

**CITATION:** *Gerloff v Jesudason* [2011] QCATA 083

**PARTIES:** Christian Gerloff  
v  
Maria Jesudason

**APPLICATION NUMBER:** APL366-10

**MATTER TYPE:** Appeals

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** Richard Oliver, Senior Member  
Peta Stilgoe, Member

**DELIVERED ON:** 4 April 2011

**DELIVERED AT:** Brisbane

**ORDERS MADE:** **Leave to appeal refused.**

**CATCHWORDS:** MINOR CIVIL DISPUTE – whether respondent represented at the hearing – whether appellant should have been entitled to legal representation at hearing – whether presence of witness throughout the hearing affected the credibility of the witness – whether a failure to give reasons – whether a failure to make necessary finding of fact – effect of any failure to give reasons or make finding of fact

*Queensland Civil and Administrative Tribunal Act 2009, s142(3)*

## **APPEARANCES and REPRESENTATION (if any):**

This matter was heard on the papers in accordance with section 32 of the *Queensland Civil and Administrative Tribunal Act 2009*.

## **REASONS FOR DECISION**

### **Senior Member Richard Oliver**

- [1] In this matter the Appeal Tribunal consisted of Ms Stilgoe, QCAT Member and me. I have had the benefit of reading her reasons in draft. I agree with her reasons, and her conclusions, and the order she proposes.

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**Member Peta Stilgoe**

- [2] Mr Gerloff was married to Mrs Jesudason's daughter. In 2004, Mrs Jesudason paid Mr Gerloff \$10,000 which was used to purchase a car for the use of Mr Gerloff and his wife. There was a dispute about the nature of the payment: Mr Gerloff says it was a gift whereas Mrs Jesudason claimed it was a loan. Mrs Jesudason brought proceedings in the minor civil disputes jurisdiction of the tribunal claiming repayment of the \$10,000. The learned Adjudicator found that the payment was a loan and ordered Mr Gerloff to pay Mrs Jesudason \$10,000 plus \$90 for the tribunal filing fee.
- [3] Mr Gerloff has appealed the learned Adjudicator's decision. Because the original hearing was a minor civil dispute, leave is necessary: s 142(3) *Queensland Civil and Administrative Tribunal Act 2009*. Leave to appeal will ordinarily only be granted where there is some question of general importance upon which further argument, and a decision of the Appeal Tribunal, would be to the public advantage; or, there is a reasonably arguable case of error in the primary decision and reasonable prospect of the applicant would obtain further substantive relief. Another question sometimes asked is: is leave necessary to correct a substantial injustice to the applicant, caused by some error?
- [4] Mr Gerloff submits:
- a) He was not given the same opportunity for representation as Mrs Jesudason.
  - b) Mrs Jesudason's witness was in attendance during the whole of the proceeding.
  - c) The learned Adjudicator erred in finding that the presumption of advancement had been rebutted.
  - d) The learned Adjudicator erred in finding that Mr Gerloff was liable for the claim having regard to the uncontradicted admission of indebtedness from Mrs Jesudason's witness.
  - e) The learned Adjudicator erred in failing to give reasons for, or making a finding of fact in respect to, the receipt of funds or the parties to the agreement.

**Representation**

- [5] Mr Gerloff says that Mrs Jesudason was represented at the hearing by her daughter, despite there being no application for leave to be represented and no order that Mrs Jesudason have leave to be represented. Mr Gerloff further says that, in the circumstances, he should have been entitled to legal representation because: English is his second language; the case had legal complexity and involved a substantial amount of money; and Mrs Jesudason was represented.

- [6] Mr Gerloff also refers the Appeal Tribunal to its obligations in s 28 of the QCAT Act to ensure that the hearing is fair and that it observes the rules of natural justice.
- [7] In response, Mrs Jesudason asserts that: there was no denial of natural justice in the way the proceedings were conducted; she, herself, cannot read or write English whereas Mr Gerloff is fluent in English; Ms Gerloff is not legally qualified and did not represent her mother; and the management of the hearing was within the tribunal's control.
- [8] Even though the learned Adjudicator adjourned the proceedings to seek confirmation from a colleague, I do not consider that the proceeding was so complex, or involved such a substantial amount of money, to justify leave for the parties to be legally represented.
- [9] Although it may not be usual practice to allow a witness to remain in the hearing throughout the proceedings, that event, in itself, does not elevate Ms Gerloff's involvement to the level of a representative of Mrs Jesudason. Section 44(1)(b) of the QCAT Act allows a party to be helped in a proceeding by another person necessary or desirable to make the proceeding intelligible to the party. The learned Adjudicator formed a view that Ms Gerloff's presence was beneficial to Mrs Jesudason's understanding of the hearing. There is nothing in the transcript or material filed that would persuade me to take a contrary view.
- [10] The material that he filed in response to the claim and the transcript demonstrates that Mr Gerloff was not suffering from any handicap in the hearing of this dispute. He was articulate and showed that he had a good understanding of the issues to be determined. I am satisfied that the manner of the hearing did not result in a denial of natural justice. I am also satisfied that Mr Gerloff did not require legal representation to "equalise the advocacy positions".
- [11] Even if the proceeding did fall into the class of matters contemplated by s 43(3) of the QCAT Act, Mr Gerloff had the opportunity to apply for leave and did not do so. It is not for the tribunal to unilaterally determine that a party should apply for leave, or to grant leave where none has been requested. It cannot be a legitimate ground for appeal that a party should have sought leave for legal representation but failed to do so.

