QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Wang & Anor v Best Auto Care Pty Ltd* [2024] QCATA 41
PARTIES:	**AO WANG** (first applicant/appellant) **and** **WENZI ZHAO** (second applicant/appellant) **v** **BEST AUTO CARE PTY LTD** (respondent)
APPLICATION NO/S:	APL304-22
ORIGINATING APPLICATION NO/S:	MCDO0307-22 (Brisbane)
MATTER TYPE:	Appeals
DELIVERED ON:	26 March 2024
HEARD AT:	Brisbane
DECISION OF:	Member Lember
ORDERS:	**Application for leave to rely on fresh evidence** **1. Leave to rely on fresh evidence is refused.** **Decision on the application in MCDO0307-22** **2. Leave to appeal the decision dismissing the application in MCDO0307-22 is refused.** **Decision on the counter-application in MCDO0307-22** **3. Leave to appeal the decision made on the counter-application in MCDO0307-22 is granted.** **4. Appeal allowed.** **5. The decision made on the counter-application in MCDO0307-22 is set aside and replaced with a decision that the applicants (Wang and Zhao) pay the respondent (Best Auto Care Pty Ltd) the sum of $1,000.00 within twenty-eight days of the date of today.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where applicants applied for leave to appeal – where Tribunal dismissed applications

based on bailment and Australian Consumer Laws – where counter-application granted on vehicle damage – whether damage caused by or arising from use of a vehicle – whether evidence supported decision made on counter-application

Civil Liability Act (2003) s 7, schedule 2
C*ompetition and Consumer Act* 2010 (Cth) schedule 2 (Australian Consumer Laws s 60, s 61, s 62, s 267, s 268, s 269)
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 13, s 32, s 143, schedule 3
Queensland Civil and Administrative Tribunal Rules 2009 (Qld) r 48, r 51

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Brisbane City Council v Mainsel Investments Pty Ltd [1989] 2 Qd R 204
Cachia v Grech [2009] NSWCA 232
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404
Colonial Bank of Australasia v Willan (1874) LR 5 PC 417
Darbyshire v Warran [1963] 1 WLR 1067
Davidson v J S Gilbert Fabrications Pty Ltd [1986] 1 Qd R 1
Dimond v Lovell [2002] 1 AC 384
Financial Advisers Australia v Mooney [2016] QCATA 181
Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (1993) 40 NSWLR 206
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388
Johnson v Perez (1988) 166 CLR 351
McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577
Meandarra Aerial Spraying Pty Ltd v GEJ Geldard Pty Ltd [2012] QCA 315; [2013] 1 Qd R 319
Penfold v Firkin & Balvius [2023] QCATA 11
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41

APPEARANCES & REPRESENTATION: 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

What is the application about?

[1] The substantive dispute between the parties in the Tribunal below concerned a claim by Mr Wang and Ms Zhao for damage to their vehicle suffered whilst in the

possession of Best Auto Care Pty Ltd ('Best Auto') for mechanical work and for a refund of money they paid Best Auto for that work, together with a counter-application by Best Auto against Mr Wang and Ms Zhao for damage sustained to a vehicle loaned to Mr Wang and Ms Zhao to use while their own vehicle was in for repair.

[2] At a hearing on 16 September 2022, the Tribunal below dismissed the applicants' claims and awarded Best Auto $1,750.00 towards the damage to its vehicle on the counter-application (the 'decision').

[3] Mr Wang and Ms Zhao want to appeal the decision but to do so, leave is first required.[1] In determining whether to grant leave, the Appeal Tribunal must be satisfied that:

(a) there is a reasonably arguable case of error in the primary decision;[2]

(b) there is a reasonable prospect that the appellant will obtain substantive relief;[3]

(c) leave is needed to correct a substantial injustice caused by some error;[4] or

(d) there is a question of general importance upon which further argument, and a decision of the Appeal Tribunal, would be to the public advantage.[5]

The claim

[4] Mr Wang and Ms Zhao brought their claim as an application for a minor civil dispute – consumer/trader dispute alleging that:

(a) They first sent their 2007 BMW to Best Auto to address concerns that they could smell fuel when driving and paid $420.00 on 8 February 2022 for works undertaken by Best Auto on that occasion.

(b) Upon collecting the vehicle, they could still smell fuel when driving, and when the vehicle was again returned to Best Auto, they were informed that the vehicle required further repair.

(c) Further payments of $1,000.00 on 22 February 2022 and $550.00 on 23 February 2022 were made, at which time the vehicle repairs had not yet been completed.

(d) Best Auto gave Mr Wang and Ms Zhao use of its 2009 Audi for the duration of the repair work.

(e) In the early hours of 27 February 2022, the Rocklea community was flooded at which time Mr Wang and Ms Zhao's BMW was irreparably damaged by water inundation when Best Auto's premises was flooded.

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1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act'), s 143(3).
2 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
3 *Cachia v Grech* [2009] NSWCA 232, 2.
4 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
5 *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.

(f) Mr Wang and Ms Zhao's home was also inundated; however, they had moved Best Auto's Audi to higher ground to keep it safe. Nonetheless, the Audi was damaged whilst in the possession of Mr Wang and Ms Zhao.

