QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Collins v McLellan* [2015] QCATA 93
PARTIES:	Ossie Collins (Applicant/Appellant) v John McLellan (Respondent)
APPLICATION NUMBER:	APL113 -15
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Senior Member Stilgoe OAM**
DELIVERED ON:	26 June 2015
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal refused.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL - MINOR CIVIL DISPUTE – MINOR DEBT – where sale of a boat where consideration for sale part cash and part installation of solar power system – where cash paid – where system not installed – where claim for value of system – where respondent claimed he was only acting as agent for installer - 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 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 *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] John McLellan sold his boat to Ossie Collins for $10,000 plus the installation of a solar power system. Mr McLellan received the $10,000. Mr Collins did not supply and install a working solar power system. Mr McLellan filed a claim for the equivalent cost of a solar power system, then limited his claim to the $25,000 jurisdiction of tribunal's minor civil disputes claim. The tribunal ordered in Mr McLellan's favour.

[2] Mr Collins 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]

[3] Mr Collins says that the tribunal did not hear evidence from the solar system installer, Mysol Pty Ltd. He says that, because he appeared at the hearing by telephone, he was not able to see documents Mr McLellan filed on the day of the hearing.

[4] Mr Collins has filed fresh evidence with his application for leave to appeal. It consists of an email from "Kyle" acknowledging that Mysol was at fault in failing to provide Mr McLellan's solar power system.

[5] The appeals tribunal will only accept fresh evidence if it was not reasonably available at the time the proceeding was heard and determined. Ordinarily, an applicant for leave to adduce such evidence must satisfy three tests. Could the parties have obtained the evidence with reasonable diligence for use at the trial? If allowed, would the evidence probably have an important impact on the result of the case? Is the evidence credible?[3]

[6] An application for leave to appeal is not, and should not be, an attempt to shore up the deficiencies of a party's case at the initial hearing. The email is dated 26 March 2015 and is supported by text messages that show the email was generated for the purpose of the appeal. The text messages also show that Mr Collins knew that Kyle was an important witness but Mr Collins tried to keep him out of the dispute. The learned Judicial Registrar asked Mr Collins if he was going to call Kyle as a witness and Mr Collins said "no"[4].

[7] The evidence was available for use at the hearing and Mr Collins has no good explanation for his failure to call Kyle. The evidence may be credible but, for the reasons that follow, it would not have an important impact on the result of the case. That evidence should not be admitted and the application for leave to appeal must proceed on the basis of the evidence before the tribunal.

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1 QCAT Act s 142(3)(a)(i).
2 *Pickering v McArthur* [2005] QCA 294 at [3].
3 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408.
4 Transcript page 1-14, lines 38 – 40.

[8] The appeal tribunal will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.[5] An appellate tribunal may interfere if the conclusion is 'contrary to compelling inferences' in the case.[6]

[9] The tribunal found that the agreement was as Mr McLellan described; that Mr Collins would provide a solar power system. The tribunal did not accept Mr Collins' alternative argument; that he would pay for the system on Mr McLellan's behalf and then simply act as the agent for an agreement between Mr McLellan and Mysol.

[10] The evidence can support the tribunal's findings. As the tribunal noted[7], the parties' documents do not support Mr Collins' version of the agreement. Kyle was the solar power installer, he was not a party to the agreement between Mr McLellan and Mr Collins and there is no suggestion that he witnessed any conversation between the two. He could not give any direct evidence about the terms of the agreement between Mr Collins and Mr McLellan. There is nothing in the transcript to persuade me that the tribunal should have taken a different view of the facts.

[11] It is true that Mr Collins could not see all the documents Mr McLellan produced at the hearing. Most of the documents were emails between Mr McLellan and Mr Collins. The learned Judicial Registrar read out the text of the documents that were relevant to his decision[8]. Mr Collins, initially, did not deny that the emails were accurate[9]. He later denied writing the emails that Mr McLellan attached to his claim[10], even though he did not raise that issue in his filed response.

[12] The documents on which the learned Judicial Registrar based his decision were all annexed to Mr McLellan's claim. Mr Collins had seen them, but did not file any material in response. The learned Judicial Registrar was entitled to rely on those documents. Mr Collins was not denied procedural fairness because he could not see other emails that Mr McLellan handed up at the hearing.

[13] There is no reasonably arguable case that the learned Judicial Registrar was in error. Leave to appeal should be refused.

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

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

7 Transcript page 1-20, lines 8 – 29.

8 See, for example, transcript page 1-8, lines 30 – 36.

9 Transcript page 1-1-8, lines 45 – 46.

10 Transcript page 1-17, lines 28 – 44.