SUPREME COURT OF QUEENSLAND

CITATION:	*Reihana v Beenleigh Show Society & Ors* [2020] QSC 55
PARTIES:	**TONI COLIN REIHANA** (applicant) **v** **QCAT MEMBER FORBES** (first respondent) and **QCAT MEMBER HOWE** (second respondent) and **BEENLEIGH SHOW SOCIETY** (third respondent)
FILE NO:	SC No 8398 of 2019
DIVISION:	Trial
PROCEEDING:	Originating Application
DELIVERED ON:	1 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2019 Supplementary submissions received 15 November 2019 (third respondent) and 19 November 2019 (applicant)
JUDGE:	Wilson J
ORDER:	**The orders of the Court are:** **1. The application for judicial review filed 7 August 2019 is dismissed.** **2. The question of costs is adjourned to a date to be fixed.** **3. The respondents are required to file and serve short written submissions as to costs by 15 April 2020.** **4. The applicant is required to file and serve short written submissions as to costs by 1 May 2020.** **5. If either party cannot meet this timeframe, then they must inform the Supreme Court registry by 8 April 2020.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the applicant seeks judicial review of a decision of an adjudicator of the Queensland Civil and Administrative Tribunal – where the

applicant failed to attend a Queensland Civil and Administrative Tribunal Appeal Hearing – where the adjudicator refused the applicant's application for an adjournment and application for leave to appeal in the applicant's absence – where the application to review the adjudicator's decision was out of time - where the applicant seeks an extension of time to review the decisions of the adjudicator – where the applicant was afforded the opportunity to present an argument at the hearing and was not denied procedural fairness – where the applicant alleges the adjudicator's decision breached natural justice – where the applicant alleges the adjudicator's decision was infected with bias - where s 156 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) precludes the application of the *Judicial Review Act 1991* (Qld) to decisions of the Queensland Civil and Administrative Tribunal unless there is jurisdictional error

Judicial Review Act 1991 (Qld) ss 4, 7, 18, 20, 23, 26
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 3, 4, 6, 9, 28, 149, 150, 156

Australian Broadcasting Tribunal v Bond (1990) 170 CLR, cited
Brandy v Human Rights & Equal Opportunity Commission (1995) 183 CLR 245, cited
Craig v South Australia (1995) 184 CLR 163, cited
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, cited
Edelsten v Health Insurance Commission (1990) 27 FCR 56, cited
Hossain v Minister for Immigration and Border Protection (2018) 92 ALJR 780, cited
Johns v Australian Securities Commission (1993) 178 CLR 408, cited
Kioa v West (1985) 159 CLR 550, cited
Kirk v Industrial Relations Commission of New South Wales (2010) 239 CLR 531*,* cited
Lowis v Queensland Industrial Relations Commission [2019] QSC 277, cited
Medical Board of Australia v Judge Horneman-Wren & Leggett [2013] QSC 339, cited
Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421, cited
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597, cited
Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507, cited
Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation (1963) 113 CLR 475, cited
Minister for Immigration and Multicultural Affairs v Yusuf

(2001) 206 CLR 323, cited
Re Minister for Immigration and Multicultural Affairs; ex parte Lam (2003) 214 CLR, cited
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82, cited
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (2014) 232 FCR 361, cited
Walters v Drummond (2019) 287 IR 153, cited

COUNSEL:	Toni Colin Reihana (self-represented) for the applicant L E Grayson (*sol*) for the first and second respondent B M Schefe (*sol*) for the third respondent
SOLICITORS:	Toni Colin Reihana (self-represented) for the applicant Crown Solicitor for the first and second respondent McCarthy Durie Lawyers for the third respondent

Background

[1] The applicant seeks judicial review under the *Judicial Review Act 1991* (Qld) ("the JR Act") of a direction and two decisions made by the Queensland Civil and Administrative Tribunal ("QCAT").

[2] The applicant owned two caravans in a caravan park operated by the third respondent in the Beenleigh Showgrounds. Logan City Council compulsorily acquired the caravan parkland and in September 2012, all residents were requested to move. The applicant refused.

[3] On 3 January 2013, the Beenleigh Show Society, the third defendant, served a notice to leave upon the applicant, requiring him to move by 4 March 2013. Initially, the applicant did not contest the notice to leave or the third respondent's subsequent application, but he declined to vacate the site.[1]

[4] On 18 March 2013, the third respondent applied to QCAT to terminate the applicant's tenancy.

