QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Grammenos (t/a GGG Motors) v Steinmann* [2019] QCATA 93
PARTIES:	GEORGE GRAMMENOS (t/a GGG MOTORS) (applicant) v SARAH KAYE STEINMANN (respondent)
APPLICATION NO:	APL167-18
ORIGINATING APPLICATION NO:	MCDO1690 of 2017 Brisbane
MATTER TYPE:	Appeals
DELIVERED ON:	5 July 2019
HEARING DATE:	26 June 2019
HEARD AT:	Brisbane
DECISION OF:	Dr J R Forbes, Member
ORDERS:	**The application for leave to appeal is dismissed.**

CATCHWORDS: APPEAL – LEAVE TO APPEAL – MINOR CIVIL DISPUTE – CONSUMER CLAIM – *Motor Dealers and Chattel Auctioneers Act 2014* (Qld) - where purchase of used motor vehicle – whether statutory warranty applies – whether warranty satisfied – whether merchantable and fit for purpose – whether fresh evidence admissible – whether new issue and evidence admissible on appeal

Competition and Consumer Act 2010 (Cth) ss 54, 55
Motor Dealers and Chattel Auctioneers Act 2014 (Qld) s 115, Schedule 1
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 11, Schedule 3
Davison v Vickery's Motors Ltd (in liq) (1925) 37 CLR 1
Fox v Percy (2003) 214 CLR 118
Hawkins v Pender Bros Pty Ltd [1990] 1 Qd R 135
Malouf v Malouf (2006) 64 NSWLR 449

Minister for Immigration and Citizenship v SZMDS & Another (2010) 240 CLR 611
Orr v Holmes (1948) 76 CLR 632
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418
W (an infant), In re [1971] AC 682
Water Board v Moustakas (1988) 180 CLR 491

APPEARANCES & REPRESENTATION:

APPLICANT: Ms A Grammenos

RESPONDENT: Ms S Steinmann

REASONS FOR DECISION

[1] On 23 August 2016 the Respondent (`Steinmann') purchased a used motor vehicle from the Respondent (`GGG'), a dealer licensed under the *Motor Dealers and Chattel Auctioneers Act 2014* (Qld) (`the Dealers Act'). It would not be a happy experience.

Claim and jurisdiction

[2] Steinmann instituted a Minor Civil Claim alleging breach of statutory warranty and unfitness for purpose, and, absent any satisfactory offer of repairs, claimed a refund.

[3] Jurisdiction to hear and decide minor civil claims is conferred by section 11 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (`the QCAT Act'). In Schedule 3 to that Act the definition of `minor civil claim' includes `a claim arising out of a contract between a consumer and trader". GGG fits the description of `trader'[1] and Steinmann satisfies the definition of `consumer'.

A Statutory Warranty

[4] Section 115 of the Dealers Act establishes a 3 months `statutory warranty' for used motor vehicles with an odometer reading of less than 160,000 kilometres at the time of sale. The vehicle must be less than 10 years old, and be driven no more than 5000 kilometres during three months following the purchase. The warranty is that the vehicle is free from defects at the time of taking possession and for 3 months thereafter, and that any defects reported during that period must be repaired free of charge by the vendor.[2]

---

1 I.e. a person who in trade or commerce carries on a business of supplying goods or providing services: QCAT Act Schedule 3, definition of `consumer' 1(a)(i).

2 Dealers Act s 115, Schedule 1, definition of `warranted vehicle' clauses 3,4,7.

Difficulties arise

[5] Steinmann described her vicissitudes as follows: On 18 September 2016 the car became overheated. She called the RACQ, who told her not to drive it. She followed that advice. It was towed to her residence. Two days later, she had it towed to a motor repairer, Cole Robinson, where the thermostat was temporarily repaired.

[6] On 20 September 2019 Steinmann had the car towed to another repair shop, Brisbane Automotive Services, where the faulty thermostat was replaced. Not being a motor mechanic, Steinmann then reasonably assumed that the car was fit to drive. But five weeks later it suddenly stopped and could not be restarted. It was a major breakdown.

