QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Lift and Load Removalist Pty Ltd v Anna Hamwood* [2020] QCATA 91
PARTIES:	**LIFT AND LOAD REMOVALIST PTY LTD** (Applicant) **v** **ANNA HAMWOOD** (Respondent)
APPLICATION NO:	APL277-19
ORIGINATING APPLICATION NO:	MCD0124 of 2019 Townsville
MATTER TYPE:	Appeals
DELIVERED ON:	25 June 2020
HEARING DATE:	22 June 2020
HEARD AT:	Brisbane
DECISION OF:	Dr J R Forbes, Member
ORDERS:	**1 The application of leave to appeal is granted.** **2 The appeal is allowed, but only to the extent noted in Order 3.** **3 The orders made herein on 12 September 2019 are set aside, and in lieu thereof it is ordered that the Appellant Lift and Load Removalist Pty Ltd pay to the Respondent Anna Hamwood the sum of $4,135.65, comprising $3,444.05 by way of compensation for items damaged or not delivered, and filing fee for this application, namely $691.60.**
CATCHWORDS:	APPEAL – APPLICATION FOR LEAVE TO APPEAL – contract of carriage – furniture removal – estimated sixe of load – whether estimate binding on company – where terms of carriage contract in writing – whether employee of company authorised to vary terms – where consumer claims refund – whether refund available in

	circumstances – whether `palm tree justice' appropriate - where refund ordered by primary tribunal – whether refund should be awarded – whether leave to appeal should be granted – where leave and appeal allowed on limited basis – where award against appellant company reduced
	Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 28, s 32 s 142 *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325; [2008] VSCA 86 *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1; [2008] WASC 239 *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union* [2000] FCA 1613 *Christ Church Grammar School v Bosnich & Anor* [2010] VSC 476 *Clark v CA Kruger & Sons Pty Ltd* [1946] St R Qd 206 *Fourniotis v Vallianatos* (2018) 56 VR 85; [2018] VSC 369 *Fox v Percy* (2003) 214 CLR 118 *Guarnaccia v Rocla Concrete Pipes Ltd* [1976] VR 302 *Hardman v Hobman* [203] QCA 467 *Jet 60 Minute Cleaners Pty Ltd v Brownette* [1981] 2 NSWLR 232 *Kable v Director Of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 *Pearlberg v Varty* [1972] 1 WLR 534 *R v Secretary of State for the Home Department; Ex parte Mughal* [1974] QB 313 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 *Rosenberg v Percival* (2001) 205 CLR 434 *Smith v Joyce* (1954) 89 CLR 529 *Stanford v Stanford* (2012) 247 CLR 108 *Thin Thin Cho v Minister for Immigration & Multicultural Affairs* (1998) 55 ALD 487 at 501; [1998] FCA 1663
APPEARANCES & REPRESENTATION:	This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (QCAT Act).

REASONS FOR DECISION

[1] The ultimate question in this case is whether the Respondent (`Hamwood') is liable to pay the Appellant (`Lift and Load') $5,280 or only $2,160 for removalist services.

Formation of the agreement

[2] In March 2019 Hamwood was moving house from the Gold Coast to Townsville. Online, she sought quotations from removalists. She was promptly contacted by a lady (identified simply as `Trish' throughout this case) from Lift and Load's office. Trish acted as `rainmaker' for the company. Hamwood was charmed: `She was very, very friendly, very nice and basically telling me ... everything what I wanted to hear.'[1] Hamwood goes on:

> I told them [*sic*] that it would be a ... four-bedroom, fully-furnished house plus outside, like, tools and garden items, and Trish said to me that usually a four-bedroom house would be about 26 ... cubic metres. I did say to her that it might be a bit more ... and she said `No, that's basically it.[2] .

[3] Trish, according to Hamwood, repeated her assurances twice:

> I spoke to Tricia and at that time she said to me that I won't be charged extra even if the load is bigger.[3]
>
> I even asked Trish if there is a bigger load am I going to be charged more and she said no.[4]

[4] Trish then left the stage:

> Text messages that I have sent to Trica always got a response she's not in the office. She will call me back. I never got called back from her. I started dealing with Ayesha [Siddiqa].[5]

[5] Trish did not give evidence.