[5] The circumstances of this termination application are set out in the reasons of *Reihana v Beenleigh Show Society* [2019] QCATA 91:[2]

> "[7] On 25 March 2013 the Tribunal posted a Notice of Hearing to the parties. While the Applicant maintains that he was unaware of such service, he does not deny that the notice of the trial date was posted to him at that time. A relative located the notice among his effects shortly before the trial, and sought an adjournment on his behalf.
>
> By virtue of the *Acts Interpretation Act 1954* (Qld) service of the notice of hearing is deemed to have been effected at the time when the letter

1 *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [5].
2 *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [7], [8], [9] (footnotes omitted).

containing it would be delivered in the ordinary course of post, unless the contrary is proved. No such proof has been adduced.

Present applicant absent from hearing

[8] The Society's application for eviction was heard, as scheduled, on 16 April 2013. The Applicant did not appear. The Adjudicator entered judgment for the Society and ordered a warrant for possession to issue.

Reopening Application 2015

[9] The Applicant then did nothing to challenge the eviction order for more than two years. It was not until 21 September 2015 that the Applicant filed an application for reopening of the 2013 proceedings. That application, of course, was grossly out of time. At first instance it was dismissed, but was restored to the list when submissions were not received by the primary decision maker."

[6] The applicant's caravans were removed on 8 May 2013 when the warrant for possession was executed.

[7] As stated in *Reihana v Beenleigh Show Society*,[3] the applicant did nothing to challenge the eviction order for more than two years.

[8] However, in the intervening period, the applicant did pursue a judicial review of QCAT Adjudicator Mr Davern's decision made on 25 February 2013. The applicant asserted that the Adjudicator wrongly failed to hear him about, and adjudicate upon, his claims to resist efforts by the third respondent and the local council, which owns the showgrounds land, to evict him and his caravans.

[9] On 12 June 2014, Alan Wilson J in *Reihana v Davern & Anor* [2014] QSC 127 ("*Reihana v Davern*") dismissed the applicant's judicial review application and ordered costs be paid to the third respondent on the standard basis.

[10] The applicant then appealed this decision, and the Court of Appeal dismissed the appeal and ordered that the applicant pay the third respondent's costs of the appeal.[4] The applicant then made an application for special leave from the High Court in respect to this decision, and this was refused.

[11] In September 2015, the applicant applied to QCAT to reopen the 2013 proceeding. On 23 October 2015, QCAT made an order refusing to extend and reopen the 2013 proceeding. The applicant sought leave to appeal this decision.

[12] On 8 December 2015, the QCAT appeal tribunal made an order dismissing the applicant's application for leave to appeal,[5] and then the applicant sought review of this decision in the Supreme Court.[6] On 31 August 2016, Boddice J remitted the matter back to QCAT for further consideration.[7]

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3 [2019] QCATA 91.

4 *Reihana v Davern & Anor* [2015] QCA 42.

5 The order also refused to extend time.

6 The applicant sought his costs and on 11 October 2016, Holmes CJ made an order that the applicant be paid costs in the sum of $160.00, calculated as the filing fee of $121.00 and photocopying costs of $39.00

[13] On 29 January 2018, Member Gordon then made the following orders:[8]

> "THE DECISION OF THE TRIBUNAL ON REMISSION IS:
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> 1. Time to apply to reopen MCDT749/13 is extended to 21 September 2015 when the application to reopen was received by the tribunal.
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> 2. The tribunal being of the opinion that the application to reopen is more effectively and conveniently dealt with as an appeal, the application to reopen filed on 21 September 2015 is accepted as an application for leave to appeal or appeal.
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> 3. Having extended time to bring the application to reopen, the application for leave to appeal or appeal shall be taken by the tribunal to be in time (time to file the appeal is extended to 21 September 2015).
>
> 4. Directions will be given by the Appeal Tribunal for the furtherance of the appeal."

[14] The applicant has not sought to review any of Member Gordon's orders.

[15] It is noted that in his reasons, Member Gordon stated that:

> 1. On his preliminary findings, he had serious concerns whether the tribunal had jurisdiction to make the termination of tenancy at the original hearing on 16 April 2013, and the justice of the case required consideration;[9]
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> 2. The appeal would probably concentrate on whether the tribunal had jurisdiction to make the termination order;[10] and
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> 3. If the appeal tribunal decides that the tribunal did not have jurisdiction to make the termination order, it would set it aside.[11]

[16] Mr Schefe, the solicitor for the third respondent, sets out in his affidavit the progression of this matter after Member Gordon's orders.[12]

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incurred by the applicant. The applicant appealed the decision of Holmes CJ on the basis, *inter alia*, that the Court failed to recognise the concept of "Reasonable Man's Remuneration", although this appeal was dismissed and the applicant was ordered to pay the respondents' costs of the appeal (*Reihana v QCAT Client Services Manager & Ors* [2017] QCA 117). The applicant made an application for special leave from the High Court in respect of the Court of Appeal's decision; this was refused.

