QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Kay v Habermann [2014] QCAT 17
PARTIES:	John William Kay (Applicant) v Shane Habermann (First Respodent) Renegade Engine Company Pty Ltd ACN 150395565 (Second Respondent)
APPLICATION NUMBER:	MCDO1759-13
MATTER TYPE:	Other minor civil disputes matters
HEARING DATES:	21 August 2013 (Southport) 8 October 2013 (Brisbane)
HEARD AT:	Southport and Brisbane
DECISION OF:	**Adjudicator Gordon**
DELIVERED ON:	15 January 2014
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The Application is struck out because QCAT does not have jurisdiction to hear it.**
CATCHWORDS:	CLAIM FOR REPAYMENT OF LOAN – loan of barter dollars – whether QCAT has jurisdiction to hear it – whether it is a claim for a debt or liquidated demand of money, or a claim between traders – value of a barter dollar *Queensland Civil and Administrative Tribunal Act* 2009 s 11, Schedule 3 *McGarry v Coates* [2013] QCATA 32 *Ogdens Ltd v Weinberg* (1906) 95 LT 567 *Spain v Union Steamship Co of New Zealand Ltd* (1923) 32 CLR 138

APPEARANCES and REPRESENTATION (if any):

Applicant:	In person
First Respondent:	In person
Second Respondent:	Michael Nugent (at first hearing) Shane Habermann (at second hearing)

REASONS FOR DECISION

[1] In the claim as it was originally cast, the Applicant said that he lent 30,000 BarterCard trade dollars to Shane Habermann and to Michael Nugent. He claimed that these had not been repaid despite his request for repayment. He claimed the sum of $25,000 as a debt.

[2] The claim came before me sitting in Southport but it was obvious from the paperwork submitted by the Applicant and exhibited to his affidavit sworn on 6 March 2013, that the correct Respondent was in fact Renegade Engine Company Pty Ltd of which Shane Habermann and Michael Nugent (named on the ASIC register as Sonny Michael Nugent) were directors. At the time of the transactions with which I am concerned in this claim, Renegade Engine Company Pty Ltd was called Renegade Streetwear Pty Ltd.[1]

[3] I made an order removing Michael Nugent (who appeared on that day) as a respondent to the claim and joining Renegade Engine Company Pty Ltd ("Renegade") as a respondent. The matter was adjourned part-heard for completion in Brisbane.

[4] For the restored hearing, Mr Habermann filed an affidavit sworn on 17 September 2013 on his own behalf and on behalf of Renegade, and the Applicant filed submissions. And following the hearing in Brisbane on 8 October 2013, both sides were given a further opportunity to make submissions on the question of jurisdiction. Only Renegade took this opportunity.

<u>Factual findings</u>

[5] BarterCard is a global operation and in Australia operates from premises on the Gold Coast through Bartercard Australia Pty Ltd. Renegade had a trade dollar account with BarterCard. This account enabled Renegade to trade with other account holders. A sale to another account holder would result in a transfer of trade dollars from the purchaser's account to the seller's account. Services could also be traded in the same way. Some sales were achieved through auctions. There were contractual arrangements between BarterCard and account holders whereby other

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[1] The company changed its name to Renegade Engine Company Pty Ltd on 16 January 2013.

transactions could be performed such as the borrowing or purchasing of trade dollars. BarterCard took a commission on each transaction, payable in Australian dollars. It could also impose various charges and fees on the happening of other events, also payable in Australian dollars.

[6] At the time of the events with which I am concerned, the Applicant was employed by BarterCard as a membership trading broker. He was appointed account manager for Renegade's account.

[7] In June 2012, the directors of Renegade desired to bid for a Harley Davidson motorcycle in a BarterCard auction. In order to do this they would need to bid about 60,000 BarterCard dollars for the motorcycle. At the time, Renegade only had a few BarterCard dollars in its account and so through the Applicant as its account manager, it arranged credit from BarterCard to enable it to make the bid. It won the auction at 60,000 BarterCard dollars and therefore became liable to pay this amount from its account to the seller of the motorcycle.