An excess clause

[6] In due course Hamwood received a written quotation from Life and Load advising:

> Your quote ... is based on the calculation of your list of items that you have provided and is estimated at 26m3 for $2,160. ... **Excess charges**: $130 per m3 if you exceed the allowed capacity of 26m3. ... To secure your booking we require confirmation from you in writing.

[7] On or about 18 March 2019 Hamwood received an email from Lift and Load confirming her booking and attaching a copy of the initial quotation. The confirmation document noted that the price for the service, based on an estimated load of 26m3 was $2,160, but repeated the warning that an additional $130 per m3 would apply if the load exceeded 26m3 (`the

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1 Transcript of evidence 12 September 2019 (`T') page 19 lines 32-34.
2 T page 6 lines 9-19.
3 T page 7 line 25.
4 T page 20 lines 8-10.
5 T page 7 lines 40-42.

excess clause'). In the event, the projected 26m3 load turned out to be 55m3.[6] That figure was not seriously challenged.

[8] On 4 April 2019 Lift and Load sent Hamwood an invoice for $5,280 made up of the original estimate of $2,160 plus an excess of $3480 for an additional 29 m3.[7] Hamwood paid the company $5,280 on the same day.[8]

[9] When the first instalment of her goods arrived in Townsville on 5 April Hamwood questioned the van driver:

> Am I going to be charged on extra because when I spoke to Trish she told me that there will be no extra charges?[9]

[10] The driver was sceptical if not cynical:

> [H]e laughed and he said, `Well, good luck to you'.[10]

The hearing and tribunal's orders

[11] About two months later Hamwood commenced these proceedings[11], claiming a refund of the full $5,280 paid for transport and $4,979.52 compensation for damage or loss of items in transit.[12]

[12] The trial was conducted by a Judicial Registrar at Townsville on 12 September 2019 who ordered -

> that [Lift and Load] refund [Hamwood] for the extra delivery costs of 3220, [and] compensation for the items that were damaged or not delivered at all in the sum of $3,444.05, totalling $6,664.05, plus the filing fee for this application, which is $338.29, coming to a total figure of $7,002.25.[13]

Lift and Load seeks to appeal

[13] Lift and Load now seeks leave to appeal[14] against that decision.[15] The proposed grounds of appeal are briefly and by no means clearly described:

(i) I was on telephone to attend this hearing. I haven't given [*sic*] a chance to fully and briefly explanation [*sic*] about the case.

(ii) I have clearly stated documentation which is not seen and even discuss [*sic*] by tribunal.

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6 See T page 7 line 20, page 24 line 3, page 54 line 22, page 57 line 8, page 59 line 19.
7 The carrier's second invoice, dated 4 April 2019 allowed a discount from $130 to $120 per cubic metre: T , reducing the total charge from $5,570 to $5,280.
8 Email Hamwood to Lift and Load, 4 April 2019 at 1.52 pm.
9 T page 24 lines 24-26.
10 T page 24 line 26.
11 Townsville Case No Q124 of 19, 17 June 2019.
12 T page 12 lines 1-11.
13 T page 61 lines 43-46.
14 Leave is necessary: QCAT Act s 142(3).
15 Application for leave filed 14 October 2019.

Ground 13(i)

[14] There are no particulars of what was not `briefly and fully' explained. In other words this assertion is too vague and general to enable a specific reply. Ms Siddiqa, appearing for Lift and Load, announced that she would not be giving evidence because `I already forwarded my report, the documentation.'[16]

Ground 13(ii)

[15] I shall revisit the allegation of unseen or disregarded `documentation' in due course

Orders sought

[16] Under the heading `Brief details of orders you are [seeking]' these requests appear:

(i) Please reconsider and reopen this case.

(ii) Please check all of our correspondence with Anna Hamwood.

(iii) Give us further chance to clarify and give opportunity to come personally to tribunal.