[5] The claim sought:

(a) A refund of the $1,970.00 paid to Best Auto for repairs that were either not carried out or not successfully carried out; and

(b) Compensation of $5,030.00 for the value of the 2007 BMW.

[6] Best Auto denied liability for the loss of Mr Wang and Ms Zhao's car because, it says:

(a) The value of the 2007 BMW was $4,000.00 prior to it being damaged by water inundation, and $400.00 as scrap value after.

(b) In any event, the 2007 BMW ought to have been collected by Mr Wang or Ms Zhao prior to the flooding event (however, text messages tendered by Best Auto establish that they were closed on 26 February 2022, the collection date they gave to Mr Wang and Ms Zhao and that no offer was made by Best Auto for the vehicle to be collected sooner).

[7] Best Auto also denied liability for refunding the cost of repair work undertaken because the repairs undertaken by them were not to rectify a fuel smell but rather:

(a) for radiator replacement and repair of a leaking coolant reservoir (8 February 2022); and

(b) relating to a software issue that required reprogramming (from 22 February 2022).

The counter-application

[8] On 22 April 2022 Best Auto filed a response/counter-application seeking the following orders:

(a) that the claim be dismissed: and

(b) that Mr Wang and Ms Zhao pay Best Auto $3,200.00 for the cost of repairs to the 2009 Audi.

[9] Best Auto alleged that the 2009 Audi suffered the following damage whilst in the possession of Mr Wang and Ms Zhao:

(a) deep scratches to the left-hand front passenger door,

(b) denting and heavy scratches to the left-hand rear quarter panel,

(c) heavy dents requiring repair and paint to the right rear tailgate, and

(d) damage to the roof antenna.

[10] It estimated the cost of repairs for the damage to be $3,200.00 and sought compensation from Mr Wang and Ms Zhao in that amount.

The first instance hearing

As to the repairs conducted to the BMW

[11] Oral evidence was taken in the hearing about repair works for the BMW. Mr Zahedi appeared for Best Auto. The transcript records the following exchange:

> MR WANG: …I think that the repairing job not finished because – I mean, when she – when we paid – paid him, and we drive the car to pick up my baby on Friday – Friday evening, the car – I drive out along for five or 10 kilometres, and the [indistinct] broken. I drive back to him, and he said that the – the engine has problem – engine computer has problem…
>
> MR WANG: So I paid – that means – in one word, that the – I paid the – I paid him, but he didn't finish the job.
>
> MR WANG: - - - the situation – I drive out – is broken. So I think – for my opinion, I paid him, but he – he didn't really fix the problem because I just drive out five – five – five kilometres work his workshop, and the car broken. So I bring the car back to his job and ask – ask him to fix the problem. So I think the situation is the – the operation of repairing not finished. Yeah. But I paid him [indistinct] yeah.
>
> MR ZAHEDI: …We did repair the – we finished the – we repair the car and work complete, but, unfortunately, we did put – at that time, he put a second-hand sensor on it, and then the sensor does not work properly. So he did bring the car back. … And I got him a new sensor. I put it to him, and I fixed the – I [indistinct] the ECU as well. It was playing up. It's not working. So I did fix his car. It was ready on Friday afternoon time.

As to how the 2007 BMW came to be damaged

[12] As mentioned, Mr Zahedi gave evidence that the BMW was ready for collection on Friday afternoon, 25 February 2022. It was not collected; the vehicle was put on a hoist in the yard to raise it above flood waters but water inundated the entire workshop to its ceiling and the BMW was damaged as a result. In any event, Mr Zahedi says police preventing him from attending the workshop to move cars once the warnings came through on Saturday, because it was not safe to do so.

[13] The transcript records oral evidence given as follows:

> MR ZAHEDI: … It was ready on Friday afternoon time. But that time – I'm – I'm – I'm not – I'll be honest with you, I'm not exactly sure if I call him or not, but I remember – I think I call him or left him a text – said the car is ready on Friday afternoon time, but the rain was very bad. You could not do anything, you know? The rain was very – it was very, very heavy raining. And then it – it just comes on my mind that they just put this car on the hoist. So I did put his car on the hoist, and my car – I had maybe – maybe – how many cars? Maybe I have – maybe I have about 50 cars or 40 cars. So they all got flooded as well.
>
> So if I knew – if I knew this flood will come, and it's – I was 100 per cent. I will move all these cars to somewhere safe, and I try to come and get the car, and the police not allow to – not allow me to take the cars, saying the road is closed. "It's dangerous. You're not allowed to go inside." So I – I actually – I did try three or four times to go there and take the car from – from the yard, but the police would not allow me to go because water was up maybe about a

> metre. They say, "You're not allowed to go because electricity or something happen to you. We're not going to allow you to go inside." So I left my car as well in the yard....
>
> ADJUDICATOR: … When was – the car was supposed to be picked up on – was it the Friday or the Saturday?
>
> MR ZAHEDI: Yes. On – I think it was on Friday, the car was completely ready. And then – and the car was – in afternoon time, it was ready. So I think Sunday we are open. And then – we were open on Sunday. He call me and say the car is ready. I say "The car is ready, but we have a little bit of water come to our workshop." Like, the work – we could not do any work. The shop was closed. And then I tell him to come on Monday. So the water rise [indistinct] and the car was actually – I left it on the hoist. It was on the hoist as well. So the water come up and then it reach the car. He call me, says, "Did the water come to my car?" I said, "No, it does not come, because your car is on the hoist. It safe." And then obviously the water rise, and then it comes – it gets to the car and damaged the car.