7 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019 at 3 [25]; this occurred after QCAT discovered that due to a clerical error, only the first page of the applicant's submissions filed on 21 October 2015 in respect of proceeding MCDT749/13 was provided to the adjudicator.

8 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019, Exhibit BMS-13 (QCAT Decision, Member Gordon, 29 January 2018).

9 *Beenleigh Show Society v Reihana* [2018] QCAT 97 at [116].

10 *Beenleigh Show Society v Reihana* [2018] QCAT 97 at [50].

11 *Beenleigh Show Society v Reihana* [2018] QCAT 97 at [50].

12 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019.

[17] On 27 March 2018, Member Fitzpatrick made further directions that:[13]

> "THE APPEAL TRIBUNAL DIRECTS THAT:
>
> 1. Toni Reihana must file in the Tribunal two (2) copies and give to Beenleigh Show Society one (1) copy of:
>
> (a) all submissions detailing the alleged error/s of fact and/or law made by the original decision maker; and
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> (b) any further submissions in support of the application for leave to appeal or appeal that he wishes to rely upon, or advise that no further material will be filed, by:
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> **4.00pm on 18 May 2018**
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> 2. Beenleigh Show Society must file in the Tribunal two (2) copies and give to Toni Reihana one (1) copy of all submissions in reply by:
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> **4.00pm on 15 June 2018**
>
> 3. Neither party will be allowed to rely upon any evidence which was not before the original decision maker without leave of the appeal tribunal.
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> 4. Unless either party files an application for an oral hearing by **4.00pm on 22 June 2018**, the application for leave to appeal and the appeal (if the application for leave to appeal is granted) will be determined on the papers."

[18] The applicant failed to provide his submissions as stipulated by Member Fitzpatrick's order, and therefore, as a consequence, the third respondent was unable to comply with Member Fitzpatrick's directions. The third respondent accordingly filed an application with QCAT seeking to extend time for compliance with those directions.[14]

[19] On 5 July 2018, the applicant filed an application to adduce new evidence.

[20] On 10 July 2018, Member Howe extended time for the parties to make submissions and also ordered (in the same terms as Member Fitzpatrick) that neither party would be allowed to rely upon any evidence that was not before the original decision maker without leave of the appeal tribunal.[15] This direction by Member Howe is part of the applicant's application for judicial review. As the application is clearly out of time, he seeks an extension of time.

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13 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019, Exhibit BMS-14 (QCAT Appeal Tribunal Directions, Member Fitzpatrick, 27 March 2018).

14 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019, at 4 [33].

15 Affidavit of Toni Colin Reihana affirmed 7 August 2019, Exhibit B (QCAT Appeal Tribunal Directions, Member Howe, 10 July 2018).

[21] On 17 July 2018, Member Howe ordered that the application to rely upon fresh evidence would be considered after the parties have complied with his order directing the parties to file submissions.[16]

[22] The third respondent's solicitor states that the parties filed submissions in accordance with Member Howe's direction of 10 July 2018. However, a copy of these submissions have not been placed before me.

[23] On 17 September 2018, Senior Member Howard directed that the application for leave to rely upon fresh evidence be determined with the application for leave to appeal (and if successful, the appeal) at an oral hearing on a date to be fixed, not before 5 October 2018.[17]

[24] An oral hearing was listed for 29 March 2019.

[25] However, on 11 March 2019, the applicant emailed a QCAT case officer stating that:[18]

1. He was seeking copies of documents on the original file including all the affidavits, application relevant documents and directions; and

2. He sought an adjournment of the 29 March 2019 hearing date until he had received this material, and had sufficient time to review and prepare submissions.

[26] On 24 March 2019, the applicant emailed a QCAT case officer and stated:[19]

1. That on 25 March 2019, he would file at the Beenleigh QCAT Registry a copy of the urgent application to vacate the file;

2. On 25 March 2019, he would then fly to Christchurch to be with his gravely ill father and would not return until "things [had] settled down there"; and

3. Upon his return he would inspect the files.

[27] The hearing was adjourned for a final hearing to be heard on 6 June 2019.[20]

[28] On 20 May 2019, the applicant emailed a QCAT case officer stating he had just returned from New Zealand and he would inspect the files on 23 May 2019.[21]

[29] The applicant inspected the files on 23 May 2019 and made an application for waiver of fees on 28 May 2019. The applicant states that he has never had to make such an

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16 There seems to be an error in this order. Reference is made to third respondent complying with direction 2 of the directions dated 10 July 2018. It appears that this should be direction 3 of the directions dated 10 July 2018.

