

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *IO v JO* [2019] QCATA 132

PARTIES: **IO**
(applicant\appellant)

V

JO
(respondent)

APPLICATION NO/S: APL153-17

ORIGINATING APPLICATION NO/S: MCDO 2127-15

MATTER TYPE: Appeals

DELIVERED ON: 2 September 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Deane

ORDERS: **The application for leave to appeal and appeal is dismissed.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – OTHER CASES – where minor civil dispute – whether leave to appeal should be granted – whether misleading and deceptive conduct in contract dispute – whether total failure of consideration – whether customer suffered greater loss than awarded – whether declaration should be made

Australian Consumer Law (Queensland), s 18, s 236
Fair Trading Act 1989 (Qld), s 50
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142(1), s 142 (3)(a)(i), s 146, s 147

Chambers v Jobling (1986) 7 NSWLR 1
Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389
Dearman v Dearman (1908) 7 CLR 549
Dunmoor Pty Ltd v Queensland Building and Construction Commission & Anor [2016] QCATA 39
Ericson v Queensland Building and Construction Commission [2014] QCA 297
Fox v Percy (2003) 214 CLR 118

Harrison & Anor v Meehan [2017] QCA 315
John Urquhart t/as Hart Renovations v Partington [2016] QCA 199
Moose Plastering Pty Ltd v Habul [2014] QCATA 354

REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

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

REASONS FOR DECISION

- [1] On or about 21 April 2015 IO contracted with a Cosmetic Tattoo College ('the College') to undertake a six day Beginner Cosmetic Tattoo Diploma course conducted interstate, to purchase a digital tattoo machine and also agreed to pay for accommodation provided by the College for use during the course. At the time of enrolment and payment of the deposit JO was the owner of the College. By the time IO paid the balance owing and then subsequently attended the course in July 2015 the College had been sold but JO retained some involvement as a trainer.
- [2] IO found the course and accommodation unsatisfactory but did not tell the College of her issues during the course so it had no opportunity to seek to address her concerns at that time. The evidence before the learned Adjudicator was that the pre-enrolment information offered extra training if she was not happy or confident with procedures on completion of the course and that she did not give the College the chance to do so. The College was not a registered training organisation.
- [3] By letter dated 31 August 2015 she claimed for repayment of the moneys paid, for out of pocket expenses for airfares and transportation to and from the interstate airport and the College and for one week's wages foregone during the time she was interstate.
- [4] The College's response was not satisfactory to IO and she commenced proceedings seeking payment of the amounts claimed in her letter and the filing fee.¹
- [5] She sought the following orders:
- (a) An order requiring the payment of \$9603.15 pursuant to section 13(2)(a)(i) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act);
 - (b) Further or alternatively an order requiring the payment of damages pursuant to section 236(1) of the Australian Consumer Law (Queensland) (ACL);

¹ 28 September 2015.

- (c) A declaration that the respondent engaged in misleading conduct or conduct likely to mislead in contravention of section 18(1) of the ACL, pursuant to section 60 of the QCAT Act;
 - (d) Further or other order and/or declarations the Tribunal thinks fit.
- [6] Upon an oral hearing of the evidence, the learned Adjudicator ordered JO to pay IO \$3,833² and ordered that
- The details of the order and matter must be kept confidential by both the Applicant and the Respondent.³
- [7] There is no appeal from the confidentiality order and so these reasons have been published in a de-identified format.
- [8] It is not disputed that the amount ordered to be paid has been paid and the machine, which was to be returned in exchange for \$1,000 of the amount ordered had not been made available for return at the time of the filing of the submissions.
- [9] IO commenced this appeal proceeding and seeks to set aside the learned Adjudicator's decision to the extent that it did not order payment of all of the moneys claimed, did not make an order requiring the payment of interest on the full amount claimed and did not declare that JO engaged in misleading conduct or conduct likely to mislead in contravention of section 18(1) of the ACL.⁴ She also seeks the filing fee paid in respect of this appeal.
- [10] The delay in finalising this appeal proceeding is regrettable and relates to resourcing issues.

