

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Watson v State of Queensland* [2023] QCATA 157

PARTIES: **ERIC ALLAN WATSON**
(applicant)

v

STATE OF QUEENSLAND
(respondent)

APPLICATION NO/S: APL300-23

ORIGINATING APPLICATION NO/S: MCDT69/23 (Gladstone)

MATTER TYPE: Appeals

REASONS DELIVERED ON: 7 December 2023

DECISION DATE: 23 October 2023

HEARD AT: Brisbane

DECISION OF: Member Lember

ORDERS: **1. The application to stay a decision is refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – STAY OF PROCEEDINGS – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where stay is sought– where termination order made on grounds of serious breach – where tenant facing criminal charges and asserts right to silence – whether termination hearing should have been adjourned to permit the tenant to exercise those rights – where application to stay a decision was refused

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 11, s 13, s 48, s 58, s 93, s 143, s 145, Schedule 3
Residential Tenancies and Rooming Accommodation Act 2008 (Qld) s 290a, s 293, s 329, s 345A

Cachia v Grech [2009] NSWCA 232
Cooks Construction Pty Ltd v Stork Food Systems Aust Pty Ltd [2008] 2 Qd R 453
Day v Humphrey [2017] QCA 104
Elphick v MMI General Insurance Ltd & Anor [2002] QCA 347
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388
Hessey-Tenny & Anor v Jones [2018] QCATA 131

McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577
Queensland v O'Brien and Falzon (QSC, Muir J, 879/2006, unreported)
Queensland v Shaw [2003] QSC 436
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
Simonova v Department of Housing and Public Works [2018] QCA 60
State of Queensland through the Department of Housing and Public Works v Turnbull [2014] QCAT 442

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

Summary

- [1] On 6 September 2023 the Tribunal sitting in Gladstone made an order terminating Mr Watson's community housing tenancy from midnight on 6 September 2023 and ordered that a warrant of possession issue from 7 September 2023 ('the Decision').
- [2] On 23 October 2023, after taking submissions from the parties, I refused an application by Mr Watson to stay the Decision, vacated an interim order that had suspended the Decision and reissued the warrant of possession to take effect on 26 October 2023 and to expire after 8 November 2023, for the reasons that follow.

Primary dispute

- [3] The application for termination of Mr Watson's tenancy was filed by the State of Queensland through the Department of Housing ('the Department') on 30 June 2023 seeking termination on the grounds of failure to leave under section 293 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ('RTRAA').
- [4] The Form 12 notice to leave upon which the termination application was grounded was issued on 5 June 2023, referred to a 'serious breach' under section s 290A of the RTRAA and provided for a handover date of 18 June 2023. This exceeded the seven-day minimum notice period for a notice to leave given for serious breach under section 329, and the application for termination was brought within fourteen days of the handover date in the notice, required under section 293.
- [5] According to the MCD file:
 - (a) Notice of hearing was first given to the parties for 21 July 2023, but several adjournments followed to allow for police information to be produced to the tribunal, although it does not appear that the police information was produced in time for the hearing: it was received by the tribunal on 7 September 2023.
 - (b) The Department had, with the application to terminate, filed an affidavit setting out the basis upon which it had formed its reasonable belief regarding the serious breach.
 - (c) Mr Watson had, himself or via his solicitor, appeared at mentions where the hearing was adjourned including on 21 July 2023, 3 August 2023 and 15

August 2023, the latter occasion upon which matter was set down for hearing on 6 September 2023.

- (d) Neither Mr Watson nor his solicitor attended the 6 September 2023 hearing.
 - (e) Mr Watson did not file any written submissions for the hearing.
 - (f) Mr Watson did not request an adjournment of the hearing.
- [6] By his application for leave to appeal or appeal and his application to stay the decision Mr Watson points to his elderly age, and says at the time of his hearing he was charged with:
- (a) Stalking (over two days);
 - (b) Assault occasioning bodily harm;
 - (c) Wilful damage; and
 - (d) Breach of bail.
- [7] The complainants in the stalking charges and the assault charges are different people, only one of whom resides in the complex in which the tenancy is situated.
- [8] Central to the application for termination is Mr Watson's alleged conduct which is the subject of criminal proceedings.
- [9] Mr Watson argues in this proceeding that his right to silence in respect of those criminal proceedings, that, essentially, carries over to civil proceedings where there is a high potential for evidence to be given that effectively removes his privilege self-incrimination and conflicts with his right to silence.¹
- [10] Mr Watson says the termination proceeding out to have been stayed pending the outcome of his criminal proceedings as he was unable to give evidence at the termination proceeding whilst exercising his right to silence for the criminal proceeding.

