

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Fleming v Queensland Urban Utilities* [2019] QCATA 140

PARTIES: **KENNETH WILLIAM FLEMING**
(appellant)
v
QUEENSLAND URBAN UTILITIES
(respondents)

APPLICATION NO/S: APL085-19

ORIGINATING APPLICATION NO/S: MCDO1032/18

MATTER TYPE: Appeals

DELIVERED ON: 18 September 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Hughes

ORDERS: **Leave to appeal refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – interference with findings of Tribunal below – functions of appellate tribunal – where no valid ground of appeal raised – where findings open on evidence – where no reasonably arguable case of Tribunal in error – where no reasonable prospect of substantive relief on appeal

South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld), s 11, s 12
Water Supply (Safety and Reliability) Act 2008 (Qld), s 164, s 165

Bradlyn Nominees Pty Ltd v Saikovski [2012] QCATA 39
Cachia v Grech [2009] NSWCA 232
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388
McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577
Piric & Anor v Claudia Tillier Holdings Pty Ltd [2012] QCATA 152
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41

REPRESENTATION:

Applicants: Self-represented
 Respondent: E Madden, Team Leader

APPEARANCES: This matter was heard and determined on the papers pursuant to s32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

REASONS FOR DECISION

- [1] On 29 March 2019, two Justices of the Peace dismissed Kenneth Fleming's application for a refund of his water payment.
- [2] Mr Fleming has applied for leave to appeal that decision.
- [3] In determining whether to grant leave, the Tribunal will consider established principles including:
- (a) whether there is a reasonably arguable case of error in the primary decision;¹
 - (b) whether there is a reasonable prospect that the appellant will obtain substantive relief;²
 - (c) whether leave is needed to correct a substantial injustice caused by some error;³ and
 - (d) whether there is a question of general importance upon which further argument, and a decision of the Appeal Tribunal, would be to the public advantage.⁴
- [4] In his grounds of appeal, Mr Fleming submitted a statutory declaration about his water consumption usage.⁵ Mr Fleming said that this evidence was available to the Tribunal at first instance but considered in detail.
- [5] The statutory declaration is fresh evidence. The Appeal 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 fresh evidence must satisfy three tests:⁶
- (a) Could the parties have obtained the evidence with reasonable diligence for use at the trial?
 - (b) If allowed, would the evidence probably have an important impact on the result of the case?

¹ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

² *Cachia v Grech* [2009] NSWCA 232, 2.

³ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

⁴ *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 577, 580.

⁵ Statutory Declaration of Kenneth William Fleming sworn 29 May 2019.

⁶ *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408.

(c) Is the evidence credible?

- [6] Unfortunately for Mr Fleming, even if the Appeal Tribunal admitted the statutory declaration into evidence, it would not affect the outcome of the case. This is because the legislative basis upon which he is required to pay his water is not his individual usage.⁷
- [7] Instead, Mr Fleming is charged a fixed amount based on deeming provisions. This is due to his property (and, it would seem, other lots in his complex) not being individually metered.⁸ However, because of his limited usage, Mr Fleming feels it is unfair that he is charged this way.
- [8] This method of charging inevitably produces winners and losers, as people are charged according to average use, rather than individual use. Although Mr Fleming is understandably concerned about the amount he is charged for water compared with his limited usage, his appeal does not raise any error by the learned Justices. The Tribunal's finding that Queensland Urban Utilities was entitled to charge Mr Fleming as it did was open on the evidence. Nothing in the material or the transcript persuades the Appeal Tribunal that the learned Justices' findings were not open to the Tribunal.
- [9] The Tribunal's decision was correct and I can find no reason to come to a different view.

Should the Appeal Tribunal grant leave to appeal?

- [10] Having read the transcript and considered the evidence, I find nothing to indicate that the Tribunal acted on a wrong principle, or made mistakes of fact affecting their decision, or were influenced by irrelevant matters. The evidence was capable of supporting the Tribunal's conclusions.
- [11] Leave will not be granted where a party desires to re-argue the case on existing or additional evidence.⁹ A clear purpose of the requirement for leave, before a party has the right to appeal, is to prevent any attempt to simply conduct a retrial on the merits of the case.¹⁰ An application for leave to appeal is not, and should not be an attempt to reargue a party's case at the initial hearing.¹¹
- [12] There is no question of general importance for the Appeal Tribunal to determine. There is no reasonably arguable case that the Tribunal was in error. There is no reasonable prospect of substantive relief on appeal. There is no evidence that a substantial injustice will result if leave is not granted.
- [13] Leave to appeal is refused.

⁷ *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld), s 11, s 12; *Water Supply (Safety and Reliability) Act 2008* (Qld), s 164, s 165.

⁸ Transcript, page 1-6, line 4.

⁹ *Piric & Anor v Claudia Tillier Holdings Pty Ltd* [2012] QCATA 152, [12] (Wilson J).

¹⁰ *Ibid.*

¹¹ *Bradlyn Nominees Pty Ltd v Saikovski* [2012] QCATA 39.