17 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019, Exhibit BMS-16 (QCAT Appeal Tribunal Directions, Senior Member Howard, 17 September 2018).

18 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit D (email dated 11 March 2019).

19 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit D (email dated 24 March 2019).

20 *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [14], [15].

21 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit D (email dated 20 May 2019).

application before and, since March 2019, QCAT had four opportunities to advise him that such fees were payable. All of this, the applicant submits, caused delays.

[30] On 3 June 2019, a QCAT case officer emailed the applicant to advise him that his application for fee waiver was approved and a copy of his requested documents were attached. The applicant was asked if he would like a hard copy of these documents.[22] The applicant agrees that he had the relevant documents emailed to him but, for various reasons, he had difficulties accessing these documents.[23]

[31] On 3 June 2019, the applicant replied to this email from the QCAT case officer and stated that he wanted the hard copies, but noted that by the time he would receive them the appeal hearing would have already been held:[24]

> "But don't panic!!!
>
> So, I have attached an Application to Vacate the appeal hearing to enable me to have sufficient time to properly prepare for this multi-facetted appeal."

[32] On 4 June 2019, a QCAT officer posted the hard copies to the applicant and also advised him that he had not served the third respondent and, until he had done so, the miscellaneous application could not be heard.[25] On 4 June 2019, the applicant made, and served upon the third respondent, a miscellaneous application (the "adjournment application") to adjourn the trial.

[33] Member Dr Forbes made an order on 5 June 2019 that the adjournment application would be heard at the appeal hearing and if the applicant did not attend, the tribunal would consider striking out the matter.[26] The applicant then emailed the QCAT case officer and stated, amongst other things, that:[27]

> "why the fff would i come to an appeal hearing that i am seeking to vacate – when i still havent received or obtained the documents i sought inspection upon for the preparation of submissions for the appeal hearing on that same day".

[34] The hearing proceeded before Member Dr Forbes on 6 June 2019.

[35] The applicant did not attend and Member Dr Forbes refused the applicant's miscellaneous application for an adjournment. The applicant seeks an extension of time to review Member Dr Forbes' decision to refuse an adjournment.

[36] Member Dr Forbes determined the substantive matter and dismissed the application for leave to appeal on 14 June 2019 with written reasons.[28] The applicant seeks an

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22 This email was never included in the applicant's material.
23 Applicant's submissions in reply, 19 November 2019.
24 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit G (email dated 3 June 2019).
25 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit G (email dated 4 June 2019).
26 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019, Exhibit BMS-18 (QCAT Appeal Tribunal Directions, Member Dr Forbes, 5 June 2019).
27 Affidavit of Toni Colin Reihana, affirmed 15 October 2019, Exhibit C (email dated 5 June 2019).
28 *Reihana v Beenleigh Show Society* [2019] QCATA 91.

extension of time to review Member Dr Forbes' decision to dismiss the application for leave to appeal.

Grounds of review

[37] The grounds of the applicant's application are quoted directly as follows:[29]

1. "The Reasons document or substantive decision issued by first respondent member Forbes on 14th June 2019 which seeks to justify the above two inter-related 14th June 2019 decisions is deemed an improper exercise of power under s. 20 (2) (e) of the Judicial Review Act 1991, and a breach of natural justice under s. 20 (2) (a), given the clearly "menopausal" (bitchy, retaliatory, exaggerated, emotional, buck passing) degree of decision given;

2. Failure to take account, taking irrelevancies into account, exercising discretionary power without regard to the merits are all abuses of discretionary power of first respondent Forbes decision under s. 23 (a), (b), (f);

3. In lay terms, and to typify the whole decision, first respondent Forbes starts the tirade (decision Reasons) with a complete exaggeration about the "in excess of $60,000" litigation cost to date to the respondent in the current relevant tenancy termination QCAT case, when there has only ever been one Application to Terminate Tenancy hearing on 16th April 2013, which was held when the Applicant was absent in New Zealand and oblivious to that appln. and hearing;

4. The "catalyst" 10th July 2018 decision of second respondent Member Howe is deemed unlawful and an improper exercise of power, through an initial failure to take account of Member Gordon's 29th January 2018 "process and procedure setting" decision, means s. 20 (2) (e) is under scrutiny here, and because Howe's decision is either in error at law or otherwise contrary to law, under ss. 20 (2) (f) & (i), then Howe's exercise of power is uncertain under s. 23 (h) of the Judicial Review Act 1991;

5. Member Forbes "secondary" 14th June 2019 decision above, made upon one side of the appeal subject matter, in the Applicant's absence, must draw Certiorari because of the **failures to take account and breach of natural justice** circumstance that arise out of the first respondent deciding to proceed with the substantive appeal hearing on 6th June 2019 – when for a second time (since the 16th April 2013 instance) a QCAT decision would be made upon this tenancy termination application business without the Applicant being present to put his side of the story to the decision maker;

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[29] Application for Statutory Order of Review / Ext. Time, 7 August 2019, at 1.