Jurisdiction

- [11] Mr Watson wants to appeal the Decision but to do so, leave is first required.²
- [12] In the meantime, it is well established that final decisions should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Therefore, courts and tribunals should not be disposed to delay the enforcement of orders and decisions made.³
- [13] Under section 145(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') the Appeal Tribunal may make an order staying the operation of the Decision until the appeal is finally decided. However, there is no appeal until and unless leave to appeal has been granted where required.

¹ Citing authorities that included *Queensland v Shaw* [2003] QSC 436; *Queensland v O'Brien and Falzon* (QSC, Muir J, 879/2006, unreported).

² *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act'), s 143(3).

³ *Cooks Construction Pty Ltd v Stork Food Systems Aust Pty Ltd* [2008] 2 Qd R 453 at [12] cited in *Hessey-Tenny & Anor v Jones* [2018] QCATA 131 at [27].

- [14] Section 58(1) of the QCAT Act permits the Appeal Tribunal to make an interim order it considers appropriate in the interests of justice, including, for example:
- (a) to protect a party’s position for the duration of the proceeding; or
 - (b) to require or permit something to be done to secure the effectiveness of the exercise of the tribunal’s jurisdiction for the proceeding.
- [15] A “proceeding” is defined in Schedule 3 of the QCAT Act to generally mean “a proceeding before the tribunal, including an appeal before the appeal tribunal and a proceeding relating to an application for leave to appeal to the appeal tribunal”.
- [16] Therefore, an application to stay a decision that falls outside the ambit of section 145 may be considered under section 58 to allow a stay of a primary order in circumstances where leave to appeal has not yet been granted.⁴
- [17] McMurdo JA said in *Simonova v Department of Housing and Public Works*⁵ that “the circumstances must be exceptional before an order in the nature of a stay will be granted, pending an application for leave to appeal”.
- [18] To succeed on a conventional application for a stay, the party applying for the stay must satisfy the Appeal Tribunal that there is a good reason for the stay, including:⁶
- (a) that the applicant has a good arguable case on appeal;
 - (b) that the applicant will be disadvantaged if a stay is not ordered; and
 - (c) that competing disadvantage to the respondent, should the stay be granted, does not outweigh the disadvantage suffered by the application if the stay is not granted.

Discussion and findings

Is there a good arguable case on appeal?

- [19] As mentioned, Mr Watson requires leave to appeal the Decision before the appeal is heard.
- [20] In determining whether to grant leave, the Appeal Tribunal must be satisfied that, relevantly:
- (a) there is a reasonably arguable case of error in the primary decision;⁷
 - (b) there is a reasonable prospect that the appellant will obtain substantive relief;⁸ and
 - (c) leave is needed to correct a substantial injustice caused by the error;⁹ or

⁴ *Hessey-Tenny & Anor v Jones* [2018] QCATA 131 at [24].

⁵ [2018] QCA 60 at page 5.

⁶ *Elphick v MMI General Insurance Ltd & Anor* [2002] QCA 347 per Jerrard JA at [8]; *Day v Humphrey* [2017] QCA 104 per Morrison JA at {5} and [6].

⁷ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

⁸ *Cachia v Grech* [2009] NSWCA 232, 2.

⁹ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

- (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.¹⁰

Could the Tribunal proceed in Mr Watson's absence?

- [21] Mr Watson had notice of the hearing and did not attend. He has offered no reasonable excuse for his failure to attend, other than the inference that in doing so he may have jeopardised his right to silence. However, Mr Watson or his representative had attended all prior hearings. It is not the attendance that risks a right to silence, but the giving of evidence in the proceeding that may do so.
- [22] In those circumstances section 93 of the QCAT Act permits the Tribunal to hear and decide the matter in Mr Watson's absence and the Tribunal did not fall into error by doing so.
- [23] Section 48 of the QCAT Act goes further to permit the Tribunal to make a final decision in an applicant's favour if the respondent causes disadvantage in the proceeding, including by failing to attend a hearing of the proceeding without reasonable excuse.

Was the Tribunal compelled to adjourn pending the outcome of Mr Watson's criminal proceedings?

- [24] In minor civil disputes, the Tribunal must, among other things, must make orders that it considers fair and equitable to the parties to the proceeding in order to resolve the dispute which, for a tenancy matter, means making a decision the tribunal may make in relation to the matter under the RTRAA.¹¹
- [25] Community housing tenancy terminations fall into two categories:
- (a) cases based on misbehaviour (where no Form 11 or 12 is required); and
 - (b) cases based on a failure to leave after a Form 12 has been issued.
- [26] In the former category, a tenant may be required to give evidence about the behaviour relied upon to terminate the tenancy and in those cases, on a case by case basis, the giving of such evidence might conflict with a tenant's conflicting right to be silent at risk of self-incrimination.
- [27] However, termination for serious breach falls into the latter category.
- [28] Section 290A provides that a community housing lessor may give a notice to leave the premises to the tenant *if the lessor reasonably believes* the tenant, an occupant, a guest of the tenant or a person allowed on the premises by the tenant has:
- (a) used the premises or any property adjoining or adjacent to the premises (including any property that is available for use by the tenant in common with others) for an illegal activity; or
 - (b) intentionally or recklessly—
 - (i) destroyed or seriously damaged a part of the premises; or

¹⁰ *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.

