QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	MB Fleet Services Australia Pty Ltd t/as Motorfleet v James Frizelle's Automotive Group Pty Ltd [2015] QCATA 21
PARTIES:	MB Fleet Services Australia Pty Ltd t/as Motorfleet (Applicant/Appellant) V James Frizelle's Automotive Group Pty Ltd (Respondent)
APPLICATION NUMBER:	APL433 -14
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Senior Member Stilgoe OAM**
DELIVERED ON:	10 February 2015
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal granted.** **2. Appeal allowed.** **3. The decision of 4 September 2014 is set aside.** **4. James Frizelle's Automotive Group Pty Ltd shall pay MB Fleet Services Australia Pty Ltd t/as Motorfleet $5,026.17 by 10 March 2015.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL - MINOR CIVIL DISPUTE – where claim for brokerage on car sales – where buyer purchased cars for on-sale – where dealers agreement prohibited sale to persons who acquired for resale – whether broker aware of dealers agreement conditions – whether broker obliged to ensure compliance with dealers agreement terms – whether loss established - whether grounds for leave to appeal *Dearman v Dearman* (1908) 7 CLR 549 *Fox v Percy* (2003) 214 CLR 118 *Pickering v McArthur* [2005] QCA 294

Chambers v Jobling (1986) 7 NSWLR 1

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act).

REASONS FOR DECISION

[1] James Frizelle's Automotive Group Pty Ltd sells cars through three dealerships in the Gold Coast. MB Fleet Services Australia Pty Ltd t/as Motorfleet is a broker, sourcing cars for clients.

[2] In March/April 2014, Motorfleet arranged for Frizelle to sell four Hyundai cars to "White Water Services". White Water was based in Western Australia, so the cars were sold unregistered and with no fuel in the tanks, ready for shipment across the country.

[3] In accordance with an informal agreement, Frizelle was to pay Motorfleet commission, or brokerage fees, on the cars. Motorfleet rendered four invoices, but only one was paid. Motorfleet also issued an invoice for brokerage fees for sale of a car to another entity. Frizelle did not pay that invoice.

[4] Frizelle's Dealers Agreement with Hyundai provided that Frizelle could not sell cars to an entity who proposed to on-sell them. It turns out that White Water was a New Zealand based company in the business of securing cars for sale in New Zealand at cheaper prices than a New Zealand dealer could offer. Hyundai wrote to Frizelle, threatening sanctions. Frizelle decided not to pay Motorfleet.

[5] Motorfleet filed an application for minor debt in the tribunal. Frizelle claimed that Motorfleet had deliberately misled Frizelle and, therefore, it was not entitled to its commission. An Adjudicator of the tribunal agreed with Frizelle's argument and dismissed Motorfleet's claim.

[6] Motorfleet wants to appeal that decision. Because this is an appeal from a decision of the tribunal in its minor civil disputes jurisdiction, leave is necessary.[1] Leave to appeal will usually be granted where there is a *reasonable argument* that the decision is attended by error, and an appeal is necessary to correct a *substantial injustice* to the applicant caused by that error.[2]

[7] Motorfleet submits that the learned Adjudicator was wrong in law, and misdirected herself, in finding that Mr Baker, director of Motorfleet, would have been aware of the terms of the Dealers Agreement.

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1 QCAT Act s 142(3)(a)(i).

2 *Pickering v McArthur* [2005] QCA 294 at [3].

[8] The finding that Mr Baker must have been aware of the terms of the Dealers Agreement is a finding of fact. The appeal tribunal will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.[3] An appellate tribunal may interfere if the conclusion is 'contrary to compelling inferences' in the case.[4]

[9] The only evidence to support the learned Adjudicator's finding was a submission from Mr Perrin, representing Frizelle, that Mr Baker was previously employed as a fleet sales manager of Frizelle and, therefore, must have known about the terms of the Dealers Agreement. He relied on an affidavit from Mr Martin, Group Fleet Manager, in which he says:

> In my opinion, the actions of the applicant clearly show that they were aware of the end destination of these vehicles and that every attempt was made to hide the fact from Frizelles and therefore induce a breach of the Dealership Agreement.