The Tribunal's findings

[7] The Tribunal was satisfied, on the balance of probabilities, (a) that the defects complained of were exposed within the prescribed 3 months period,[3] (b) that the vehicle was driven `well under 5000 kms during that time,[4] and (c) that within the statutory period it suffered a `major collapse'[5] which rendered it unfit for purpose and unusable.[6]

[8] The Tribunal also considered that the vehicle was unacceptable within the meaning of the overarching *Competition and Consumer Act 2010* (Cth),[7] but in view of its findings in relation to the Dealer Act, it is unnecessary to pursue that point.

Misuse not an issue at trial

[9] GGG's case at the primary hearing was essentially that, in consequence of the breakdown and electrical failure, it could not ascertain the distance driven since the time of purchase.[8] That was `the whole issue',[9] so it was said. However, as noted above, the Tribunal was satisfied that the 5000 km limit had not been exceeded.

[10] Negligence or misuse by Steinmann was certainly not an issue at the trial. No witness was produced to prove it, nor was Steinmann questioned about it. Her evidence of having the car towed when breakdowns occurred was unchallenged.[10]

[11] The Tribunal awarded Steinmann the sum of $9,500. GGG now seeks leave to appeal, and to have that award set aside.

---

3 Transcript of hearing 26 June 2018 (`T') page 23 lines 20-22.
4 T page 21 lines 1-2.
5 `If a motor is entirely non-functional, that is a major fault on any assessment': Adjudicator T page 22 lines 30-31.
6 T page 23 lines 20-22, 26.
7 Sections 54, 55.
8 T page 8 lines 27, 43.
9 T page 13 lines 8-9.
10 T page 3 line 34; T page 4 lines 5 and 27.

[12] On the evidence on trial, as accepted by the Tribunal as finder of fact, the case for the award was clear. However, in its application for leave to appeal GGG essays an *ex post facto* defence, namely negligence or misuse of the vehicle on Steinmann's part:

> The catastrophic failure of the vehicle was not caused by a major fault of the vehicle, but by the use of the vehicle by [Steinmann] in the face of expert advice as to the likely outcome of continued use.[11]

New Issue on appeal

[13] That was not an issue on trial. It was not raised in the evidence or submissions of Ms Grammenos (for GGG). Certainly Steinmann was not questioned about it. GGG's case, at trial focussed on the question of whether the statutory warranty applied, coupled with complaints that an odometer reading could not be obtained. Naturally, then, no question of misuse is addressed in the Tribunal's judgment.

[14] GGG's proposed new defence is based on an unsworn statement by an unnamed person in the motor repair firm of Col Robinson & Co Pty Ltd (`Robinson'). It is dated 16 July 2018, which is about three weeks after the Tribunal's decision. The statement reads:

> As discussed the customer with the above Peugeot 307 [096 KVL - `the car'] came to our workshop with an overheat fault with her engine. We checked the vehicle and found the engine thermostat was not opening. As the customer was in a hurry and couldn't leave the vehicle with us the replace the thermostat, we explained that if we cut the centre of the thermostat out ... the engine should not get hot, allowing her to drive her vehicle home. However, we also explained ... that it was only a temperary [*sic*] repair and the vehicle requires a new thermostat and possibly further tests and the vehicle should not be driven on a regular basis until it was repaired properly ... she was well aware the engine could overheat again.

[15] Robinson's experience of the car was brief. Notwithstanding Robinson's advice that she could safely drive it home[12], Steinmann's uncontradicted evidence is that she had it towed to her residence. Then, so far as the evidence goes, Robinsons had nothing more to do with the car, and was in no position to observe what was done with it after it left their workshop on 18 September 2016. Even if Robinson's evidence were admitted at this late stage, it would not assist GGG.

[16] On 20 September 2016, two days after consulting Robinson, Steinmann had the car towed to another repairer, Brisbane Automotive Service, Kedron. That firm replaced the thermostat at a cost (to Steinmann) of $300. Steinmann then reasonably assumed that the car was fit to drive. GGG's allegation[13] that `the Respondent failed to have the vehicle repaired and drove [it] for a further 5 weeks' is completely at odds with the evidence accepted at the trial.