6. Which is the first respondent's (this time) failure to take account of that relevant part of Member Gordon's "process and procedure setting" decision of 29th January 2018.

7. Member Forbes "initial" Application for Miscellaneous Matters decision on 14th June 2019 decision is deemed a rights abusive and deliberate (Misfeasance afflicted) failure to take account of relevant considerations – jurisdictional error begging Certiorari relief."

Relief sought

[38] The applicant seeks:[30]

1. "An order of Certiorari invalidating the first respondent's "initial" and "secondary" decisions of 14th June 2019;

2. An order of Certiorari invalidating the 10th July 2018 directions decision of the second respondent;

3. Disbursements and fees incidental to this application for review;

4. A Declaration that the Applicant's general legal rights, or statutorily provided rights have been adversely affected by the respondents actions and decision making;

5. An order in the nature of Mandamus, ordering all QCAT decision makers to stop making Breach of Natural Justice type decisions, especially where subject matter from one side alone is considered sufficient with which to make a decision."

The decisions being reviewed

[39] Evidently, this matter has a prolonged and somewhat complicated background. It can be distilled from the applicant's application that he seeks judicial review of:

1. Member Howe's direction on 10 July 2018;

2. Member Dr Forbes' decision on 6 June 2019 to refuse the applicant's miscellaneous (adjournment) application; and

3. Member Dr Forbes' decision on 14 June 2019 dismissing the application for leave to appeal.

Member Howe's direction on 10 July 2018

[40] The appeal tribunal Directions of Member Howe dated 10 July 2018 state that:

"THE APPEAL TRIBUNAL DIRECTS THAT:

1. The time for Toni Reihana to file in the Tribunal two (2) copies and give to Beenleigh Show Society one (1) copy of:

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30 Application for Statutory Order of Review / Ext. Time, 7 August 2019, at 3.

(a) all submissions detailing the alleged error/s of fact and/or law made by the original decision maker; and

(b) any further submissions in support of the application for leave to appeal or appeal that he wishes to rely upon, is extended to:

4:00pm on 31 July 2018.

2. If Toni Reihana does not comply with direction 1 above, the application for leave to appeal or appeal may be dismissed without further notice to the parties.

3. The time for Beenleigh Show Society to file in the Tribunal two (2) copies and give to Toni Reihana one (1) copy of all submissions in reply is extended to:

4:00pm on 21 August 2018.

4. Neither party will be allowed to rely upon any evidence which was not before the original decision maker without leave of the appeal tribunal.

5. The application for leave to appeal or appeal is listed for an oral hearing in Brisbane on a date to be advised.

[41] For ease of reference this will be referred to as "Member Howe's direction".

[42] In relation to Member Howe's direction, the application refers to the following provisions of the JR Act:

1. Section 20(2)(e), i.e. that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made, as it was an exercise of power in such a way that the result of the exercise of power is uncertain (section 23(h));

2. Section 20(2)(f), i.e. that the decision involved an error of law (whether or not the error appears on the record of the decision); and

3. Section 20(2)(i), i.e. the decision was otherwise contrary to law.

Member Dr Forbes' decision on 6 June 2019

[43] On 6 June 2019, Member Dr Forbes' decided that:

"IT IS THE DECISION OF THE APPEAL TRIBUNAL THAT:

1. The application for miscellaneous mattesr [*sic*] filed 3 June 2019 is refused."

[44] For ease of reference this will be referred to as the "first decision".

[45] No written reasons were given on 6 June 2019, however Member Dr Forbes referred to the adjournment application in his written reasons of 14 June 2019.[31]

Member Dr Forbes' decision on 14 June 2019

[46] On 14 June 2019, Member Dr Forbes decided that:

> "IT IS THE DECISION OF THE APPEAL TRIBUNAL THAT:
>
> 1. The application for leave to appeal is dismissed."

[47] For ease of reference this will be referred to as the "second decision".