[17] **Request 16(i):** A reopening application has already been considered. It was refused for the reasons given by Member Brown on 27 November 2019.

[18] **Request 16(ii):** Presumably `all of our correspondence with Anna Hamwood' (as distinct from more formal documentation, considered below[17]) was included in the material Siddiqa tendered on 12 September 2019. There is no evidence to the contrary. I shall return to the formal documentation in due course.

[19] **Request 11(iii):** An application for leave to appeal is not an opportunity to repeat, supplement or revise the case presented to the primary tribunal. In directions issued for the conduct of the application for leave the parties were informed:

> Unless otherwise ordered or unless either party files an application for an oral hearing ... the application for leave to appeal and [any] appeal ... will be determined on the papers, on the basis of the written submissions of the parties and without an oral hearing.[18]

[20] No request for an oral hearing was made, and there is no order to that effect.

Some Lift and Load submissions

[21] No written submissions have been filed by Lift and Load beyond an undated document of one page, headed "Ground of Appeal". It repeats some of the swingeing assertions in the application for leave. Apart from those complaints and general expressions of dissatisfaction, Lift and Load submits:

> On the hearing date the judge sounds confused.
>
> I have not been provided with natural justice.

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16 T page 4 line 35.

17 Paragraphs [25] ff.

18 Appeal Tribunal Directions 4 November 2019 paragraph 11; 31 January 2020 paragraph 12.

> The judge simply ignored everything that supported my case.
>
> The judge ignored the fact and the evidence showing that the Customer gave permission and did not report of damages.
>
> On the day of the hearing I was not given enough time to support. I was only given 15-20 minutes only, considering that [Hamwood] was given one and a half hours.
>
> I was the one that asked the judge: `Should I have been given a chance to explain my ground' and she replied that I will be given the chance after their break.

[22] The complaint that `the judge sounds [*sic*] confused' is utterly devoid of particulars or examples. The transcript and the audio recording of the trial show that it was conducted in an orderly manner. The adjudicator's questions and interpolations are pertinent, and the reasons for the decision are clear and articulate. There is no substance in this complaint.

[23] The unsubstantiated statement that `I [*scil* the company] have not been provided with natural justice' conveys nothing more than the discontent of an unsuccessful litigant - a common misuse of the `majestic conception of natural justice'.[19] There are no particulars. The record of proceedings shows that the hearing was conducted fairly and courteously. The adjudicator was careful to ensure that parties were able to put their cases in full.[20] No submissions were cut off. There is no reason to believe that if Siddiqa had more to say that was relevant, she would have been prevented from saying it.

[24] The complaint that Siddiqa received much less air time than Hamwood is simply incorrect. It was Hamwood, after all, who had the carriage of the matter. The tribunal devoted almost 4 hours to the trial. Some 22 of 54 pages[21] of transcript are occupied by Siddiqa's submissions and her cross-examination of Hamwood. Of the remaining 32 pages, several are devoted to questions or observations from the bench. It is evident that substantially equal time was made available for `full and brief' exposition of the company's case. Despite the contrary assertion, Siddiqa was `given the chance [to reply] after their break', whereupon she addressed the tribunal for a considerable time.

A particular submission - Documents `not seen or even discussed'[22]

[25] I now return to this allegation.

[26] Bearing in mind the circumstances (a) that Lift and Load was not professionally represented and (b) that at least some of its personnel appear to have limited mastery of English, I consider that this broad complaint should be beneficially interpreted and subjected to further inquiry.

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19 *Pearlberg v Varty* [1972] 1 WLR 534 at 540 per Lord Hailsham LC; *R v Secretary of State for the Home Department; Ex parte Mughal* [1974] QB 313 at 325.

20 See e.g. T page 12 line 17 (to Hamwood): `Is that all at this stage you wanted to say?'; T page 18 lines 22-24 (to Siddiqa): `Ms Siddiqa, any other questions you had for the applicant?' **Ms Siddiqa**: `No'; T page 37 lines 25-26: `I've heard all the evidence for the applicant, so I'll hand over to you Ms Siddiqa'; (Siddiqa then speaks uninterrupted for about 10 pages); T 55 lines 1-2: `So is there anything further you would like to say, Ms Siddiqa, before we finish today?' **Ms Siddiqa**: `No'.