[8] When the time came to make this payment, the Applicant informed Renegade that the credit from BarterCard was going to be less than the 60,000 dollars originally agreed. Instead it was only 30,000 BarterCard dollars. There was a shortfall of 30,000 BarterCard dollars.

[9] Because of this shortfall, the Applicant offered personally to make up the difference. The words he used were that "I will put up the other 30,000 and we will sort it out later".

[10] Renegade accepted this offer. So the Applicant transferred from his own personal BarterCard account the sum of 30,000 BarterCard dollars into Renegade's account. This was on 29 June 2012.

[11] This enabled the transaction to be completed, and the seller of the motorcycle permitted Renegade to collect it and take it away.

[12] Whilst Renegade accepts that it received a credit of 30,000 BarterCard dollars into its account from the Applicant, it reserves its position as to whether this amounts to a loan as the Applicant says. It points out that the Applicant did not use the term "loan" or "lend" at the time.

[13] The nature of the transaction needs to be viewed objectively, in other words how a reasonable person would view it in the circumstances. It cannot be said from the words used by the Applicant that he was saying that BarterCard had relented and were now advancing the remaining 30,000 BarterCard dollars, so that the transfer was on behalf of BarterCard. Nor can it be said that he was gifting the BarterCard dollars to Renegade. Using the words "we will sort it out later" obviously meant it was not a gift. The only way it can be viewed is that it was a loan of the BarterCard dollars.

[14] No repayment terms were agreed. However, both parties were aware that Renegade would need to make sales in order to earn BarterCard dollars to repay the loan in BarterCard dollars. Both parties were aware therefore that there would be a period of time before the repayment could be made. One sale which was contemplated by the parties was the resale of the Harley Davidson motorcycle itself. As it turned out, this was hindered by compliance issues and did not happen.

[15] The original intention of both sides was that the loan would be repaid by a transfer of BarterCard dollars to the Applicant, but as it turned out, this became impossible for Renegade to achieve. This was because its BarterCard dollar account was suspended. This happened in early August 2012 after Renegade failed to pay fees payable in Australian dollars to BarterCard. About this time, the Applicant left the employ of BarterCard. Although Renegade's trading position may have been made more difficult by his departure, it is not argued that the Applicant caused Renegade's account suspension.

[16] Since no period for repayment of the loan was agreed, the Applicant would have to wait a reasonable time before demanding the return of his BarterCard dollars. Certainly by the time the claim was issued on 7 March 2013 a reasonable time had passed. Prior to that time he had made a number of requests for repayment.

[17] It is clear that the first Respondent Mr Habermann has no personal liability in this transaction. At all times the Applicant was aware that he was providing the 30,000 trade dollars to the second Respondent company. Whilst Mr Habermann did discuss terms of repayment, he was doing so on the company's behalf. These discussions would not in any event be capable in law of making him personally liable to repay the debt.

[18] The Applicant is entitled to compensation for Renegade's failure to repay the loan in BarterCard dollars. Such compensation would be the equivalent value of the BarterCard dollar loan in Australian dollars.

QCAT's jurisdiction

[19] QCAT can only decide claims where it has jurisdiction to do so, and if there is any doubt over whether it has jurisdiction in any particular case, this must be considered even if the parties do not raise the issue.[2]

[20] QCAT has jurisdiction to hear and decide a "minor civil dispute".[3] In the context of this case, the types of claims within the meaning of minor civil dispute are:-

(a) a claim to recover a debt or liquidated demand of money; or

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2 *McGarry v Coates* [2013] QCATA 32 at [6], Dr J R Forbes.

3 QCAT Act s 11.

(b) a claim arising out of a contract between a consumer and trader, or a contract between two or more traders for payment of money.[4]

[21] Is this a claim to recover a debt? The Applicant describes his claim as a claim to recover a debt. On the face of it therefore QCAT has jurisdiction. However, this suffers from two problems.

