[2019] QCA 193

COURT OF APPEAL

McMURDO JA
BODDICE J
CROW J

Appeal No 11210 of 2018
QCAT No 5 of 2018

STEPHEN ROYCE **Applicant**

v

YOUI PTY LTD **Respondent**
ACN 123 074 733

BRISBANE

THURSDAY, 19 SEPTEMBER 2019

JUDGMENT

BODDICE J: The applicant seeks leave to appeal a decision of the appeal tribunal of the Queensland Civil and Administrative Tribunal (***"QCAT"***). Dismissing an appeal from an adjudicator's dismissal of a consumer claim by the applicant.

At issue, should leave be given, is whether there was error of law in the decision of the appeal tribunal, giving rise to a substantial injustice.

On 28 January 2013, the applicant's motor vehicle stalled in floodwaters which had inundated Connection Road in the Tallebudgera Valley on the Gold Coast. Attempts at restarting the vehicle were unsuccessful. It was towed to a storage facility.

At the time of the incident, the applicant was the holder of a motor vehicle insurance policy in respect of that vehicle. The respondent was the insurer under that policy.

On the evening of 28 January 2013, the applicant telephoned the respondent's emergency contact number, in respect of his vehicle. He telephoned the respondent again on 29 January 2013. In that conversation, which was recorded, the applicant gave an account of the vehicle having been inundated with water, although no water had entered the car itself. The applicant was given an insurance claim number and details of the process.

Later that same day, the applicant was advised by the respondent's assessor that the vehicle had been written off. The assessor advised that the tow truck driver had stated the water had been up to the door handles. The assessor noted that the interior of the vehicle was soaked and advised the applicant to collect his personal property from the vehicle.

In response, the applicant telephoned the respondent, insisting there had been a mistake, as no water had entered the vehicle internally. However, the applicant attended the vehicle the next day and collected his personal belongings.

On 13 February 2013, the applicant received a payout on the policy. The payout was at the agreed value of $33,000 less the excess of $625. An amount of about $28,000 was paid to the finance company with a registered interest in the vehicle and the balance to the applicant. The value was several thousands of dollars above market value.

The applicant accepted the amount paid to him and the benefit of a discharge he received from the finance company which had received the majority of the payout in satisfaction of the applicant's obligations.

The applicant did not, at that stage, object or reserve his rights. He subsequently repurchased the vehicle when it was put to auction for salvage on 28 February 2013. The vehicle was listed for sale as a statutory write off.

Almost 13 months later, the applicant contacted the respondent to complain about the total loss assessment in respect of his vehicle. He requested the respondent take steps to have the

vehicle taken off the register of written off vehicles so that he could take steps to obtain a roadworthy certificate. The respondent declined to do so.

On 23 November 2016, the applicant filed a consumer claim with QCAT. The applicant sought a variety of orders, including a declaration that the respondent's assessment was inaccurate, an order that the respondent give notice correcting the written off vehicle register and "damages/restitution" of $25,000 plus interest and fees applicable.

On 12 January 2018, an adjudicator dismissed the applicant's consumer claim. The adjudicator found the applicant had made a claim on the insurance policy, the applicant had accepted the respondent's financial settlement in satisfaction of that claim, and that accordingly, the respondent had discharged his contractual obligations and the policy was at an end. The adjudicator rejected any suggestion the applicant had relied detrimentally on any representation by the respondent and rejected an assertion that the respondent was estopped from reliance upon the circumstances of the satisfaction of the claim. The adjudicator also rejected the applicant's claim for restitution, on the basis that the applicant had accepted a payment in accordance with the policy and was not entitled to be compensated for the restoration of the vehicle he had purchased as a write off.

On 6 February 2018, the applicant sought leave to appeal the adjudicator's decision. The applicant contended the Adjudicator had made a number of errors of mixed law and fact. The applicant also asserted bias on the part of the adjudicator.

On 18 September 2018, a Member of QCAT's appeal Tribunal dismissed the applicant's appeal. In doing so, the Member noted the adjudicator had made findings after a comprehensive hearing and that those findings were in accordance with the evidence. The adjudicator had also correctly concluded he did not have power to grant declaratory or injunctive relief.

The Member found the adjudicator's conclusion that the applicant had made a claim and had participated in the processes which followed from it was consistent with the evidence and, in any event, did not raise issues of law or mixed fact or law. Further, the adjudicator had correctly

found it was open to the respondent to write the vehicle off, having regard to the findings as to the extent to which that flooding had penetrated the vehicle.

That conclusion meant the respondent had not breached its duty of utmost good faith and there was no justification for an order to compel it to do things to rectify the public record as to the writing off of the vehicle.

Finally, and relevantly for this application for leave to appeal, the Member found the applicant's assertions of bias and pre-judgment by the adjudicator or of an apprehension of bias, but not established from a consideration of all of the circumstances. There was nothing to suggest pre-judgment of the issues on the part of the adjudicator and no basis for a finding of an apprehension of bias.