### **Ms Gerloff's presence during the hearing**

- [12] Mr Gerloff rightly says that the presence of a witness during the evidence of others is a matter that goes to the credibility of that witness's evidence. That Ms Gerloff was once Mr Gerloff's wife, there are now divorce proceedings on foot and there is obvious acrimony between the parties adds to the difficulty of assessing credibility.
- [13] The learned Adjudicator acknowledged this difficulty. He specifically notes that his decision was based upon a consideration of the surrounding circumstances, namely Mrs Jesudason's financial

circumstances and her ability to gift \$10,000. Although unorthodox, I find that Ms Gerloff's presence during the whole of the proceeding was not an error that went to the heart of the learned Adjudicator's decision.

- [14] I note the submission that Mr Jesudason was not called to give evidence. That submission ignores the clear statement from Mrs Jesudason that she is now a widow.

### **The presumption of advancement**

- [15] With all due respect to the learned Adjudicator, the discussion about the presumption of advancement is a distraction. The presumption may apply as between Mrs Jesudason and Ms Gerloff but it cannot apply as between Mrs Jesudason and Mr Gerloff. The presumption arises in equity, principally to displace a presumption of a resulting trust, in relation to the transfer of property.
- [16] Even if I accept that the presumption does apply, I am not persuaded that the learned Adjudicator erred in his application of the principle. The presumption can be rebutted by evidence of the transferor's intention. The learned Adjudicator found, from the surrounding circumstances of Mrs Jesudason's financial position at the time, that it could not have been her intention to gift the money.
- [17] Findings of fact by a Tribunal will not usually be disturbed on appeal if the facts inferred by the Tribunal, upon which the finding is based, are capable of supporting its conclusions, and there is evidence capable of supporting any inferences underlining it<sup>1</sup>. The evidence was reasonably capable of supporting the learned Adjudicator's findings. There is no compelling reason to come to a different view of the facts in this proceeding.

### **The uncontradicted admission**

- [18] Mr Gerloff has correctly recorded a conversation that took place at the hearing which referred back to a conversation between Mr Gerloff and Ms Gerloff in February 2010 in which Ms Gerloff agreed that she had to repay Mrs Jesudason.
- [19] There are a number of observations about this evidence:
- a) If, as Mr Gerloff asserts in relation to the presumption of advancement argument, conduct after the date of the advancement is irrelevant, the conversation between the Gerloffs cannot change the character of the payment from Mrs Jesudason to Mr Gerloff.
  - b) The admission is inconsistent with Mr Gerloff's argument that there is a presumption of advancement.

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<sup>1</sup> *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Fox v Percy* (2003) 197 ALR 201 at 207, 208

- c) At best, Ms Gerloff acknowledges that both Mr and Ms Gerloff are responsible for repayment of the debt. A creditor can choose which debtor from which to recover a sum of money; Mrs Jesudason is not obliged to limit her claim against Mr Gerloff to half the amount claimed.
- d) Ms Gerloff is not a party to these proceedings.
- e) Ms Gerloff explained to the learned Adjudicator the context in which the admission was made. Presumably, that was a matter he took into account when considering the weight to be given to each person's evidence.
- [20] The section of the transcript referred to does not amount to an admission of such weight that the learned Adjudicator was not entitled to find, as he did, that the payment from Mrs Jesudason to Mr Gerloff was a loan.

### **Failing to give reasons or make a finding of fact**

- [21] Mr Gerloff says that the learned Adjudicator failed to determine to whom the money was loaned.
- [22] I accept the learned Adjudicator was in error in saying that "Mr Gerloff's submissions ...was that it was always intended that the moneys were to be a loan designed to assist both him and his then wife...". The error was in assuming Mr Gerloff accepted that the payment was a loan. The comment is relevant to a determination of to whom the money was paid.
- [23] Mr Gerloff says that the money was handed to his then wife. Ms Gerloff denies this; Mrs Jesudason told the learned Adjudicator "I gave it to him."<sup>2</sup> As I have already observed, the Appeal Tribunal will not overturn a finding of fact if there is evidence capable of supporting the finding. The learned Adjudicator was able to form a view on this issue and there is no compelling reason why the Appeal Tribunal should interfere.
- [24] The nature and extent of the obligation to provide full reasons varies according to the nature of the case<sup>3</sup>. In QCAT's minor civil disputes jurisdiction, giving immediate oral decisions accords with the spirit and purpose of the QCAT Act. Those decisions will not be exposed to criticism which fails to acknowledge the circumstances in which they are given, or the pressure of the adjudicator's caseload.
- [25] Although there is no explicit finding, it is reasonable to infer that the learned Adjudicator preferred the evidence of Mrs Jesudason and her daughter that the payment was made to Mr Gerloff. The learned Adjudicator's failure to give reasons is not a ground for overturning the decision.

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<sup>2</sup> Transcript page 5, line 24.

<sup>3</sup> *Attorney-General v Kehoe* [2001] 2 Qd R 350 at 356; *Tully v McIntyre* [2001] 2 Qd R 338.

**Conclusion**

- [26] Mr Gerloff has not pointed to any question of importance to members of the public which should be determined by giving leave to appeal; he has not submitted any material to suggest that he would suffer a substantial injustice if leave were not given and he has not demonstrated that he has reasonable prospects of substantial relief on appeal. Leave should be refused.