[48] With respect to the first and second decisions, the application refers to the following provisions of the JR Act:

> 1. Section 20(2)(e), i.e. that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made with specific reference to:
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> a) Taking an irrelevant consideration into account in the exercise of a power (section 23(a));
>
> b) Failing to take a relevant consideration into account in the exercise of power (section 23(b)); and
>
> c) An exercise of discretionary power in accordance with a rule or policy without regard to the merits of the particular case (section 23(f)).
>
> 2. Section 20(2)(a), i.e. that a breach of the rules of natural justice happened in relation to the making of the decision.

[49] The applicant claims Member Howe's direction was the "catalyst" decision, and the two decisions of Member Dr Forbes were "inter-related".

[50] I note that important directions were also made by Member Dr Forbes on 5 June 2019, which informed the first and second decision, those directions being:

> "THE APPEAL TRIBUNAL DIRECTS THAT:
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> 1. The Appeal Hearing listed at 9:30am on 6 June 2019 is confirmed.
>
> 2. The application for miscellaneous matters filed on 3 June 2019 will be considered further at the Appeal Hearing.
>
> 3. If Toni Reihana does not attend the Appeal Hearing the Tribunal will consider striking out the matter due to non-compliance with these Directions, without further notice to the parties."

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[31] *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [20].

Extension of time required

[51] Member Howe's direction was made on 10 July 2018.

[52] Member Dr Forbes' first decision was made on 6 June 2019 and the second decision on 14 June 2019. The applicant states he didn't receive the first and second decisions for at least a week. Consistent with this, the solicitor for the third respondent states that on 21 June 2019, he received an email from QCAT enclosing the appeal tribunal's decisions and the associated reasons.[32]

[53] The application for judicial review was filed on 7 August 2019.

[54] The applicant relies on an email he sent to a QCAT case manager on 12 July 2019, advising that he was going to judicially review Member Dr Forbes' first and second decisions.[33]

[55] Section 26 of the JR Act prescribes the period of time within which an application for a statutory order of review must be made.

[56] The applicant acknowledges that his application for judicial review of all three matters is out of time and seeks an extension of time.

[57] The applicant cites impecuniosity, ill health and personal problems amongst his reasons for failing to file the application within time.

[58] Specifically in relation to Member Howe's direction made on 10 July 2018, the applicant acknowledges that it is a bit more difficult to justify an extension of time, but states it probably can best be put in this context:[34]

> "Because the second respondent's 10th July 2018 directions decision did instigate and create the "further impediment arising from its lateness" that Member Gordon otherwise sought "justiciably" to prevent from happening in his 29th January "process and procedure setting" QCAT decision, then the subsequent clarifications and negotiations that the Applicant got bogged down in about those "further impediments" over the following months of 2018, and into 2019, only exacerbated the delay to make any application to review second respondent Howe's 10th July 2018 decision, especially considering both respondents complete reluctance to FAIRLY deal with and dispose of before the substantive appeal hearing, the "further impediment" Application to Adduce Further Evidence Not Before the Original Decision Maker, and Application for Leave to Appeal components added in by the first respondent on 10th July 2018-"

The judicial review hearing

[59] On 16 October 2019, there were two applications listed on the Applications List in relation to this matter;

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32 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019, at 5 [44].
33 Affidavit of Toni Colin Reihana affirmed 7 August 2019, Exhibit C (emailed dated 12 July 2019).
34 Application for Statutory Order of Review / Ext. Time, 7 August 2019, at 3.

1. The applicant's application for judicial review; and

2. The third respondent's application that the applicant be declared a vexatious litigant and be prohibited from commencing or continuing proceedings against the third respondent.

[60] It was agreed by the parties, and I so ordered, that the third respondent's application to have the applicant declared a vexatious litigant be adjourned to the registry for a date to be fixed.[35]

[61] At the hearing, the first and second respondents indicated their position was that they would abide by the order of the Court, and sought leave to be excused from further appearance save as to costs including any allegation of misconduct or bias. The first and second respondents were granted this leave.

Further written submissions

[62] At the hearing, I was given little assistance to define the issues by the parties' written submissions. The applicant did not provide any written submissions and the third respondent's brief written submissions were of little assistance.

[63] Accordingly, after hearing oral argument, I requested that the parties provide further written submissions and ordered that the applicant's submissions were due on 30 October 2019 and the respondents' submissions were due on 6 November 2019.

[64] The first and second respondents' solicitor requested the opportunity to respond, in written submissions, to any submissions in relation to allegations of misconduct and bias as against the first and second respondents. The first and second respondents' solicitor indicated that these would be provided by 6 November 2019. I received written submissions from the first and second respondent, only in relation to costs, on 7 November 2018.

[65] After the hearing, I requested further submissions from the parties to address the application, or relevance, of Part 8, Division 2 and 3 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("the QCAT Act") (in particular, section 156) in relation to this matter.