Leave to appeal and appeal

- [11] On appeal, legal, factual or discretionary error must be demonstrated. An appeal is not another opportunity to simply reargue and remake submissions not accepted at the initial hearing. It is not sufficient that the Appeal Tribunal might have come to a different conclusion if it was hearing the matter for the first time. Appellate tribunals will not usually set aside findings of fact on appeal if there is evidence capable of supporting the conclusions reached.⁵ However, if the conclusion is 'contrary to compelling inferences' an appellate tribunal may interfere.⁶
- [12] An appeal against a decision in a proceeding for a minor civil dispute may only be made if leave to appeal is granted.⁷

² Although not expressed in the order this was on the basis that IO would make the tattoo machine available for collection at JO's cost.

³ 01 March 2017.

⁴ Application for leave to appeal or appeal filed on 12 May 2017.

⁵ See *Dearman v Dearman* (1908) 7 CLR 549; *Fox v Percy* (2003) 214 CLR 118.

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

⁷ *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') ss 142(1); (3)(a)(i).

- [13] Leave to appeal will usually only be granted where there is a reasonable argument that the Tribunal's decision is attended by error and the appeal is necessary to correct a substantial injustice caused by the error.⁸
- [14] An appeal on a question of law only is an appeal in the strict sense. In deciding an appeal on a question of law only, the appeal tribunal must proceed under s 146 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'). There is no element of rehearing. If determination of the appeal does not determine the proceeding then the matter must be remitted for a determination either to the same decision maker or a different one.
- [15] An appeal decided on a question of fact or on a question of mixed law and fact must be decided by way of rehearing.⁹
- [16] IO claims that there are three grounds of appeal but does not seek to characterise the claimed errors as errors of law or of fact or mixed law and fact. The specific errors relied upon are not particularly clear in IO's submissions.
- [17] The Appeal Tribunal has previously observed¹⁰

The distinction between questions of law and fact is not always clear. Courts have not found it easy to formulate a satisfactory test of universal application.¹¹

The Supreme Court of Canada in *Canada (Director of Investigation and Research) v Southam Inc*¹² has provided the following concise formula:

Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

- [18] The errors relied upon appear to be errors of mixed fact and law.
- [19] I have read the documents filed in the tribunal below and considered the transcript.
- [20] JO contends that the learned Adjudicator did not err and that the orders made were correct.
- [21] The learned Adjudicator considered each claim of loss alleged and determined the following:
- (a) \$1,000 to be refunded in respect of the machine. IO contended that she was promised a particular type of digital tattoo machine for \$1,000 and that an imitation brand machine was supplied. He allowed a refund of the \$1,000 on the basis IO would make the machine available for collection at JO's cost.

⁸ *Dunmoor Pty Ltd v Queensland Building and Construction Commission & Anor* [2016] QCATA 39, [10].

⁹ See QCAT Act s 147; *Harrison & Anor v Meehan* [2017] QCA 315; *Ericson v Queensland Building and Construction Commission* [2014] QCA 297; *John Urquhart t/as Hart Renovations v Partington* [2016] QCA 199.

¹⁰ *Moose Plastering Pty Ltd v Habul* [2014] QCATA 354, [9]-[10].

¹¹ *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 394.

¹² [1997] 1 SCR 748 at [35] per Iacobucci J.

The learned Adjudicator was not persuaded that he should order JO to give IO the particular type of digital tattoo machine, which she believed she would receive, but did find that she should be put back into her original position as the bargain hadn't been met.¹³ This is not sought to be appealed.

- (b) \$450 to be refunded in respect of accommodation. IO contended she should be refunded the \$450 paid for the six nights' accommodation. The learned Adjudicator found that IO did not receive the accommodation she bargained for as she should not have been forced to accept a second student sharing the unit. This is not sought to be appealed.
- (c) \$108 in respect of the filing fee for the application be paid. This is not sought to be appealed.
- (d) that a refund of 35% of the course fee or \$2,275 compensated IO's loss as he assessed that 65% of the training offered was provided. This part is appealed.
- (e) that no amounts were payable for travel costs and income forgone. This part is appealed.

Ground of Appeal One: The Tribunal erred by failing to make an order requiring the payment of \$9,603.15

[22] I am not satisfied that IO has established this appeal ground.

[23] IO contends that the learned Adjudicator erred in not requiring JO to pay the full amount of her claimed loss.

