

SUPREME COURT OF QUEENSLAND

CITATION: *Robb v Tunio* [2014] QCA 127

PARTIES: **EGERTON MACPHERSON ROBB**
(applicant)
v
MUSHTAQ TUNIO
(respondent)

FILE NO/S: Appeal No 10888 of 2013
QCAT No 279 of 2013

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time/General Civil Appeal

ORIGINATING COURT: Queensland Civil and Administrative Tribunal at Brisbane

DELIVERED ON: 30 May 2014

DELIVERED AT: Brisbane

HEARING DATE: 9 May 2014

JUDGES: Muir JA and Martin and Jackson JJ
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDERS: **1. The application to extend the time to apply for leave to appeal is dismissed.**
2. The application for leave to appeal is dismissed.
3. The applicant pay the costs of the application.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – NATURE OF RIGHT – where an appeal was made from a decision of the Appeal Tribunal of the Queensland Civil and Administrative Trial – where the applicant claimed \$8,000 from the respondent as money lent – where the grounds of proposed appeal and reasons for justifying an extension of time for leave to appeal were that the applicant alleged he had proven that the statements made in the defence by the respondent were false – where the applicant further alleged that the Queensland Civil and Administrative Tribunal had failed to refer to these alleged falsehoods in their written judgment – whether the grounds alleged by the applicant constitute an appeal only on a question of law

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 150(2)
Uniform Civil Procedure Rules 1999 (Qld), r 748

Bagumya v Kakwano [2010] NSWSC 600, applied
Williams v The Queen (1986) 161 CLR 278; [1986] HCA 88,
 applied

COUNSEL: The applicant appeared on his own behalf
 D Wilson with R Gordon for the respondent

SOLICITORS: The applicant appeared on his own behalf
 Aitken Whyte Lawyers for the respondent

- [1] **MUIR JA:** I agree with the reasons of Jackson J and with the orders he proposes.
- [2] **MARTIN J:** I agree with Jackson J.
- [3] **JACKSON J:** The applicant applies for an extension of time to start an appeal¹ and for leave to appeal against the decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal.²
- [4] On 1 October 2013, the Appeal Tribunal gave leave to the applicant to appeal from the decision of the Tribunal³ and dismissed the appeal.⁴ The Appeal Tribunal heard and determined the matter on the papers.⁵ The appeal to the Appeal Tribunal was from the decision of the Tribunal dated 6 November 2012. The Tribunal dismissed the applicant's claim in a minor civil dispute. The Tribunal also heard and determined the matter on the papers.
- [5] The applicant's claim was for \$8,000 as money lent by the applicant to the respondent. The claim was started by the applicant in the Magistrates Court of Queensland in 2008. It was transferred to QCAT in 2009.
- [6] The reasons for decision of the Tribunal were:
 "After considering all of the relevant material provided by both sides, on the merits, it is determined that there is no sufficient evidence to substantiate any order against the Respondent."
- [7] The Appeal Tribunal gave more extensive reasons. However, it is enough to extract a small part of them as follows:
 "Mr Robb is [sic] asking the learned Adjudicator to find that he loaned money to Mr Tunio and Mr Tunio failed to repay it. There is evidence that Mr Robb was helping Mr Tunio to gain lawful entry to Australia. There is some evidence that Mr Robb was attempting to charge Mr Tunio for this help. A settlement offer, after court proceedings have started is not evidence of the debt; it is simply an attempt to resolve a dispute. The parties' character, and what they may or may not have done in Pakistan or elsewhere, is irrelevant. There is no evidence of a loan. The learned Adjudicator's decision to dismiss Mr Robb's claim can be supported by the evidence and I can find no good reason to overturn it."

¹ *Uniform Civil Procedure Rules* 1999 (Qld), r 748.

² *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 150(2)(b) and (3)(b).

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

⁴ *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 148.

⁵ *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 32.

- [8] If an extension of time and leave to appeal were granted, the draft notice of appeal that the applicant would file seeks “judgment in favour of the appellant with costs” and gives as the grounds of the proposed appeal that:

“A great many statements by the Respondent in his affidavit as to his affirmative defence were demonstrated by the Appellant to be false, rendering plainly untrue the entire defence.