[66] I proposed for the parties to provide their written submissions on 15 November 2019 (for the respondents) and 22 November 2019 (for the applicant). The applicant and third respondent confirmed they were content with this timeframe.

[67] The first and second respondents' position was that the application of Part 8, Division 2 and 3 (in particular, section 156) of the QCAT Act goes to the substantive issues in the matter and, therefore, no submissions on behalf of the first and second respondents were provided in relation to this issue.[36]

[68] Written submissions were received by email from the third respondent on 15 November 2019, and from the applicant on 19 November 2019.

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35 Transcript of Proceedings, 16 October 2019, at 46-47.

36 Exhibit 2.

[69] Both parties attached exhibits to their submissions.

[70] On 17 March 2020, I requested that each party file an affidavit attaching these exhibits. The third respondent has done so.[37] However, the applicant was in New Zealand and could not file an affidavit. As a result, the exhibits attached to the applicant's submissions have been tendered as exhibits on the application,[38] so as to form part of the material before me.

[71] The respondents have not objected to the applicant's attachments being taken into account in this manner and the applicant states he has "no objection to the respondents not objecting to said proposal."[39]

[72] All email correspondence received from the parties by the Court following the hearing has been made an exhibit.[40]

Section 156 of the QCAT Act precludes the operation of the JR Act as a remedy other than to the extent the decision or conduct is affected by jurisdictional error

[73] Section 156 of the QCAT Act limits the operation of the JR Act as a remedy to decisions of QCAT:

> "The *Judicial Review Act 1991*, parts 3 to 5 do not apply to a decision or to the conduct of the tribunal in a proceeding other than to the extent the decision or conduct is affected by jurisdictional error.
>
> *Note—*
>
> The *Judicial Review Act 1991*, part 3 deals with statutory orders of review, part 4 deals with reasons for decisions and part 5 deals with prerogative orders and injunctions."

[74] It can be gleaned from the application that the applicant seeks judicial review pursuant to Parts 3 to 5 of the JR Act.

[75] In *Reihana v Davern,*[41] Alan Wilson J dealt with whether the JR act applies to the QCAT Act and specifically in relation to the applicant in this proceeding.

[76] Alan Wilson J determined the following with respect to the application of section 156 of the QCAT Act:[42]

> "[13] The first question is whether judicial review under the *Judicial Review Act 1991* (Qld) (the JR Act) is actually available as a remedy for Mr Reihana in those circumstances. Unsurprisingly, in light of the Tribunal's internal appeal process, the QCAT Act provides in s 156 that the JR Act does not apply to '*… a decision or to the conduct of the tribunal in a proceeding*

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37 Affidavit of Benjamin Matthew Schefe affirmed 18 March 2020.
38 Exhibit 1.
39 Exhibit 2.
40 Exhibit 2.
41 *Reihana v Davern & Anor* [2014] QSC 127.
42 *Reihana v Davern & Anor* [2014] QSC 127 at [13]-[18] per A Wilson J (footnotes omitted).

other than to the extent the decision or conduct is affected by jurisdictional error'.

[14] The learned Adjudicator who comprised the tribunal was dealing with a proceeding and made a decision – that the proceeding was imperfect, and should be adjourned for a necessary step to be taken. Unless jurisdictional error can be shown, Mr Reihana has no valid claim for relief under the JR Act.

[15] The term *jurisdictional error* necessarily connotes some mistake around a court's or tribunal's power affecting its proper functioning, either by it misapprehending or disregarding the nature or limits of its functions or powers or acting wholly outside that jurisdiction. Errors may extend to include instances where a tribunal acts in the absence of a jurisdictional fact; disregards a matter the legislation requires to be taken into account (but only as a condition of jurisdiction); or, misconstrues the statute which gives it power so that it misconceives the nature of the function it is performing.

[16] None of those things can be argued here. If the learned Adjudicator made an error, it was to simply fail to rule on one aspect of the relief Mr Reihana says he claimed in his tribunal application. Nothing in the transcript suggests that, if that mistake occurred, it involved a misunderstanding or misapprehension on the part the Adjudicator about his powers or the Tribunal's jurisdiction. He made orders and gave directions about what he apparently perceived was the primary issue between the parties – the compensation claim – and said nothing about Mr Reihana's application under s 291. Again, nothing in the transcript suggests that occurred because he wrongly doubted his power to do so or otherwise misapprehended his jurisdiction. If he made a mistake, it was one of oversight, not jurisdiction.

[17] (It should also be observed, in fairness to the Adjudicator, that if an error of that kind occurred it is unsurprising, in light of the numerous applications Mr Reihana had lodged by that time and the different kinds of relief they sought.)