¹¹ Section 13(2)(b), QCAT Act.

- (ii) endangered another person in the premises or a person occupying, or allowed on, premises nearby; or
- (iii) interfered significantly with the reasonable peace, comfort or privacy of another tenant or another tenant's appropriate use of the other tenant's premises.

- [29] Importantly, section 290A(4) provides that: "A lessor may form a reasonable belief that premises or property has been used for an illegal activity whether or not anyone has been convicted or found guilty of an offence in relation to the activity". This suggests that any related criminal proceedings need not be finalised before the termination hearing can proceed and, again, focuses on the reasonable belief of the lessor rather than directly on the behaviour of the tenant.
- [30] By section 340(2) the tribunal may make the order if satisfied that the lessor has established the ground of the application (failure to leave) and notice to leave (reasonable belief of illegal activity, intentional or reckless destruction or serious damage, danger to others, or significant nuisance).
- [31] On one view, the tribunal cannot enquire into whether the Department was justified in serving the notice to leave, apart from being satisfied that it has not acted capriciously. One reason for this is that to do so would effectively be conducting a judicial review and this may only be done by the Supreme Court under the *Judicial Review Act 1991* (Qld) (which provides a comprehensive procedure for such review).
- [32] In *Simonova v Department of Housing and Public Works* [2018] QCATA 33, Justice Carmody stated that applications for termination for serious breach do not "appear" to authorise an investigation of the underlying breach but merely whether there was a failure to leave after proper service of the Form 12 ([6]), given the wording of section 340(2) allows the tribunal to make a termination order if the "ground of the application", which his Honour construed to mean the failure to leave after proper service of the Form 12.
- [33] Two other decisions on section 290A (serious breach in at public or community housing), including one of the Appeal Tribunal, indicate that an enquiry into the basis of the issue of the Form 12 is permissible.
- [34] In *State of Queensland though the Department of Housing and Public Works v Turnbull* [2014] QCAT 442, Adjudicator Trueman did engage in a detailed examination of the evidence supporting the justification for serving the notice to leave but observed that section 290A provides a low threshold test for the Department to give a notice to leave premises on a reasonable belief ([33]).
- [35] On the material currently before the Appeal Tribunal neither the application nor the order made were outside jurisdiction.
- [36] Where:
- (a) the applicant did not attend the hearing and did not have a reasonable excuse for such failure;
 - (b) the applicant did not file any material or submissions asserting his objection to the matter proceeding, did not seek a further adjournment pending the outcome of his criminal proceedings asserting a right to silence;

- (c) the Tribunal had the power to make the Decision under the QCAT Act and on the basis of a valid application and a valid notice given under the RTRAA; and
- (d) the scope of the inquiry was as to the Department's reasonable belief, to a low threshold, as to whether illegal activity, intentional or reckless destruction or serious damage, danger to others, or significant nuisance occurred, rather than as to the guilt or otherwise of the applicant of committing an offence to a criminal (or civil) standard; and
- (e) the Department evidenced such material in affidavit form;

it was open to the Tribunal to make the orders it made and on the material before it. There is no good arguable case or error in the Decision and no reasonable prospect of substantive relief on appeal.

Will the applicant be disadvantaged if a stay is not ordered?

- [37] Mr Watson will be significantly disadvantaged if the stay is not ordered.
- [38] He is of an advanced age and his evidence is that the loss of his tenancy will have the likely result of throwing him into homelessness.

What is the competing disadvantage to the respondent, should the stay be granted, and does it outweigh the disadvantage suffered by the applicant if the stay is not granted?

- [39] The competing disadvantage to the respondent lies in an inability to enjoy the fruits of its first instance success, which means it is not able to offer the tenancy to other persons or families needing the accommodation in circumstances where the need for such accommodation vastly exceeds its availability.
- [40] This does not outweigh the disadvantage to the applicant, but it is a significant disadvantage nonetheless, noting also that section 349A of the RTRAA does not permit the tribunal to refuse to terminate a tenancy merely because the tenant is a community housing tenant (and, impliedly, more vulnerable) and in other cases before the tribunal (albeit not serious breach) the tribunal must consider the Department's responsibility to other tenants and the needs of persons awaiting housing assistance from the State when making termination decisions.¹²

Are the circumstances exceptional?

- [41] On balance, the material before the Appeal Tribunal does not satisfy me that the interests of justice require the granting of a stay. The circumstances of this application are not so exceptional as to warrant an interim order being made to stay the Decision pending the outcome of the application for leave to appeal or appeal.

Decision

- [42] For those reasons, the application to stay was refused.

¹² For example, RTRAA section 345A(2).