[22] The first is that the Applicant does not seek judgment in BarterCard dollars. Instead he seeks judgment in Australian dollars. This is the correct approach since QCAT has no jurisdiction to make an award in BarterCard dollars. This necessarily means that an assessment is required as to the correct amount to award in Australian dollars. Whilst the Applicant argues that each BarterCard dollar is worth one Australian dollar, he does not argue that an assessment is not required at all.

[23] The second is that barter dollars are not in the nature of cash or money. Instead they can only exist as a right against another party, in this case, BarterCard. This means that they are a step away from the natural meaning of the word debt. A debt has been described as an ascertained amount of money[5], and this would be its natural meaning.

[24] Debt can be contrasted with "damages". In the context of the QCAT Act and the clause "a claim to recover a debt or liquidated demand of money", in my view where a claim is properly described as a damages claim it cannot also be a debt claim. The nature of the Applicant's claim is one for compensation for Renegade's failure to repay the BarterCard dollars: it is therefore a damages claim and not a claim to recover a debt.

[25] Is this a claim for a liquidated demand of money? The difficulty with this is that because an assessment is required to ascertain the value of the BarterCard dollars in Australian dollar terms, the claim is not for a "liquidated" amount. The need for the claim to be liquidated means that the amount of the money must "be ascertained by calculation or fixed by any scale of charges, or other positive data".[6]

[26] In his submissions the Applicant argues that BarterCard dollars are no different from a foreign currency. It is true that QCAT would have jurisdiction to hear a claim for a repayment of a loan in a foreign currency. QCAT would have no power to make the award in the foreign currency and would have to convert the amount owed into Australian dollars. It is true that in doing so QCAT would be making an assessment of the value of the award in Australian dollars.

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4 As defined in Schedule 3 of the QCAT Act.

5 A view expressed by Lord Davey in the English House of Lords case of *Ogdens Ltd v Weinberg* (1906) 95 LT 567 at 567.

6 A passage approved from *Odgers Pleading and Practice* in *Spain v Union Steamship Co of New Zealand Ltd* (1923) 32 CLR 138 at 142.

[27] There is however a significant difference between such an assessment which would be based on positive data, and an assessment of the value of BarterCard dollars. The latter assessment would depend on many factors including the position of the parties as traders and their status with the BarterCard trading system. Because of the need for that assessment, it cannot be said that the claim is for a liquidated demand of money.

[28] It follows that this claim is not one to recover a debt or liquidated demand of money and thus does not fall within the first definition of a minor civil dispute.

[29] I turn now to the second definition of a minor civil dispute, that is a claim for payment of money arising out of a contract between a consumer and trader, or a contract between two or more traders. In this definition the word "money" is used much more loosely than in the first and is capable of encompassing a claim for compensation of the type in this case.

[30] However, the problem is that the Applicant does not come into either the category of consumer or trader as defined in the Act.

[31] There are three types of "consumer" defined[7], and the most relevant definition covers an individual for whom services are supplied for fee or reward when not in business. Here the Applicant received no services for fee or reward. So he was not a consumer.

[32] A trader (in the context of this case) means a person who in trade or commerce:-

(i) carries on a business of supplying goods or providing services; or
(ii) regularly holds himself, herself or itself out as ready to supply goods or to provide services of a similar nature

[33] In his affidavit of 6 March 2013 the Applicant makes it very clear that he lent the BarterCard dollars whilst employed as an Account Manager with BarterCard and that the loan was made during that employment and arising out of that employment – but was carried out by him personally, using his own personal BarterCard account. In the circumstances he was not a "trader" because he was not carrying on a business nor did he hold himself out in the terms of paragraph (ii) above.

[34] It follows that QCAT does not have jurisdiction to hear and decide this claim. On that basis it must be struck out.

[35] However since I have heard the evidence in the case it is right that I should give my decision in any event. This is in case this matter should go further and I am found to be wrong on the jurisdictional issues above.

