 the application for leave to appeal was also refused. No request was made for written reasons pursuant to s 122.

At the hearing of the application this morning, counsel for the applicant, Mr Barataraj, has said that requests actually had been made within the 14 day time period allowed by s 122 for each of the decisions, namely, that of the Adjudicator and also that of the Member who decided the application for leave to appeal. However he was unable to substantiate his assertion and it must be said that the evidence before the Court in the application book including evidence led by the applicant himself is to the contrary. I am satisfied that no such application was ever made within time.

Instead, six months after the Adjudicator's decision and two months after the refusal of leave to appeal, the applicant sent an email to communications@justice.qld.gov.au requesting – of whom, it is not known – that reasons be furnished, but only after the registry requested of the applicant that he provide the Auscript transcript for the purposes of preparation of the appeal book. On 22 June 2017, Mr Barataraj of counsel wrote to his client, the applicant, as follows:

> "While we had requested the transcript and they have not given us, it will be useful to request again this time saying that it is requested for the Appeal Book. I have to argue that the adjudicator applied the wrong law but have no evidence to show." (sic)

He instructed his client to send a request to QCAT's registry to furnish him with reasons for judgment and transcripts. Not surprisingly, nothing came of this, for the registry does not furnish transcripts and any application to the Tribunal for reasons, and that is what this was, was well out of time. When the Court's registry again requested the necessary material for the appeal book, Mr Barataraj took matters into his own hands and on 3 July 2017 wrote to QCAT to ask it to kindly assist in obtaining the transcripts as soon as possible.

As I have said, no proper request for written reasons for judgment by either the Adjudicator or by the Senior Member of the Tribunal who decided the application for leave was ever made within time. No application was made to the President of the Tribunal for an extension of time within which to obtain such reasons. No application has been made to Auscript itself for a transcript, as far as the record shows.

Consequently, no written reasons were ever obtained and there is no transcript. Mr Barataraj remains, as he feared on 22 June 2017, without evidence to show any error. As a consequence, the applicant makes his application for leave to appeal to this Court without being able to point to any errors of law in either of the proceedings below. Indeed, when by email dated 25 January 2018 the respondent objected to the applicant's failure to incorporate either the transcript or any reasons for the decisions, the applicant by his counsel declared in his email by way of response on the same date that, "He has taken the risk in not providing transcripts." In the same email, Mr Barataraj contended that the applicant is appealing the decision of the QCAT appeal for failing to give reasons, not against the Adjudicator. The

respondent complained in correspondence that this was a far narrower contention than that contained in the application for leave to appeal itself. To this, Mr Barataraj responded by rejecting the respondent's complaint and telling him, "You may take it up with the Judges at the hearing." This, he has now done. As I have related, however, the difficulties only begin at that point.

The grounds for leave being granted by this Court are said to be:

1. one of fact about the credit of a witness heard by the Adjudicator;

2. a failure to accord natural justice because of the Adjudicator's refusal to allow time to obtain the evidence of a witness;

3. the Adjudicator's failure to give written reasons which is said to be a breach of natural justice;

4. the Adjudicator's failure to consider relevant witnesses' documents and information in making the decision;

5. the Adjudicator's failure to require the respondent to mitigate his loss;

6. the Adjudicator's failure to apply certain provisions of the *Competition and Consumer Act* 2010. In his written outline, the applicant points to the Adjudicator's alleged failure to take factual matters into account, constituting the failure to apply those provisions;

7. an assertion that this matter is a matter of public interest. In his written outline, the applicant contends that the outcome of this case is of significance to all other second-hand dealers.

In my view, all of these grounds are incompetent. Not a single one of them addresses the only question in the application, which is whether the Appeal Tribunal, not the Adjudicator, was in error and whether, if she was, there is any reason why this Court's discretion should be exercised by granting leave to appeal in a case that involves such a small sum of money.

The draft grounds of appeal are similarly incompetent. In addition to repeating some of the matters above, the draft notice of appeal asserts an error of law on the part of the Appeal Tribunal by confirming the decision of the Adjudicator. Of course, the Appeal Tribunal did no such thing. The learned Member refused leave to appeal and said nothing as far as I know about the correctness or incorrectness of the decision. The grounds otherwise state that the respondent should have sued AWN, a company which furnished a limited warranty in respect of the car. This cannot raise any doubt about the Appeal Tribunal's decision to refuse leave to appeal.

Next, the applicant would wish to contend that the Senior Tribunal Member denied the applicant natural justice in refusing to hear the appeal by a new hearing, which would rectify the facts of the case, which were clearly identified by a specialist engineer and supported by the pre-inspection, as well as the AWN insurance, which refused the insurance claim on the engine. The Senior Member affirmed the decision of the Adjudicator without addressing these issues. It is enough to observe that this ground makes no sense.