21 An additional 6 pages contain the reasons for judgment.

22 See [13](ii) above.

[27] When the lay pleader refers to `documentation' (as distinct from correspondence) that expression includes. by necessary implication[23], the written quotation and `confirmation', respectively reciting and repeating that:

> Your quote ... is based on the calculation of your list of items that you have provided and is estimated at 26m3 for $2,160. ... **Excess charges**: $130 per m3 if you exceed the allowed capacity of 26m3.

[28] The gist of the complaint, then, is that terms of the contract, particularly the extras clause, were improperly disregarded.

Relevant evidence

[29] Hamwood was well aware of `extras' clause, as evidenced by her anxious questions to Trish,[24] whose alleged assurance Hamwood now relies on to avoid the force of that clause.

[30] The extras clause surfaced a third time on 2 April 2019, the day when the company's van left for Townsville, Hamwood was then given another document reading:

> Please be aware that you have only been allocated a certain area as indicated in your quote – if you exceeded this, you will be given a choice as to whether you would like to carry the excess and **pay the cost** – or put it on another trip if we do not have the room on that day.[25]

[31] Hamwood signed that form, electing to `carry the excess' and have all her goods treated as one load - a load more than double the size of the 26m3 for which the original, conditional[26] quotation of $2,160 was given.

[32] However, the judgment of the tribunal brushes that clause aside:

> [A]lthough the terms and conditions of the agreement say that if you go beyond that, we're going to charge more, I don't accept that it is *fair and just in the circumstances* to increase that quote by two and a-half times, and not give the applicant any indication that there would be an increase, particularly when Trish had led Ms Hamwood to believe that she wouldn't be charged any additional cost if the load was bigger.[27]

[33] Whatever the effect of Trish's oral advice, there was ample notice in writing – acknowledged by Hamwood's signature – that there would be an increase, pursuant to the excess clause, if the entire load left for Townsville on 2 April 2019, as it did.

[34] The evidence of the excess clause should not have been so lightly passed by.

No initial complaint

[35] Payment was required in advance on 4 April 2019, and on that day Hamwood emailed the company: `I will transfer the money and make a screen shot of $5,280, regards AH'.[28] That message contains no complaint about the amount charged.

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23 So much was made explicit by company employee, a Mr Deaker: T page 58 lines 13-18.
24 See T page 7 lines 23-25; page 8 lines 10-12.
25 Customer Data Sheet, Life and Load, dated 2 April 2019, emphasis added.
26 I.e. subject to the extras clause.
27 T page 59 lines 23-28, emphasis added
28 Email Hamwood to Lift and Load 4 April 2019 10.51 am.

[36] Two days later Hamwood contacted the company to complain about a delay in delivering part of the consignment. Again there is no query or complaint about the expense.[29]

[37] On 8 and 15 April Hamwood sought confirmation the rest of the load would arrive on 20 April. Still she made no complaint about the amount charged.[30]

[38] It was not until 26 April that Hamwood expressed dissatisfaction with the company's service, `customer interaction', and lack of `care and respect' and demanded a full refund.[31]

Trish's authority?

[39] It is remarkable that there was no inquiry at the trial about Trish's position in the company hierarchy, and the extent of her authority, if any, to waive the extras clause. If there were a plea of estoppel based on Trish's unconditional absolution, a formidable answer would be that there was no reasonable reliance upon her assurances.[32]

[40] It does not appear that Trish was in a senior position with the company. When difficulties arose, her role was immediately taken over by Siddiqa. Cogent evidence would be required to justify the proposition that Trish, whatever she stood in the company peck order, was authorised to grant an informal *carte blanche* waiver of the excess clause and of several thousand dollars. There is no such evidence.