Because the action was conducted in writing rather than aloud by oral submissions the Appellant clearly did not sufficiently alert the Bench to the falsehoods in the Respondent’s defence, [which] despite there being a vast amount of affidavit evidence with ample exhibits, clearly did not sufficiently come to the attention of the Bench since none of it was referred to in judgment.

The written judgment in the QCAT gives no indication whatever that the issue of the Respondent’s falsehoods was taken any notice of.”

- [9] Section 150(3) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) provides that an appeal to this Court made under s 150(2) “may be made ... only on a question of law”. However, the applicant did not identify an error on a question of law made by the Appeal Tribunal, either in the application or in his written or oral argument.
- [10] The application for leave to appeal should have been filed by 30 October 2013. It was filed on 19 November 2013, that is 20 days late. In support of the application for an extension of time the applicant relied upon evidence, that he alone gave, as to disabling medical problems from which he suffers and that, although he is a lawyer, he has primarily practised in jurisdictions other than Queensland.
- [11] The respondent opposes any extension of time. The respondent submits that the applicant’s reasons for the delay are confused and misguided. He points to the absence of any medical evidence as to the applicant’s disabilities. He further submits that an appeal would be hopeless because the applicant does not identify any error of law made by the Appeal Tribunal.
- [12] The length of the delay in commencing the proposed appeal or application for leave to appeal, the reasons for the delay, the prospects of success of the appeal and the degree of prejudice to the respondent if time is extended are factors relevant to the exercise of discretion to extend time. In the present case, the length of the delay is not particularly great and the applicant says that he attempted to file an application from as early as 4 November 2013. The reasons for delay are not compelling, since it is difficult to form any clear view of the extent that the applicant suffered from a disabling illness at the relevant time. However, the absence of any prejudice to the respondent assists the applicant. The circumstances might support the grant of an extension of time if the prospects of success on the application for leave to appeal or the appeal were reasonable.
- [13] In the application for leave to appeal, the applicant gave the following as reasons justifying the grant of leave:
- “The QCAT Adjudicator simply held against Robb’s action. The Adjudicator did not indicate any consideration of Robb’s demonstration that ample material in affidavit of Tunio in his Defence was plainly untrue and rendered the Defence unviable. If

Leave to Appeal is granted, the Applicant will have the opportunity to demonstrate the validity of the claim and invalidity of the defence.”

- [14] Before the Tribunal, there was a dispute on the evidence as to whether any loan was made. It was common ground that in early 2003 the disputed amount had been paid by the applicant to the Queensland University of Technology in advance for the respondent’s fees for a course at the University. However, the respondent did not attend the University in that or following years. Eventually, in 2009, he obtained a refund from the University of the amount paid. However, the respondent’s case was that he had put the applicant in funds to make the payment of the fees in the first place. The applicant denied that. The relevant evidence about making the loan was in short compass, so it may be set out conveniently.
- [15] First, the applicant swore an affidavit saying:
 “This is a straight forward civil action for recovery of AUD\$8,000.00 from the Pakistani Respondent Mushtaq Ahmed Tunio, who has now relocated from Hyderabad, Sindh, Pakistan to greater Toronto, Ontario, Canada:
 a. Mr Tunio had obtained such fund as a loan from me paid directly to the Queensland University of Technology (‘QUT’) of his first term’s fees.
 b. He had promised to repay that loan to me on his imminent arrival in Brisbane.
 c. Instead he obtained payment of such fund by QUT to him rather than me after he relocated from Pakistan to Greater Toronto, Ontario, Canada.”
- [16] Second, the respondent swore an affidavit saying:
 “Initially the fees asked were \$8200AU. These fees were for one semester in a course based Master’s Program in Civil Engineering for the period 2003-2004. Mr. Robb informed me about the amount that had to be paid in advance before QUT would admit me. I transferred the money in USD through Western Union to Mr Robb who then paid QUT. The payment was conducted in early 2003 through Western Union’s branch in Karachi to be picked up by Mr Robb at Brisbane in AUD. Mr Robb acknowledged the money and said that, after conversion, it was sufficient for the fees.”
- [17] Third, in an affidavit sworn in reply, the applicant said:
 “*Paragraph 47.* Mr Tunio alleges that he transferred money for QUT fees in USD through Western Union to me. This is certainly not so. I have never received any funds from Mr Tunio.”
- [18] Lastly, in his first affidavit, the applicant had said about documentary records that “there is only QUT evidence of such payment having been made without specifying the payer”. The applicant did not produce any banking records in support of his claim that he had not received any funds from Mr Tunio via Western Union. Equally, Mr Tunio did not produce any banking records or records from Western Union that the payment he claimed to have made to the applicant had been made.
- [19] As stated by the applicant, the respondent lives in Canada. As previously stated, the hearing before the Tribunal was conducted on the papers. Neither the applicant nor