---

11 Application for leave to appeal filed 23 July 2018, Annexure paragraph 11.

12 As GGG admits in paragraph 4(d) of its application filed on 23 July 2018, Robinsons advised Steinmann that `they could carry out a short-term temporary fix that would enable he to be able to drive the vehicle home.'

13 Application for leave to appeal annexure paragraph 6.

[17] Another seriously misleading allegation is that `no evidence was led by [Steinmann] that the vehicle was faulty during the statutory warranty period'.[14] The complete breakdown of the car occurred on 27 October 2016.[15] The car was purchased on 23 August 2016, and, as the Tribunal found, the statutory warranty ran until 23 November 2016.[16] The adjudicator, as judge of fact, has found that the statutory warranty applied. Findings of fact will not normally be disturbed if they have rational support in the evidence, even if another reasonable view is available.[17] A decision cannot properly be called erroneous, simply because one conclusion has been preferred to another possible view.[18] GGG adduced no evidence to the contrary. Indeed, early in the hearing, Ms Grammenos (for GGG) agreed that the statutory warranty applied.[19] And in any event there remained the `guarantee' provided by the ACL.

More fundamental considerations

[18] The inadequacy of Robinson's evidence, as a basis for a plea of misuse, has already been considered. However, there are more fundamental objections to the late introduction of that defence.

[19] The suggested fresh evidence of Robinson, even if given in proper form, would only be admissible if it were shown that it could not, by due diligence, be found and presented at the time of the trial.[20] That strict principle of the common law is reproduced in the pre-hearing directions of the appeal Tribunal.[21] The onus of proving that the due diligence test is satisfied falls upon GGG.

[20] GGG has not discharged that onus. It has not shown that at the time of the trial it was unaware of Robinson's evidence, such as it is. Alternatively, if GGG was not aware, it has not shown, on the balance of probabilities, that it could not, with due diligence, have discovered it before the trial. GGG had about 20 months to do so. If GGG's contacts in the local motor trade could not identify Robinson as Steinmann's first port of call, GGG had only to ask Steinmann the identity of her repairer of first resort. There is no evidence that she refused to disclose that information, let alone concealed it.

[21] A second fundamental objection is that the proposed new defence seeks to raise, on appeal, an entirely new issue of fact – one not raised at the trial. The general rule against such an attempt is another a strict rule of law:

---

14 Application for leave to appeal annexure paragraph 2.

15 T page 4 line 27.

16 T page 21 line5.

17 *Fox v Percy* (2003) 214 CLR 118 at 125-126.

18 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131]; *In Re W (an infant)* [1971] AC 682 at 700; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1025.

19 T page 2 lines 43-46.

20 *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135; *Orr v Holmes* (1948) 76 CLR 632 at 640-641; *Malouf v Malouf* (2006) 64 NSWLR 449.

21 Appeal Tribunal Directions 13 August 2018 paragraph 4:` If either party seeks leave to rely upon ... fresh evidence they shall file in the Tribunal ... an application to rely on fresh evidence. ... The application shall include submissions about why the fresh evidence was not available at the Tribunal below ...'

> More than once it has been held by this [High] Court that a point cannot be raised for the first time on appeal when it could possibly have been met by calling evidence below ... the rule is strictly applied.[22]
>
> Where a point is not taken in the court below, and evidence [to support it] could have been given there ... it cannot be taken afterwards.[23]
>
> The conduct of the cause at the trial is governed by the questions [then] asked of the witnesses ... a party is, and ought to be bound by the course of the trial.[24]

Resolution

[22] No error appears in the decision under appeal, and there are no reasonable prospects of a successful appeal. The application for leave to appeal must be refused.

ORDER

[23] The application for leave to appeal is dismissed.

---

22 *Water Board v Moustakas* (1988) 180 CLR 491 at [13].
23 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.
24 *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1 at 35 per Starke J.