By application filed 15 October 2018, the applicant seeks leave to appeal that Member's decision. If leave be granted, the applicant seeks orders returning his claim to QCAT for a re-hearing. The applicant asserts ten reasons said to justify a grant of leave.

In order to obtain leave to appeal, the applicant must show that the appeal is necessary to correct a substantial injustice and that there is a reasonable argument that there is an error of law to be corrected: *Rintoul v State of Queensland & Ors* [2018] QCA 20, at paragraphs [9] and [10].

Although the applicant asserts that the Member erred in law in a number of respects, a consideration of the record and of the Member's reasons reveals no error of law. There is also no necessity to correct any substantial injustice.

First, the Member did not incorrectly apply the tests for determining either an apprehension of bias or actual bias. The Member properly reasoned that the applicant's reference to pre-judgment by the adjudicator and to the adjudicator having sided with the respondent properly raised an allegation of actual bias. A consideration of the record supported the Member's rejection of both of those assertions.

Second, there was no unreasonable refusal to accept evidence from one side on the basis that it was hearsay or any substitution of personal views or hearsay evidence for agreed expert witness evidence.

Third, the Member properly determined that the unfortunate circumstances of the adjudicator having received correspondence directly from one party without the knowledge of the other, had not occasioned any basis for a proper conclusion of bias or apprehended bias.

Fourth, the adjudicator's determination that the applicant had made a claim on his policy of insurance and that the respondent had responded to that claim in accordance with its contractual obligations were findings of fact, plainly supported by the evidence. There was no error of law as to the contract terms or as to the respondent's authority.

In order to obtain any relief in the consumer claim, the applicant had to establish that he had a right of action. The relationship between these parties was a contractual one. Under the policy, it was for the respondent to decide whether the vehicle had been damaged to the extent that it was not economical or safe to repair. Such a decision was made by the respondent. In that event, the respondent was able to settle a claim under the policy as it did by paying the agreed value. The assessor may have been wrong in assessing the vehicle as he did. But the provisions of the policy, dealing with a case of a total loss, were engaged by a decision by the respondent that it was not economical or safe to repair the vehicle. The contract was performed by the respondent and the applicant has had that benefit of the performance.

The application's assertion that he made no claim under the policy could not be accepted, especially when he had accepted the payment of the agreed value and then went to the auction where he re-purchased the vehicle. The adjudicator recorded in his reasons that by the conclusion of the hearing before him, the applicant had abandoned the contention that he had made no claim under the policy.

Finally, the applicant's allegation that the respondent has acted fraudulently in its assessment of the vehicle has no apparent factual foundation. Just why the insurer would wish to fraudulently assess the vehicle as a write-off and pay the full agreed value of the vehicle

under the policy is not revealed, nor is there any basis for a suggestion that the assessor was fraudulent.

In any event, a bald assertion of fraud can form no basis for a conclusion constituting an error of law, nor can a bald assertion as to error in the adoption of common law principles.

The applicant has not established any substantial injustice in the determination of his consumer claim. The applicant has also not established any reasonable basis for a conclusion that there was an error of law in the determination of that claim. I would refuse leave to appeal.

McMURDO JA: I agree.

CROW J: I agree.

McMURDO JA: The order of the Court will be that the application for leave to appeal is refused.

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McMURDO JA: The respondent seeks its costs for this application for leave to appeal. The respondent goes further and applies for those costs to be assessed upon the indemnity basis. It does so having made a Calderbank offer, by correspondence last December. The respondent then offered to settle the dispute between the parties by making a payment of $10,000 inclusive of any costs by the applicant, subject to the execution of a settlement agreement, and that offer was left open for acceptance for a period of 21 days. It was expressly made according to the principles in *Calderbank v Calderbank* [1975] 3 All ER 333. The letter informed the applicant that if the offer was not accepted and the matter proceeded to a hearing and the outcome was not more favourable to the applicant than according to the offer, then the letter would be produced, as it has been, in support of this application for indemnity costs.

The relevant consideration, however, against the application of the Calderbank principle in the present case is that a not insubstantial part of the relief claimed by the applicant was

something which would be directed towards rectifying the register of written-off vehicles, to the end that this vehicle of the applicant's would no longer be registered as a write-off. It's obvious to say that the payment of $10,000, although that is not an insubstantial sum, would not have achieved that outcome. Principally for that reason, I am not persuaded that this is an appropriate case for costs to be assessed on the indemnity basis. That having been said, the ordinary rule is that costs follow the event and the application having failed, the successful respondent should have its costs of it.

I would order that the applicant pay the respondent its costs of the application, to be assessed on the standard basis.

CROW J: I agree.

BODDICE J: I agree.

McMURDO JA: That will be the order.