- the respondent attended. There was no opportunity for the Tribunal to test any statement made by the applicant or by the respondent.
- [20] There was a vast amount of other evidence in their affidavits by which each of the parties tried to attack the credibility of the other. It was largely irrelevant. The applicant also sought to rely on offers to settle that had been made by the respondent at earlier points in the dispute. In particular, he relied on a without prejudice offer to settle made in a letter from the respondent's lawyers to the applicant's lawyers dated 19 November 2009. That followed an email from the respondent to the applicant dated 5 June 2009 where the respondent said "I'll pay you all the money you want just leave me alone forever". It is unnecessary to multiply the references. None of the offers to settle contained a direct admission by the respondent that the loan had been made or that he owed the money.
- [21] The thrust of the applicant's submissions is that by having regard to the offers of settlement and also to other instances where he believes his affidavit material demonstrates that false statements have been made (on collateral matters) by the respondent, this Court acting as a tribunal of fact would come to a contrary view to that reached by the Appeal Tribunal from whose decision he seeks leave to appeal.
- [22] From the brief conspectus of the evidence that was before both the Tribunal and the Appeal Tribunal set out above, it can be seen that the subject matter of the appeal which the applicant wishes to bring is an appeal against the finding of fact that the applicant had not established that the alleged loan was made. Because there was at least some evidence before the Appeal Tribunal to support the dismissal of the appeal from the Tribunal, it is not apparent that the applicant's proposed appeal would be made on a question of law, let alone made only on a question of law. As previously stated, the applicant did not identify a question of law upon which the appeal would be brought. The resolution of the applicant's claim for money lent by the Appeal Tribunal was based on the reasoning that the "decision to dismiss Mr Robb's claim can be supported by the evidence and I can find no good reason to overturn it."
- [23] Findings on evidence and the determination of facts based upon the totality of evidence before a tribunal, are not only questions of law and an appeal from such a decision does not raise only a question of law.⁶ That extends to an appeal based on the ground that a tribunal wrongly decided a question of credibility in dismissing a claim for money lent.⁷
- [24] For that reason, in my view, the application for leave to extend the time to apply for leave to appeal and the application for leave to appeal should be dismissed, because the proposed appeal would not be made only on a question of law.
- [25] In any event, if leave to appeal were granted and the proposed appeal were successful, in my view that would not result in the judgment that the applicant says he would seek. The resolution of whether the respondent put the applicant in funds to make the payment of the fees is a question of fact which would turn on the credibility of their evidence as witnesses at an oral hearing.

⁶ *Williams v The Queen* [1986] HCA 88; (1986) 161 CLR 278, 287, 301-302; for a recent collection of cases on the scope of an appeal on a question of law alone, see *Environment Protection Authority v Ravensworth Operations Pty Ltd* [2013] NSWLEC 92, [26]-[33].

⁷ *Bagumya v Kakwano* [2010] NSWSC 600, [28], [29] and [41].

- [26] Bearing in mind that this is a minor civil claim, the age of the claim, the central events with which it is concerned, the cost and expense that would be involved in a full hearing by the parties to resolve the credibility of the protagonists in their assertions and counter-assertions on a wide range of subject matters, and the absence of any documentary evidence on either side to assist in the resolution of the key factual dispute, in my view it would not be appropriate to grant leave to appeal, even if the applicant were able to identify a question of law on which the proposed appeal might only have been made.
- [27] The orders I propose are that the application to extend the time to apply for leave to appeal is dismissed. The application for leave to appeal is dismissed. The applicant should be ordered to pay the costs of the application.