[24] She points to the following evidence:

If I had been told that J was going to sell her business or had sold her business, I would have demanded a full refund because I was only interested in being trained by J personally and not the [College] as a business generally. Under no circumstance whatsoever would I have paid \$7,500.00 to attend a course to be trained by a person who I have never heard of before and who had no experience or qualifications. In fact, Q didn't pass her Accredited Training in Cosmetic Tattooing until after my course.¹⁴

If J had not misled me, I would not have engaged her services, including travelling for the training, and would have remained at my place of work....thereby receiving income for that whole week.¹⁵

[25] IO contends that JO relied upon statutory declarations and that there was no evidence which contradicted this evidence.

[26] IO only purported to serve the statement on the morning of the hearing so it is not surprising that there were no statutory declarations directly addressing this evidence.

[27] She submits that the learned Adjudicator accepted her evidence, which she says was unchallenged, that if she had not been misled she would not have engaged JO's

¹³ Transcript, T1-27, line 29 – 34.

¹⁴ Statement filed 1 March 2017, [98].

¹⁵ Ibid, [100].

services, travelled interstate and would have remained in her place of work and received income for the week.

- [28] In those circumstances, I infer that she submits that the learned Adjudicator erred in not finding that JO's misleading conduct caused her loss in the amount of \$9,603.15.
- [29] If a person suffers loss or damage because of a contravention of a provision in Chapter 2 or 3 of the ACL they can bring an action to recover that loss or damage where the proceeding would otherwise be within the tribunal's minor civil dispute jurisdiction.¹⁶ IO relies upon section 18(1) of the ACL, which provides that a person must not in trade and commerce mislead or deceive.
- [30] With respect this was argued by IO and simply not accepted by the learned Adjudicator.
- [31] Contrary to the submission, her evidence was challenged by JO. She gave evidence that the enrolment was with the College and submitted that when you enrol in a school you don't know who the trainer will be. She contended that she had not represented that the training would be solely with JO because IO had not paid or agreed to pay the extra fee for one-on-one training.
- [32] There was nothing in the pre-enrolment documents, which specified how much of the course would be presented by JO, although it did detail JO's experience in greater detail than the other trainer, FE, referred to in the documents and did not refer to the new owner.
- [33] The representations in relation to the training and the machine alleged by IO were made prior to her enrolment. They were representations as to future matters, namely course content to be covered, machine to be supplied and trainers. Whilst the learned Adjudicator accepted the pre-enrolment information was somewhat misleading a misleading representation as to a future matter is not necessarily misleading if the person had reasonable grounds for making the representation.¹⁷ JO gave evidence that at the time of IO's enrolment she did not know she was selling the College.¹⁸
- [34] IO contended that given the representations about JO's experience when she sold the College she ought to have been informed. There was no evidence before the learned Adjudicator that prior to entering into the contract she communicated to the College the importance she placed on JO's experience and that she was only prepared to contract on the basis that JO was the owner and primary trainer.
- [35] The learned Adjudicator did not accept IO's contention that in the circumstances she should have been informed that JO had sold her interest in the College prior to her attendance to afford her the opportunity to cancel her enrolment.
- [36] From reading the transcript it is clear that:
- (a) the learned Adjudicator regarded the dispute as primarily one of a claimed total failure of consideration for the contract and that he did not accept that

¹⁶ ACL, s236. Fair Trading Act 1989 (Qld), s 50.

¹⁷ ACL, s 4.

¹⁸ Transcript, T1-13, line 42-46; T1-14, line 1-2.

there was a total failure. He found that IO had accepted some benefits in return for the money she had paid.