As to the damage to the 2009 Audi

[14] The damage to the 2009 Audi was canvassed in the hearing as follows:

> MR WANG: I – I'm willing to pay $1000 for the back bumper dent because we noticed this dent when we parked his Audi car outside of our house. But the other damages we are not aware of them and we are not responsible for them, because the Audi car was in a very, very bad condition and when I first drive the car, I feel extremely unsafe. It will automatically power off when I stop at a red light, and the mirror behind the windscreen cannot show anything behind you and there was no cover on roof of the car. It was purely glass. So if it's a sunny day, you can hardly see because it's too bright.
>
> ADJUDICATOR: There was some damage to the front passenger door. What do you say about that?
>
> MR WANG: No, we didn't – no. We didn't do it...
>
> ADJUDICATOR: What about the rear panel? That was - - -
>
> MR WANG: No. We are not respo – that was existing damage. We didn't damage that.
>
> ADJUDICATOR: And what about the rear tailgate?
>
> MR WANG: Rear tailgate – no. No, we didn't – we didn't damage that either…
>
> ADJUDICATOR: Well, what damage do you - - -- admit to? You said – you said - - -
>
> MR WANG: So there was the back - - -
>
> ADJUDICATOR: - - - you caused $1000 worth of damage. What was that for?
>
> MR WANG: The back bumper dent. I have attached a photo in that – in my email. And then there was a dent at the right-hand corner at the back.
>
> ADJUDICATOR: Right.

MR WANG: And when my husband returned the car, Mr Zahedi said we will need to pay $1000 and my husband agreed we will pay.

ADJUDICATOR: All right. Mr Zahedi, is that true?

MR ZAHEDI: When we have the car, because when we trading the car, we always have a – a – a piece of paper. We go to the car. When I give the car to her – to them, there was no damage. So the car did not have any damage. She did, or he did, hit the bumper bar and also he did – hit the tail gates and then he did replace the tail gate light, one of them. So it was broken. He replaced one. But also the – the door, passenger side door, I'm not saying he did it, but when he had the car, somebody must hit it or somebody must did something that he is not aware of it. But when I give the car to him, it was in perfect condition...

MS ZHAO: Yeah, because of – older car, you can't – you can't – you can't – you cannot – not trade an older car – like a – brand new car. No marks, no – even those old marks or new scratch, you cannot trade – trade on my side. All I can – well, what I can do is – the rear back door – that – that damage, I did – I did it – okay, that is – I will pay. What I did I – what I pay. That is – that is – my – my – my – my situation. Yeah. Thank you.

MR WANG: Yes. So the loan car, the Audi car. It was made in 2009. And the – I also found a tax invoice and receipt in the Audi car. It was bought as a repairable write-off and there was existing damages and mentioned on that invoice and receipt. So it is already a very bad condition car and we should not pay for all the damages. They're existing there and we – we are willing to pay the $1000 because we noticed the back bumper dent while we parked the car outside our house. We noticed that, and when we noticed that, we returned the car.

We told Jimmy – we told Mr Jimmy that there is a back bumper dent, and we are – we – we pointed out – we tell them early. We didn't wait until him to find out this damage because when my husband returned the car, Jimmy didn't really want to check the car. Said, "You can go now," and my husband stayed. My husband said, "You – you come. I'll show you something. There's a damage on the car and we're willing to pay." So that's what we did.

So it's not like we're returning the car, broken the car. If the car is in so bad damage, I should be damaged or hurt. There must be accident to that car. My husband should be injured or hurt or damaged, but we are not. So the car was already in very bad condition. That's what I would like to say. Thank you.

The first instance decision

[15] With respect to the consumer/trader claim by Mr Wang and Ms Zhao for a refund of the costs paid for repairs, the learned Adjudicator said as follows:

> The circumstances are that there were a number of actions taken by the respondent in respect of damage – of defects in the running of the car. There were amounts paid of some $1500 in respect of that damage. There is an exchange of emails which, in summary, says that after attempts were made to fix up the engine, there was a notation from the respondent:
>
> > *The computer on your car is no good. I can't replace the engine computer. You can come tomorrow to get your car.*

> I interpret that to be the fact that the respondent had expended money and time and effort to try and fix the car, but that the work was beyond the respondent's capacity and needed an automotive electrical engineer to deal with the computer issues. It was then, effectively, that the respondent say, "I can't do anymore, you'll have to come and pick up your car."
>
> …I am not able to find that there has been some failure on the part of the respondent in carrying out the tasks that he was asked to do. What he was asked to do was to try and find out faults within the car and he appears to have diligently tried to do that, but to have then advised the applicants that the matter was requiring specialist electrical auto effort for which he was unqualified to do. It is a tragic circumstance, but in all the circumstances, I cannot find that the applicants are entitled to succeed in their claim.