[41] It is equally improbable that Trish had authority to determine the size of a load in the absence of any physical inspection by a company representative.[33] The law of agency carefully circumscribes the power of company officers and employees to make statements or admissions to the prejudice of a company or firm.[34]

`Fair and just'

[42] A dispensation from strict rules of evidence and procedure[35] is not a licence for a tribunal to depart from substantive principles of law. This tribunal is not at liberty to dispense `palm tree justice'.[36] (That expression is commonly used by lawyers to discountenance an approach to justice that is entirely discretionary, transcending legal rights and precedents, and enabling an adjudicator to make such order as he or she thinks is `fair and just in the

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29 Email Hamwood to Lift and Load 6 April 2019 9.12 am.

30 Emails Hamwood to Lift and Load 8 April 2019 4.14 pm; 15 April 2019 5.17 am.

31 Email Hamwood to Lift and Load 26 April 2019 10.51 am.

32 *Rosenberg v Percival* (2001) 205 CLR 434 at [24]; *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325; [2008] VSCA 86; *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1; [2008] WASC 239.

33 According to Hamwood the initial quote was given without any inspection of the contents of her house: `No one came out ... no one actually came in': T page 6 lines 16-19.

34 *Smith v Joyce* (1954) 89 CLR 529; *Clark v CA Kruger & Sons Pty Ltd* [1946] St R Qd 206; *Guarnaccia v Rocla Concrete Pipes Ltd* [1976] VR 302; *BHP Steel (AIS) Pty Ltd v Construction, Forestry, Mining & Energy Union* [2000] FCA 1613

35 As in the QCAT Act s 28.

36 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257; *Stanford v Stanford* (2012) 247 CLR 108 at [38]; *Thin Thin Cho v Minister for Immigration & Multicultural Affairs* (1998) 55 ALD 487 at 501; [1998] FCA 1663; *Christ Church Grammar School v Bosnich & Anor* [2010] VSC 476 at [25]; *Jet 60 Minute Cleaners Pty Ltd v Brownette* [1981] 2 NSWLR 232 at 236; *Hardman v Hobman* [203] QCA 467 at [3]; .

circumstances'. With respect, the primary tribunal assumed such a discretion. Palm fronds rustled in the languid tropic air.

> Public confidence in the courts requires that they act consistently and that their proceedings be conducted according to rules of general application. ... It is that feature which serves to distinguish between palm tree justice and equal justice. [37]
>
> The court and VCAT[38] should not be asked to exercise palm tree justice on the grounds of some undefined notion of fairness; and, were this to be the case, it is not an exercise properly embarked upon.[39]

[43] Accordingly with due respect, for the reasons given above, and with due regard to the principles of agency and contract law, the order disallowing Lift and Load's remuneration, must be set aside. The agreement to abide by the excess clause stands.

Compensation for Loss and Damage

[44] The tribunal's awards for loss and damage are in a different category. Short reasons were given with respect to every item and the respective assessments were not seriously contested. It is not for this tribunal to interfere with those findings. There are, of course, no precise formulae to determine the sums awarded. The values attributed to repairs and second hand items were questions of fact, credit and degree to be determined by the primary decision maker, and not to be second-guessed on appeal.[40]

[45] There was no submission that Lift and Load's remuneration, if allowed, should be reduced for inconvenience[41] or less than perfect service. That is not an issue. In any event shortcomings in the service provided are dealt with by the award of $3,444.05 for loss and damage.

ORDERS

1 The application of leave to appeal is granted.

2 The appeal is allowed, but only to the extent noted in Order 3.

3 The orders made herein on 12 September 2019 are set aside, and in lieu thereof it is ordered that the Appellant Lift and Load Removalist Pty Ltd pay to the Respondent Anna Hamwood the sum of $4,135.65, comprising $3,444.05 by way of compensation for items damaged or not delivered, and the filing fee for this application, namely $691.60.

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37 *Kable v Director Of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24 at [27].

38 The Victorian counterpart of QCAT.

39 *Fourniotis v Vallianatos* (2018) 56 VR 85; [2018] VSC 369 at [5].

40 *Fox v Percy* (2003) 214 CLR 118 at 125-126; *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131].

41 Because of overloading, a minor part of the load had to be off-loaded at Gladstone, for delivery a fortnight later.