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[7] In Schedule 3 of the QCAT Act.

The value of the BarterCard dollars in the circumstances of this case

[36] It would appear that the main impediment to settling this dispute has been the difference of opinion as to the value of 30,000 BarterCard dollars in Australian dollar terms.

[37] The Applicant's position at its highest is that each BarterCard dollar is worth one Australian dollar and that judgment should be entered in the sum of $25,000[8] plus costs.

[38] Renegade contends that each BarterCard dollar is worth much less than one Australian dollar and that if it is liable on the loan, it should have to pay a lot less than $25,000.

[39] The Applicant relies on the Australian Taxation Office's document "Bartering and barter exchanges". This explains that for the purposes of GST the ATO will accept a parity rate where that represents a fair market value of the goods and services provided.

[40] However, the ATO also states in this document:-

> As a general rule, when valuing the payment arising from barter or countertrade transactions, we will accept a fair market value as adequately reflecting the money value or arm's length value, as applicable. In most cases we will accept as a fair market value, the cash price which the taxpayer would normally have charged a stranger for the services or for the sale of the goods or property.

[41] An assessment of the fair market value of goods and services purchased with barter dollars is a rather different assessment of the value of barter dollars themselves, not attached to any particular transaction.

[42] It seems to me that the value of the barter dollars needs to be assessed based on their trading potential and value to the parties themselves. This value is likely to vary between participants in the scheme. For example, the value of barter dollars to a business with little desire or reason to purchase any goods or services available for purchase with those barter dollars, would be limited. To a business with greater barter dollar activity they would be worth more. Equally a debt of barter dollars owed by a business whose scope to obtain them was limited, would be a greater liability than a debt of barter dollars owed by a business to whom they were freely available.

[43] Potentially, barter dollars could be worthless if no use could be made of them at all. For example, if the account had been suspended as in this case.

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[8] Being QCAT's jurisdictional limit in such cases.

[44] Valuing the 30,000 barter dollars as at the date of the hearing produces an unfair result as a result of the account suspension and I propose to value them as at the date of the loan transaction.

[45] There is evidence that the value of the motor cycle was thought at the time of purchase to be about $15,000, and it is said actually to be worth $8,000 because of compliance problems which have emerged. Yet 60,000 BarterCard dollars were paid for it.

[46] On or about 2 July 2012 the Applicant visited Renegade's premises and discussed how Renegade could repay to him the 30,000 BarterCard dollars. He explained to Mr Habermann that he had provided 50,000 BarterCard dollars to the seller of the motorcycle, so that the seller of the motorcycle now had enough BarterCard dollars to purchase some land.

[47] The Applicant told Mr Habermann that he had purchased those 50,000 BarterCard dollars "at 10 cents in the dollar". In other words he had paid $5,000 for them. He also told Mr Habermann that he had sold the 50,000 BarterCard dollars to the seller of the motorcycle at "15 cents in the dollar", in other words he had sold them for $7,500.

[48] The Applicant then said that the loan of 30,000 BarterCard dollars could be paid off by a payment to him of 25 cents in the dollar, a sum of $7,500. Mr Habermann declined this offer, bearing in mind what the Applicant had just said about purchasing BarterCard dollars at 10 cents to the dollar.

[49] On 7 December 2012 the Applicant spoke directly to Mr Nugent and said he would accept $10,000 in cash or 30,000 in trade dollars. This was followed up by a text on 27 February 2013 sent by the Applicant in which he said he was willing to accept repayment of $10,000 otherwise he would be suing for $30,000.

[50] This evidence shows that to these parties, the value of the BarterCard dollar at the time of the transaction was in the range 10% to 25% of the Australian dollar, depending on how the BarterCard dollar was to be used. In the circumstances I think a fair value to assess the value of the BarterCard dollar to these parties would be 17.5%.

[51] Had I been permitted to make an order therefore, I would have ordered the Respondent Renegade to pay the sum of $5,250 to the Applicant.