- (b) the learned Adjudicator did not accept her evidence that the misleading conduct caused her loss as claimed.
- [37] IO contends that the learned Adjudicator erred in finding that she received 65% of the course she contracted to receive and therefore she should pay 65% of the fee as the effect of this finding is to force her to pay \$4,225 for a defective training course facilitated by an unknown, inexperienced and unqualified person who she did not intend to contract with.
- [38] In respect of the course fee the learned Adjudicator:
- (a) accepted that IO ‘was drawn to this course because of JO’s experience.’¹⁹
 - (b) accepted that one on one training with JO was substantially more expensive than the course fee paid by IO.
 - (c) found that there was not a total failure of consideration as IO received:
 - (i) six days’ training.
 - (ii) training on live models.
 - (iii) training in relation to a number of the techniques.
 - (d) accepted that the training received was ‘precisely the training of the type that she would have received, had the course been delivered by JO, albeit that JO would have been more hands on during that time.’²⁰
 - (e) accepted that the training had shortcomings.
 - (f) found in a qualitative and quantitative sense the training was unsatisfactory and found that 65% of the training offered was provided.
 - (g) found that a refund of 35% of the course fee or \$2,275 compensated IO’s loss.
- [39] In relation to the assessment that IO received 65% of the training offered the learned Adjudicator carefully considered the evidence of both parties in relation to the procedures promised in the pre-contract information and the training delivered. On a review of the evidence before the learned Adjudicator, I am satisfied that the conclusion reached was open on the evidence.
- [40] In respect of refusing the claim for wages foregone and the travel costs the learned Adjudicator found that IO ‘knew that was going to be a cost of going there’.²¹
- [41] Damages for breach of contract are to put the party in the same position, as far as money can do, as they would have been in had the contract been performed.

¹⁹ Ibid, T1-28, line 16 – 17.

²⁰ Ibid, T1-28, line 29-31.

²¹ Transcript, T1-29, line 44-45.

- [42] He clearly found that whilst the contract had been breached IO ought not to be placed in a better position than if the contract had been performed.
- [43] On a review of the evidence before the learned Adjudicator, I am satisfied that the conclusion reached was open on the evidence.
- [44] I am not satisfied that the matters raised demonstrates an error causing substantial injustice such that leave to appeal should be granted.

Ground of appeal two: The Tribunal erred by failing to make an order requiring the payment of interest on \$9,603.15

- [45] I am not satisfied that IO has established this appeal ground.
- [46] IO contends that the Appeal Tribunal should make an order requiring JO to pay interest on \$9,603.15 from 28 September 2015²² to 6 March 2017, being the date JO paid the \$3,883 and interest on \$5,770.15 from 7 March 2017 to the date of the Appeal Tribunal's decision at a rate or rates deemed appropriate.
- [47] She does not point to any specific error by the learned Adjudicator including to any particular basis upon which a claim for interest could be maintained.
- [48] IO's original claim did not specifically include a claim for interest.
- [49] IO's statement of evidence dated 28 February, 2017 handed up to the learned Adjudicator towards the commencement of the hearing included a claim for interest but does not identify a basis for such a claim.²³ IO advised the learned Adjudicator that the statement had been emailed to JO earlier that morning. JO advised that it had not been received by her. In those circumstances, the transcript records that the learned Adjudicator read out parts of the statement so that JO could know the nature of the claims being made against her. He did not read out the paragraph claiming interest.
- [50] After having considered the various claims of loss but not a claim for interest and having made an order for payment of \$3833 including the payment of the filing fee the learned Adjudicator asked the parties whether there was anything further and was advised there was not.²⁴ If IO wished to attempt to pursue a claim for interest that was her opportunity to do so.

- [51] An appeal is not an opportunity to improve on the way a party presented their case.
- [52] I am not satisfied that the matters raised demonstrates an error causing substantial injustice such that leave to appeal should be granted.

Ground of appeal three: The Tribunal erred by failing to declare that JO engaged in misleading conduct or conduct likely to mislead in contravention of section 18(1) of the ACL

- [53] I am not satisfied that IO has established this appeal ground.

²² The date the Application for minor civil dispute – consumer dispute was filed.

²³ [109].

²⁴ Transcript, T1-32, line 1 – 7.

- [54] IO contends that the Appeal Tribunal should declare that JO engaged in misleading conduct or conduct likely to mislead in contravention of section 18 (1) of the ACL. However, in the event the Appeal Tribunal orders JO to pay damages pursuant to section 236(1) of the ACL, she does not press for the declaration.
- [55] IO's original claim sought such a declaration. The learned Adjudicator did not make such a declaration. As stated earlier, the learned Adjudicator asked the parties whether there was anything further and was advised there was not.²⁵ If IO wished to attempt to pursue such a declaration that was her opportunity to do so.
- [56] I am not satisfied that the matters raised demonstrates an error causing substantial injustice such that leave to appeal should be granted.

Conclusion and Orders

- [57] Having regard to my conclusions, the application for leave to appeal and appeal should be dismissed.
- [58] I make orders accordingly.

²⁵ Ibid.