[16] With respect to the claim for the flood damage to the BMW, the learned Adjudicator said that:

> …The attempted repair and the subsequent loss of the car occurred in circumstances where in February '22, there had incessant rain. The applicants say that had they been contacted on the evening of the 25th of February, they would have been able to have picked up the car such that it would not have been subject to the flooding events which happened on the Saturday and the Sunday.
>
> I am not convinced as to why the car was not picked up on the Saturday, but there is an exchange of emails which says:
>
> > *I'll come and get the car tomorrow.*
>
> In any event, what has happened is that the car yard of the respondent was inundated by flooding. Mr Zahedi, who appeared for the respondent, suggested that he had put the applicant's car on a hoist. However, that was insufficient because the totality of the yard flooded to a full extent. Mr Zahedi says that in the events on Saturday and Sunday, he was prevented from getting close to his yard by police, who were concerned as to the personal safety of persons due to the high level of flooding. The applicants agree with that on the basis that unfortunately, their house was almost destroyed on the morning of the 27th such that it is still not repaired and may be the subject of a relocation application. In summary, the whole area was inundated by flood works – floodwaters.
>
> The difficulty for both parties is that neither party is insured.
>
> In my view, it is difficult to allow the applicants to establish a claim in negligence against the respondent. …the car could have been picked up earlier, and for whatever reason, that didn't happen, but then the arrangements to pick up the car on the following Monday would have been something in the normal course of events.
>
> I do not believe it can be said that there was a particular obligation on the part of the respondent to have removed this car as opposed to what other cars which were in his yard. The flooding is a regrettable event and unfortunately has happened on frequent occasions in the Rocklea area. However, I cannot find that there is a legal obligation upon the respondent to reimburse the applicants for the loss of value suffered by them as a result of the flooding and inundation.

[17] With respect to the counter-application for the damage to the Audi, the learned Adjudicator said (emphasis added):

> … I am a little dubious as to the quotation and the account, as it comes from his own workshop and it does not appear to be particularly broken down in terms of hours spent/materials as you would normally see in an invoice. The issue that is raised by the applicants, however, is that they admit liability to the amount of about $1000 in relation to the damage caused to the rear left panel. They deny responsibility for the other damage to the vehicle.
>
> One of the complaints made by the applicants is that the vehicle supplied to them was supplied as a vehicle that had been the subject of a write-off claim by the original owner of that vehicle – that is, that for insurance purposes, it had been written off as unrepairable. There are various arguments raised as to the allowability of such vehicles to be re-registered, but clearly, they can be re-registered provided some mechanical aspects are attended to.
>
> In this particular case, Mr Zahedi does not have a receipt or a handover showing photographs at the time when the lend was made and there is some basis for saying, even on Mr Zahedi's own evidence, that there were some bumps and scrapes on the vehicle at that time. Doing the best I can and accepting that there appears to be an admission of at least $1000 worth of damage – that I take that into account, but also take into account that the cost of repairs of any motor vehicle can be a surprise, at least. On the evidence that I have seen, I believe the quotation provided by the respondent has to be discounted. I am prepared, however, to in effect limit the recovery to the cost of repairs to the sum of $1750.

Jurisdiction

[18] Neither the parties, nor the Tribunal below addressed the question of jurisdiction at first instance, nor has it been raised on appeal.

[19] However, as the Appeal Tribunal has observed, "there is a fundamental obligation on any court or tribunal to satisfy itself as to jurisdiction when being asked to quell controversies that come before it".[6]

[20] Section 12 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') Act confers the Tribunal's jurisdiction over minor civil disputes and relevantly provides that:

> **12 When jurisdiction for minor civil dispute exercised**
>
> (1) The tribunal may exercise its jurisdiction for a minor civil dispute if a relevant person has, under this Act, applied to the tribunal to deal with the dispute.
>
> …
>
> (4) In this section—
>
> ***relevant person*** means—
>
> (a) for a claim to recover a debt or liquidated demand of money—a person to whom the debt is owed or money is payable; or

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6 *Penfold v Firkin & Balvius* [2023] QCATA 11.

(b) subject to paragraphs (c) to (f), for a claim arising out of a contract between a consumer and a trader—the consumer; or

(c) for a claim arising out of a contract between 2 or more traders—any of the traders; or

(d) for a claim for payment of an amount for damage to property caused by, or arising out of the use of, a vehicle—a person incurring loss because of the damage; …

[21] A 'minor civil dispute' is relevantly defined as:[7]

(a) a claim to recover a debt or liquidated demand of money of up to the prescribed amount; or

(b) a claim arising out of a contract between a consumer and trader, or a contract between 2 or more traders, that is—

(i) for payment of money of a value not more than the prescribed amount; or

(ii) for relief from payment of money of a value not more than the prescribed amount;

…

(c) a claim for an amount of not more than the prescribed amount for damage to property caused by, or arising out of the use of, a vehicle…

[22] Rule 48 of the *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld) provides that a respondent to a minor civil dispute application other than a minor debt may make counter-application that seeks orders against another person, who may or may not be a party to the proceeding instead of making a separate application to the tribunal to deal with the matters in relation to which the orders are sought.