The applicant wishes also to raise as a ground that the Senior Member denied natural justice by failing to provide reasons for judgment. As I have already said, the statutory provisions do not require written reasons to be given for a decision unless a request for such reasons is made under s 122 within the time limited by that provision or within such extra time as the President of the Tribunal grants. No such request has been made and the ground is therefore utterly baseless.

The penultimate ground is as follows: "this matter is particularly important as a public interest". The particulars provided are:

> "The Parliament repealed the laws on the 12 month warranty on used cars in December 2016 that did offer some protection to used car buyers for reasons it is not proposed to describe here. The black letter application of section 54(7)(b) without considering other factors such as whether any expert mechanic would be able to identify a latent defect and, if not, the section would deny any form of defence to the seller of the vehicle. The law is meant to apply for the consumer in that to him it was a latent defect, but this defect would be recognisable by a qualified mechanic. This will prove that the seller sold the vehicle without

> identifying the identifiable latent defect. In this instance, there was no latent defect on the engine, the main component of the claim."

None of that makes any sense to me and it is beyond analysis.

Finally, despite the statute limiting the grounds upon which leave to appeal can be granted to errors of law alone, the draft grounds candidly assert as the final ground of appeal an error of *fact* in the Adjudicator's acceptance of evidence given by a particular witness.

In short, none of these grounds are capable of raising a competent basis upon which this Court's discretion to grant leave to appeal could possibly arise for consideration.

There are still further problems. The requirement of r 758 of the *UCPR* that the appeal book be prepared at the instigation of the applicant, not the respondent, and that it contain the documents required by the registrar, or by a practice direction, has not been fulfilled. Rule 44 of the *Practice Direction 3 of 2013* requires that the appeal book contain the reasons for judgment or, if there are no such reasons, a statement to that effect and a copy of the latest pleadings or their equivalent. There are no written reasons in this case for the reasons I have described, and that is the fault of the applicant who did not invoke his right to obtain them in time. Be that as it may, the absence of reasons makes this application impossible. Indeed, as Mr Barataraj's comment to his client revealed, the applicant's counsel knew this almost a year ago but he nevertheless persisted in prosecuting this matter.

Paragraph 41(2) of that Practice Direction requires an applicant's outline in a case such as this to state in its first paragraph why it is said that leave should be given. The applicant's outline does not do so and, indeed, never does so. It fails to comply with this important rule. Indeed, as I have explained, the whole application, the draft notice of appeal and the outline are syntactically incoherent and legally incompetent. They raise no intelligible basis for the exercise of the Court's discretion to grant leave and, if an application had been made to strike them out, that application would certainly have been successful. This whole exercise has, in my opinion, been a waste of time and money and no competent counsel should have allowed it to go forward. In my opinion, this application is an abuse of process and it should be struck

out as such. The appropriate orders are to strike out the application for leave to appeal and to dismiss the application.

GOTTERSON JA: I agree.

McMURDO JA: I agree.

SOFRONOFF P: What do you say about costs, Mr Jackson?

MR JACKSON: Your Honour, the respondent contends that costs should follow the event and the respondent, being successful in this event, should have its costs. The respondent has been represented on a pro bono basis. It might be that evidence needs to be put on from the respondent as to the nature of the retainer between –

SOFRONOFF P: Oh no, that's a matter for others. Mr Barataraj, can you resist an order for costs?

MR BARATARAJ: Your Honour there are some issues --

SOFRONOFF P: I'm sorry?

MR BARATARAJ: There are some issues here with respect to the costs, because there has been some misrepresentation by the respondent that he has been, until just -- a week ago he was unrepresented.

SOFRONOFF P: So?

MR BARATARAJ: He was unrepresented and he was communicating with me, with respect to all the communication and so on, so if there is any legal costs it would only be for the appearance today and the amount of time spent --

SOFRONOFF P: Well, we're not quantifying the costs, the only question is whether, whatever the costs are, if there are any, your client should pay them or not. Do you have any basis upon which you could resist such an order?

MR BARATARAJ: I cannot, except the fact my client is not earning too much in his trade and he may have difficulty to pay --

SOFRONOFF P: I see. Well that raises another question as to whether you should pay the costs. If your client can't pay them –

MR BARATARAJ: No, he would be able to pay them.

SOFRONOFF P: Oh, now he can pay?

MR BARATARAJ: He would be able to pay.

SOFRONOFF P: What order do you seek, Mr Jackson?

MR JACKSON: Costs on the usual basis.

SOFRONOFF P: The order is that the applicant pay the respondent's costs on a standard basis. Anything further, gentlemen?

MR BARATARAJ: Nothing, your Honour.

MR JACKSON: Thank you, your Honours.

SOFRONOFF P: Adjourn the Court till 10.15 tomorrow.