[10] Mr Baker, on the other hand, denied any knowledge of the terms of that agreement.

[11] The learned Adjudicator had no evidence that positively proved Mr Baker had access to the Dealer Agreement. The learned Adjudicator preferred an inference over direct evidence. I am not satisfied that the evidence can support the learned Adjudicator's findings that Motorfleet knew about the terms of the Dealers Agreement.

[12] Even if the evidence could support the learned Adjudicator's finding, I have some difficulty with the decision. The prohibition on resale is contained in an agreement between Frizelle and Hyundai. The Dealers Agreement states that Frizelle must not sell any new Hyundai to a sub-distributor, agent, broker or any other third party who acquires the car for resale without Hyundai's prior written consent. The obligation rests with Frizelle, not the broker.

[13] There was no evidence before the learned Adjudicator to suggest that a similar terms existed in the agreement between Frizelle and Motorfleet or between Frizelle and the ultimate buyer. The transfer of the obligation to inquire into the buyer's intentions, and protect the dealer from on-sale, requires something more than an "understanding". If Frizelle wanted to pass that obligation onto Motorfleet, it should have done so in specific terms.

[14] Motorfleet did not acquire any of the cars. Each time Motorfleet presented a buyer to Frizelle, it produced a document called a Contract to Purchase a Motor Vehicle. The document named Frizelle as the supplying dealer and details of the buyer. The contract has terms and conditions on its obverse. Those terms make it clear that the contract is between Frizelle and the buyer. The buyer must pay Frizelle. Title in the vehicle does not

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3 *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Fox v Percy* (2003) 214 CLR 118 at 125-126.

4 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

pass from Frizelle to the buyer until the full purchase price has been paid. If the vehicle is not available, Frizelle has to notify the buyer and make alternative arrangements. If the buyer breaches the contract, Frizelle has the right to claim damages.

[15] Although the terms and conditions are headed "Motorfleet terms and conditions" there is no reason why Frizelle could not have included a warranty from the buyer that it was not buying the vehicle for resale. It would be a simple way to protect Frizelle from the very problem that now confronts it.

[16] I am not satisfied that Motorfleet had any obligation to inquire as to the buyer's intentions. Its role was limited to the introduction of a buyer. Frizelle, given details of the buyer, had both the opportunity and the obligation to ensure that the sale did not beach its agreement with Hyundai. It did not take any steps to protect itself.

[17] Even if Motorfleet did breach its agreement with Frizelle, the learned Adjudicator had to decide the measure of damages. She found[5] that Frizelle "*will suffer a financial loss for the bonuses they received on the sale of the four vehicles and that the bonuses may be clawed back from Frizelle's"*

[18] In his statutory declaration sworn 2 September 2014, Mr Martin swears that Frizelle has not been paid its bonuses for these cars. He exhibits a letter from Hyundai dated 9 April 2014 to support that statement. There are two problems with this evidence. Firstly, the letter does not state that Frizelle will lose, or had lost, its bonuses. It says "*HMCA reserves the right to review any applicable bonuses paid on these vehicles".* In the absence of actual evidence that Frizelle lost its bonuses, the evidence did not support the learned Adjudicator's finding.

[19] The second problem is that Frizelle's material does not identify the value of the lost bonuses. The learned Adjudicator was not entitled to assume that the loss of the bonuses was the same amount as the brokerage fee paid to Motorfleet.

[20] The learned Adjudicator was in error. Leave to appeal should be granted and the appeal allowed. The decision of 4 September 2014 should be set aside.

[21] Motorfleet filed a claim for minor debt based on unpaid invoices. Frizelle admits that it has not paid the invoices. For the reasons above, I am not satisfied that Frizelle has a defence to the claim. I therefore order that Frizelle pay Motorfleet $5,026.17 (claim of $4,675 plus interest of $249.77 plus filing fee of $101.40) by 28 days.

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5 Reasons for decision at [47].