[23] Rule 51 provides that if a counter-application is made in a proceeding, it must be dealt with in the proceeding and conducted as if it were a proceeding for an application for the orders the subject of the counter-application.

[24] In summary:

(a) The application by Mr Wang and Ms Zhao was framed as a consumer/trader dispute for a refund of money paid for vehicle repairs and as a claim for damages caused in the course of those services being provided; and

(b) It was within the rules for Best Auto to file a counter-application, to be conducted as an application for a minor civil dispute, but it cannot be a consumer-trader dispute, because Best Auto is not a consumer, and cannot be a trader-trader dispute because Mr Wang and Ms Zhao were not traders.[8] Nor can it be a minor debt because the claim is for damages to be assessed by the tribunal.[9] That only leaves the claim by Best Auto to be dealt with as a claim for damage to property caused by, or arising out of the use of, a vehicle.

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7 QCAT Act, schedule 3.

8 See definitions in the schedule 3 dictionary, QCAT Act.

9 *Financial Advisers Australia v Mooney* [2016] QCATA 181 at [12].

A reasonably arguable case of error – the grounds of appeal

[25] Mr Wang and Ms Zhao submit the following as their grounds of appeal:

The claim for the damaged BMW

Ground 1: The Tribunal erred when it found the applicants had not established a claim against the respondent in negligence, when it was not reasonable on the evidence to do so.

Ground 2: The Tribunal erred at law by failing to consider the duty of care owed by the respondent to the applicants by failure of the respondent's possession and control of the applicants' vehicle as bailee.

Ground 3: The Tribunal erred at law by finding there was no "particular obligation" on the respondent to have removed the applicants' car as opposed to any other car in the yard to prevent it from being damaged by flood.

Ground 4: The Tribunal erred by deciding, contrary to the evidence and the applicable law, that there is no legal obligation upon the respondent to reimburse the applicants for the loss of the value suffered by them because of the flooding.

Consumer dispute (cost of repairs)

Ground 5: The Tribunal misapprehended the claim for refund of money paid to Best Auto when the Tribunal mischaracterised it as a claim for reimbursements of monies paid for attempted repairs carried out by Best Auto, who was asked to "try and find faults within the car" when the request of Best Auto was to resolve the problem of the odour of burnt engine oil at a time when there were no other issues with the vehicle.

Ground 6: The Tribunal erred by deciding that Best Auto could keep moneys paid to it where it had found that the vehicle "was requiring specialist electrical auto effort for which he was unqualified to do". The evidence indicates that before the repair work undertaken by Best Auto to replace the "VVT", the car had a well-functioning computer and the replacement of the VVT damaged the car's computer.

Counter-application – the damaged Audi

Ground 7: The Tribunal erred by awarding Best Auto $1,750.00 on the counter-application where:

(a) The Tribunal had said it was "dubious" as to the quotation and account tendered by Best Auto;

(b) There was no evidence to support the quoted amount for repairs;

(c) There was no evidence as to the condition of the vehicle when it was first lent to the applicants;

(d) The Tribunal took irrelevant matters into account, including "that the cost of repairs of any motor vehicle can be a surprise"; and

(e) There was insufficient evidence on which the quantum of damages could be calculated.

Fresh evidence

[26] Mr Wang and Ms Zhao have applied for leave to tender fresh evidence, namely:

(a) Vehicle registration renewal notice for the BMW dated 13 December 2022.

(b) Affidavit of Mr Wang sworn 19 December 2022 in which he essentially repeats the evidence given in the first instance hearing, but with further details regarding the discussion he says took place between himself and Mr Zahedi. The Affidavit was prepared with the assistance of a community legal centre solicitor, with Mr Wang stating that he moved to Australia from China in 2019 and that his English skills are limited. The affidavit was prepared and signed with the assistance of a Mandarin interpreter.

(c) Mr Wang says, among other things, that:

(i) Prior to taking the BMW to Best Auto he took it to another repairer who said the VVT (which he now understands to be a 'variable value timing system') was the cause of the burnt engine oil smell in the vehicle. (No evidence by way of a statement or report is tendered to support this assertion).

(ii) Mr Wang visited Best Auto for the same issue but gives no evidence that he mentioned the prior diagnosis of a problem with the 'VVT' to Best Auto, and gives no evidence as to why he did not proceed with original repairer who diagnosed the issue.

(iii) Mr Zahedi said the problem was a gas pump leak and quoted to replace the fuel pump mounting for $420.00. This work proceeded.

(iv) Two weeks later the vehicle was returned to Best Auto at which time Mr Zahedi said the VVT needed replacement at a cost of $1,550.00. The work was undertaken and completed by 23 February 2022.

(v) Shortly after collecting the vehicle, the 'electronic motor load' light appeared on the dashboard and the vehicle lost acceleration power. It was returned to Best Auto who ran diagnostics and determined that the computer chip was burnt out.

(vi) He looked up the value of the BMW prior to the 2022 floods and it was between $5,700.00 and $7,500.00. This valuation evidence was filed with the original application.

