QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Kim v Bartlett* [2020] QCATA 8
PARTIES:	**DANIEL KIM T/AS IKAHOUSING** (appellant) **v** **SHIRLEY ANNE BARTLETT** **JEFFREY JOHN BARTLETT** (respondent)
APPLICATION NO/S:	APL099-19
ORIGINATING APPLICATION NO/S:	MCDQ18/19
MATTER TYPE:	Appeals
DELIVERED ON:	21 January 2020
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 findings open on evidence – where no reasonably arguable case of Tribunal in error – where no reasonable prospect of substantive relief on appeal *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 3, s 4 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 *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 *Creek v Raine & Horne Mossman* [2011] QCATA 226 *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 *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611 *Piric & Anor v Claudia Tillier Holdings Pty Ltd* [2012] QCATA 152

QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
Slater v Wilkes [2012] QCATA 12

REPRESENTATION:

Applicants: 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] An Adjudicator ordered Daniel Kim t/as IKAHOUSING to pay $13,980.00 (out of a claim for $15,100.00) plus filing fee of $326.80 to Shirley Anne Bartlett and Jeffrey John Bartlett for defective decking timber.

[2] Mr Kim 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] Mr Kim's grounds of appeal challenged the learned Adjudicator's findings of fact and in doing so, sought to rely upon fresh evidence including photographs and decking oil product information. Apart from this, Mr Kim sought to reargue his case by referring to the same evidence considered by the learned Adjudicator in making his findings.

[5] 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:[5]

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

(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?

(c) Is the evidence credible?

[6] Mr Kim did not provide any explanation for why he did not provide his fresh evidence at the hearing other than that he "wasn't aware that the facts have been misinterpreted or misunderstood until the Judge started explaining his decision at the end". However, the onus is always upon Mr Kim to present his case and bring all relevant material and witnesses to the hearing.

[7] Mr Kim had an obligation to act in his own best interests, including providing all evidence to support his defences that the issues with the decking timber were not reported within a reasonable period and were due to poor maintenance:

> The statutory regime under which QCAT operates places obligations upon parties themselves to take care in their dealings with Tribunal matters, and to act in their own best interests. QCAT's resources for the resolution of disputes are in high demand and serve, as the High Court has recently observed in relation to court resources,
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> > "… the public as a whole, not merely the parties to the proceedings".
>
> Finality in litigation is highly desirable, because any further action beyond the hearing can be costly and unnecessarily burdensome on the parties.[6]

[8] This alone is sufficient to not allow the fresh evidence. However, even if the fresh evidence were admitted into evidence, it has little evidential weight and is unlikely to affect the outcome of the case. The photographs are not dated, nor is it clear by whom they were taken. Similarly, the product information is general and not attached to a report or sworn statement from an independent qualified witness about the application of the product to the particular decking timber in dispute. Moreover, the fresh evidence does not address the legal requirement that as the supplier of the decking, it was incumbent upon Mr Kim to inform Mr and Mrs Bartlett of the maintenance requirements.

[9] At most, the photographs and the product information allow the drawing of a possible alternative inference of causation. But they do not prove this. Attempting to explain away the learned Adjudicator's finding with a possible alternative inference does not demonstrate error by the learned Adjudicator. A decision cannot properly be called erroneous, simply because the learned Adjudicator preferred one conclusion to another possible conclusion.[7]

[10] To arrive at his decision, the learned Adjudicator made findings that the decking timber was more than likely not of an acceptable quality and not fit for the purpose

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6 *Creek v Raine & Horne Mossman* [2011] QCATA 226, [13], citing with approval *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 217.

7 *Slater v Wilkes* [2012] QCATA 12, [6], citing *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611.

for which it was supplied, in particular in Australian conditions.[8] He also made findings that Mr and Mrs Bartlett did everything they could to salvage the incremental spread of the rotting of the timbers, the cause was not a lack of maintenance and that they rejected the timber within a reasonable period.[9] The learned Adjudicator referred to relevant evidence to support these findings, including Ms Bartlett's oral evidence, contemporaneous emails and Mr Kim's own admissions.[10]

[11] Having considered material filed with the application and oral evidence from Ms Bartlett at the hearing, the learned Adjudicator was in the best position to assess credit and make findings accordingly. Nothing in the material or the transcript persuades the Appeal Tribunal that the learned Adjudicator's findings were not open to him. The findings were open on the evidence.

[12] The appeal process is not an opportunity for a party to again present their case.[11] It is the means to correct an error by the Tribunal that decided the proceeding.[12] The minor civil disputes jurisdiction requires the Tribunal to deal with matters fairly, quickly and economically.[13] A party who does not attend provide all their relevant evidence at the hearing cannot expect a different outcome by simply re-arguing their case on appeal.

[13] The Tribunal's decision was therefore appropriate and I can find no reason to come to a different view.

Should the Appeal Tribunal grant leave to appeal?

[14] Leave will not be granted where a party simply desires to re-argue the case on existing or additional evidence.[14] 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.[15] An application for leave to appeal is not, and should not be an attempt to reargue a party's case at the initial hearing.[16]

[15] Having read the transcript and considered the evidence, I find nothing to indicate that the learned Adjudicator acted on a wrong principle, or made mistakes of fact affecting his decision, or was influenced by irrelevant matters. The evidence was capable of supporting the learned Adjudicator's conclusions.

[16] 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.

[17] Leave to appeal is refused.

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8 Transcript, page 1-14, lines 36 to 47.
9 Transcript, page 1-15, lines 1 to 38; page 1-16, lines 1 to 12.
10 Transcript, page 1-14, lines 17 to 43; page 1-15, lines 11 to 20.
11 *Bradlyn Nominees Pty Ltd v Saikovski* [2012] QCATA 39, [9].
12 Ibid.
13 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 3, s 4.
14 *Piric & Anor v Claudia Tillier Holdings Pty Ltd* [2012] QCATA 152, [12] (Wilson J).
15 Ibid.
16 *Bradlyn Nominees Pty Ltd v Saikovski* [2012] QCATA 39.