(vii) He did not receive any calls from Mr Zahedi to collect the vehicle on 25 February 2022.

(viii) He was not able to collect the vehicle on 25 February 2022 because he was working.

(ix) Ms Zhao was home all day on 25 February 2022 and would have collected the vehicle had Mr Zahedi invited her to do so, but he did not.

(x) As a result of text messages exchanged Friday evening (that were in evidence at the first instance hearing), it was understood that the car

would be collected on the morning of Saturday 26 February 2022. The text messages were filed with the original application.

(xi) Council text messages issued on 26 February 2022 with flood warnings.

(xii) Mr Wang was working on 26 February 2022, but Ms Zhao was home and able to collect the vehicle, however, Mr Zahedi since stated that his workshop was closed until Monday.

(d) Photograph of the BMW taken on 6 March 2022, showing the high-water mark from the floor on the wall behind the car. This is said to prove that the vehicle was not up on the hoist as suggested by Mr Zahedi. This is not new evidence, as it was filed with the original application.

(e) Photograph of the rear of the Audi. This is not new evidence, as it was filed with the counter-application.

[27] An application for leave to adduce new evidence in an application for leave to appeal or appeal must satisfy each of the following tests:

(a) The evidence could not have been obtained with reasonable diligence for use at the hearing, and

(b) The evidence, if allowed, would probably have an important impact on the result of the case (although it need not be demonstrated that it would be decisive; and

(c) The evidence is credible.[10]

[28] For the most part, the evidence tendered was not new evidence.

[29] The registration notice for the BMW post-dates the hearing but has no impact on the result of the case.

[30] The additional evidence give by Mr Wang by way of his statement was available to him and able to be stated in the hearing.

[31] Leave to adduce fresh evidence is refused for those reasons.

A reasonably arguable case of error? Refusal of Wang and Zhao's claim for a refund of moneys paid for services

[32] Section 267 of the Australian Consumer Law ('ACL') sets out the rights of the consumer to take action against a supplier of services where there has been a failure to comply with certain guarantees, namely:

(1) that the services will be rendered with due care and skill (section 60);

(2) that the services and any product resulting from the services will be reasonably fit for a particular purpose made known to the supplier (expressly or by implication) (section 61); and

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[10] *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408; *Brisbane City Council v Mainsel Investments Pty Ltd* [1989] 2 Qd R 204, 215.

(3) the services will be supplied within a reasonable time (if the time is not fixed by the contract and not to be determined by agreement) (section 62).

[33] Section 267(2) provides that if the failure is not major, the consumer must first give the supplier the opportunity to fix the problem. If the problem is not fixed within a reasonable time, the consumer is entitled to have the problem remedied elsewhere and claim the costs from the original supplier.

[34] Section 267(3) and (4) provides that if the failure to comply is major, or the failure cannot be remedied, the consumer may terminate the contract or recover damages for any loss suffered because of the failure to comply, provided that, for a damages claim, the loss was reasonably foreseeable. Under section 269(3), if the contract is terminated and a refund sought, a refund will only be available to the extent the consumer has not already consumed the services at the time the termination takes effect (namely, when termination is made known to the supplier).

[35] Under section 268, a major failure concerning a service occurs where a reasonable person would not have acquired the service had they had known about the problem, or the service:

(a) is substantially unfit for its normal purpose and you cannot easily fix it within a reasonable amount of time;

(b) is substantially unfit for the specific purpose you asked for, if that purpose was made known to the supplier at the time of purchase, and you cannot easily fix it within a reasonable amount of time; or

(c) creates an unsafe situation.

[36] Under s 269(3), refunds of money paid or the monetary value of the consideration for the services are available if the contract for services is lawfully terminated under s267(3) if the failure to comply with the guarantee cannot be remedied or is a major failure (according to s 268). However, by s269(3) a refund is only available to the extent that the consumer has not already consumed the services at the time termination takes effect (see s269(2)).

[37] The success of the ACL claim depends upon Mr Wang and Ms Zhao satisfying the Tribunal on the balance of probabilities that they should be compensated because the Best Auto's services were not rendered with due care and skill and were not fit for purpose in breach of ACL guarantees.

[38] In mechanical cases, where there are more than one plausible or possible causes of the failure/breakdown it is difficult to readily infer negligence in the sense of a failure to render the services with due care and skill merely from the fact of the breakdown itself.

[39] Further, because nothing was reduced to writing in terms of what the services to be provided were, it is difficult to be satisfied to the requisite degree what services were to be provided for the fees charged by Best Auto.

[40] Certainly, it seems clear from the text messages and invoices exchanges that the pump work and the VVT work did take place.

[41] Mr Wang and Ms Zhao did not offer any independent mechanical reports or opinions that suggested that the services provided, or the parts supplied, were defective or insufficient, or to support their claim that a defective VVT is likely to have caused the computer failure and subsequent breakdown that occurred. They bear the onus of proof and did not satisfy it.

[42] They did not establish in the first instance hearing, on the balance of probabilities any failure on Best Auto's part. Although the learned Adjudicator's reasons were somewhat meagre on the ACL point, they nonetheless make it clear the decision made and the basis of it:

(a) The Tribunal accepted Mr Zahedi's evidence that attempts were made to repair the vehicle and the invoiced work was undertaken. The final failure of the vehicle was something Best Auto could not fix and did not charge for.

(b) The Tribunal accepted that Best Auto had been engaged to diagnose what was wrong with the vehicle and spent money and time and effort undertaking repairs.

(c) The Tribunal was not able to find that there had been a failure on the part of Beset Auto in carrying out the tasks that it was asked to do, namely, to find faults within the car, but he concluded that the ultimate fault diagnosed required a specialist electrical auto effort for which he was unqualified to do. It was open on the evidence for the Tribunal to make that conclusion.

[43] In any event, in my view, section 269(3) also presents a barrier to the applicants in that a refund is only available for services if the contract is terminated and the consumer has not already consumed the services at the time termination takes effect (see s269(2)). The repair work had already been undertaken when the service contract was terminated, I would suggest by the exchange of text messages on the evening of 25 February 2022, which was after the work was done.

[44] There is no reasonably arguable case of error with respect to the decision dismissing the claim for a refund under the ACL.

A reasonably arguable case of error? Dismissal of the application by Wang and Zhao's for damage to the BMW

[45] The Tribunal has jurisdiction to hear as a minor civil dispute a claim in negligence for "damage to property caused by, or arising out of the use of, a vehicle" and can make orders which it considers to be fair and equitable including for the payment of money.[11]

[46] Bailment is a common law principle that seeks to define the rights and interests arising from possession (as opposed to ownership) of property.[12] Bailees are obliged to exercise reasonable care in relation to bailed goods, and if the goods are lost or

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11 Section 13, QCAT Act.

12 Professor Norman Palmer states "The essence of bailment is possession": Preface, *Palmer on Bailment*, 3d Ed.

damaged the onus lies upon the bailees to prove that the loss or damage was not caused by the bailees' own negligence or that of their servants or agents.[13]

[47] There is a distinction however between possession and use of property.

[48] The claim by Mr Wang and Ms Zhao for the damage to their vehicle arising from the *possession* of their vehicle by Best Auto does not amount, in my view, to a claim that the damage was caused by, or arose out of the *use* by Best Auto of the BMW whilst it was in their possession.

[49] "Use" in its current context is defined in the Cambridge Dictionary as "to put something such as a tool, skill, or building to a particular purpose" and in the Merriam-Webster Dictionary as:

(a) the privilege or benefit of using something (eg 'gave him the use of her car'),

(b) the ability or power to use something (such as a limb or faculty), and

(c) the legal enjoyment of property that consists in its employment, occupation, exercise, or practice.

[50] Damage to a vehicle arising during the passive storage or bailment of that vehicle whilst in the possession of a mechanic for repairs does not arise out of the use of that vehicle by the mechanic. It is not a claim that falls within the Tribunal's minor civil dispute jurisdiction for property damage caused by or arising out of the use of a vehicle. Therefore, the Tribunal below did not err when it failed to consider the claim arising in negligence, or under principles of bailment, because it had no jurisdiction to do so.

[51] A claim might arise as a consumer dispute, if it can be said that the storage/bailment of the vehicle by the mechanic forms part of the mechanical services supplied, and therefore that consumer guarantees require that service (storage of the vehicle) to be supplied with due care and skill. That would require a close examination of the terms pursuant to which the parties contracted for the supply of the services. In any event, it is clear from the evidence that was before the Tribunal that:

(a) The vehicle was not ready for collection until after 544pm on Friday 25 February 2022 according to text messages exchanged between the parties that day).

(b) The office hours of Best Auto ended at 4.30pm on Friday 25 February 2022, according to extracts from its website.

(c) Reasonable diligence would not in the ordinary course require a supplier to make special arrangements for a customer to collect a stored vehicle out of hours. Even in the circumstances of the flooding event that occurred:

(i) Mr Wang and Ms Zhao gave evidence that they were aware of possible flooding risk during the day on 25 February 2022, but they made no inquiries of Best Auto to collect their car that day, despite being in a position to do so.

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13 *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* (1993) 40 NSWLR 206, at 228

(ii) Mr Zahedi gave evidence that the business could not open on 26 February 2022 as police had refused access to the premises.

(iii) The flooding occurred overnight on 26-27 February 2022.

(iv) Water levels reached the ceiling of the workshop, therefore, evidence as to whether the vehicle was placed on a hoist (which seems unlikely to have occurred according to the photographs indicating water marks) is of little relevance: the damage would have occurred regardless.

[52] There is no reasonably arguable case of error by the Tribunal below in finding that there was no obligation on the part of Best Auto to have removed this car as opposed to any other cars: there was no obligation to move the vehicle at all. The Tribunal below did not err in finding that there was no obligation upon Best Auto to reimburse the applicants for the loss of value suffered by them because of the flooding and inundation.

Leave to appeal – the decision dismissing the application

[53] As there is no reasonably argue case of error in the dismissal of the application, on either ground, leave to appeal the decision dismissing the application in MCDO0307-22 is refused.

A reasonably arguable case of error? The decision granting Best Auto's counter-application

[54] Best Auto's counter-application *is* a claim in negligence for "damage to property caused by, or arising out of the use of, a vehicle" in respect of which orders can be made for the payment of money.[14]

[55] As mentioned, principles of bailment require a bailee (being the applicants) to exercise reasonable care in relation to Audi and, upon it being damaged, the onus lies upon them to prove that the loss or damage was not caused by their own negligence.[15]

[56] The *Civil Liability Act* 2003 (Qld) ('CLA') by section 4(1) applies in Queensland to any civil claim for damages for "harm". Schedule 2 of the CLA defines relevant terms as follows:

(a) "Duty" includes a duty of care in tort, in contract or in statute;

(b) "Duty of care" means a duty to take reasonable care or to exercise reasonable skill (or both duties); and

(c) "Harm" means harm of any kind, including damage to property and economic loss.

[57] Though not codifying the common law,[16] the CLA restates common law principles, with some modifications, including dispensing with the requirement that foreseeable risk must not be "far-fetched or fanciful" and replacing it with the requirement that

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14 Section 13, QCAT Act.
15 *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* (1993) 40 NSWLR 206, at 228
16 7(5) of the *Civil Liability Act* (2003).

the risk must be "not insignificant" that is "designed to increase the degree of probability of harm which is required for a finding that a risk was foreseeable."[17]

[58] Admissions were made by Mr Wang and Ms Zhao during the hearing as to liability with respect to the rear panel damage only. They had replaced a taillight at their own expense prior to the hearing. They conceded $1,000.00 in liability for the remaining damage.

[59] The usual principle of compensation stated in *Johnson v Perez* (1988) 166 CLR 351) that the complainant is to be put back so far as money can do it into the same position as if the damage had not occurred. With respect to vehicle damage, this is usually:

(a) diminution of value in the property, which *prima facie* is the cost of repair,[18] and

(b) consequential losses but subject to betterment, reasonableness, the duty to mitigate and remoteness of damage.

[60] The diminution in value is immediate when the damage occurs, so it is not a condition precedent to the claim that a repair has been done incurring expense.[19] Where a reasonable substitute is available for a price significantly less than the cost of repair then the replacement cost is the correct measure of damage.[20] This might arise where, for example, the car is a write off.

[61] The appeal ground pertaining to the counter-application alleges that the Tribunal below fell into error by awarding $1,750.00 on the counter-application where evidence of the damage that was not conceded was scant and unreliable, and where the only evidence as to quantum came from Best Auto, was found to be 'dubious' and where the Tribunal factored in the cost of repairs generally in calculating quantum without any reference to a particular yardstick, schedule or formula that might reasonably be applied, and, importantly, responded to, by the applicants.

[62] It is an error of law for a decision maker to make a finding without probative evidence to support it or to draw an inference which was not reasonably open on the primary facts.[21] It is also an error or law for a decision-maker to make a decision which is manifestly unreasonable by failing to give adequate weight to a relevant factor of great importance or given excessive weight to a relevant factor of no great importance. [22]

[63] I find that the decision awarding the counter-application was not supported by evidence as to quantum nor as to the condition or value of the vehicle and in particular:

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17 *Meandarra Aerial Spraying Pty Ltd v GEJ Geldard Pty Ltd* [2012] QCA 315; [2013] 1 Qd R 319 at [26].
18 *Davidson v J S Gilbert Fabrications Pty Ltd* [1986] 1 Qd R 1.
19 *Dimond v Lovell* [2002] 1 AC 384
20 *Darbyshire v Warran* [1963] 1 WLR 1067.
21 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 356.
22 *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 40-42.

(a) Best Auto did not have an independent assessment of the damage to or value of the Audi before or after the damage claimed.

(b) Best Auto did not tender evidence of the condition of the Audi prior to when it was lent to Mr Wang and Ms Zhao, but it was established that the vehicle was a repaired write off and at the very least "bumps and scratches" were evident.

(c) The terms of the loan of the vehicle were not reduced to writing such that there were no contractual terms governing responsibility for damage to the vehicle while it was in Mr Wang and Ms Zhao's possession.

(d) The learned Adjudicator's an assumption of the "cost of auto repairs" generally was not supported by evidence.

[64] This amounts to an error of law.

Leave to appeal – decision on the counter-application

[65] But for the admission of liability on the part of Mr Wang and Ms Zhao there would, in my view, have been insufficient grounds to make any order on the counter-application (other than to dismiss it). As it stands, the only order available to the Tribunal on the evidence was to award that quantum conceded by the applicants, in the sum of $1,000.00.

[66] Although a reasonably minor financial loss would not of itself establish a substantial injustice, in the circumstances of loss arising between these parties, and, importantly, that the applicants' admission of liability established the counter-application, it would be a substantial injustice to the applicants if leave to appeal was not granted.

Decision

[67] For the reasons given I grant leave to appeal the decision on the counter-application. I allow the appeal and set aside the decision granting the counter-application.

[68] Since I have decided the appeal on the question of law, I may substitute my own decision and do so. The decision awarding $1,750.00 in damages on the counter-application is set aside and substituted with a decision on the counter-application that the applicants (Wang and Zhao) pay the respondents the sum of $1,000.00 within twenty-eight days of the date of today.