[18] This is not a case in which Mr Reihana can point to any circumstance which would enable him to avoid the effect of s 156, and it operates to prevent him pursuing the relief he seeks here. For that reason alone his application must fail."

[77] Alan Wilson J then determined that, in the circumstances of *Reihana v Davern*, no jurisdictional error had occurred.

[78] The applicant then appealed this decision by Alan Wilson J, and the Court of Appeal confirmed that the JR Act does not apply to a QCAT decision unless the decision is affected by jurisdictional error:[43]

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[43] *Reihana v Davern & Anor* [2015] QCA 42 at [3], [4] per Holmes JA, with whom Gotterson JA and Jackson J agreed.

> "[3] Section 156 of the *Queensland Civil and Administrative Tribunal Act 2009* excludes the application of Pt 3 of the *Judicial Review Act* to a decision or conduct of QCAT other than to the extent it is affected by jurisdictional error. Accordingly, since the primary judge found no jurisdictional error on the first respondent's part, the application had inevitably to fail. His Honour noted that in any event it was brought out of time, some eight months after the QCAT hearing. In addition, he observed that the appellant had other avenues within QCAT to seek review of any error by the first respondent, although in the circumstances it was unlikely that he would have been successful.
>
> [4] The appellant took issue with the primary judge's comments as to the application's having been brought out of time and in the absence of any application to seek QCAT review. He sought, unsuccessfully, to adduce new evidence as to those matters. In any event, the primary judge's observations were accurate, but they are beside the point; he dismissed the application, not for those reasons, but because in his view it failed at the hurdle of jurisdictional error. The appellant here asserts that his Honour should have found jurisdictional error on the part of the first respondent because the latter had failed to perform his "core duty" and had failed to accord him procedural fairness, "commandeering" his application and not allowing him to speak. (The second argument, however, does not seem to have been advanced below.)"

[79] With respect to the application of section 156 of the QCAT Act to this current proceeding, the applicant's submissions appear to focus on:[44]

1. The QCAT Act is not listed in Schedule 1 of the JR Act. This causes ambiguity as to the meaning of section 156 of the QCAT Act.

2. Section 156 of the QCAT Act only applies to decisions of the first instance tribunal, not decisions of the appeal tribunal such as in this application.

3. Regardless, there were "clear cut instances of jurisdictional error".[45]

There is no ambiguity as to the meaning of section 156 of the QCAT Act

[80] Section 18(2)(b) of the JR Act states that the JR Act does not apply to decisions made, proposed to be made, or required to be made, under Schedule 1, Part 2 of the JR Act.

[81] The QCAT Act is not listed in Schedule 1, Part 2 of the Act.

[82] The fact that section 156 of the QCAT Act is not referred to in Schedule 1, Part 2 of the Act does not instil any ambiguity into the meaning of section 156 of the QCAT Act.

[83] Prima facie, section 156 of the QCAT Act is clear that Parts 3 to 5 of the JR Act do not apply to a decision or conduct of the tribunal in a proceeding other than to the extent the decision is affected by jurisdictional error. There is no ambiguity as to its application.

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44 Applicant's submissions in reply, 19 November 2019.

45 Applicant's submissions in reply, 19 November 2019, at 7.

[84] Alan Wilson J, in *Reihana v Davern,* determined that section 156 of the JR Act does not apply to "… a decision or to the conduct of the tribunal in a proceeding other than to the extent the decision or conduct is affected by jurisdictional error".[46]

[85] The applicant poses this question – "who said Alan [Alan Wilson J] was right?"[47] The short answer is – the Queensland Court of Appeal.

[86] The Court of Appeal determined that section 156 of the QCAT Act excludes the application of Part 3 of the JR Act to a decision or conduct of QCAT other than to the extent that it is affected by jurisdictional error.[48]

Section 156 of the QCAT Act applies to decisions of QCAT's Appeal Tribunal

[87] Section 156 refers to the term "tribunal," which is defined in the Act to mean the Queensland Civil and Administrative Tribunal established under s 161.[49]

[88] The objects of the QCAT Act are set out in section 3 and are:

> (a) to establish an independent tribunal to deal with the matters it is empowered to deal with under this Act or an enabling Act; and
>
> (b) to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick; and
>
> (c) to promote the quality and consistency of tribunal decisions; and
>
> (d) to enhance the quality and consistency of decisions made by decision-makers; and
>
> (e) to enhance the openness and accountability of public administration.

[89] Section 4 of the QCAT Act sets out the tribunal's functions relating to the Objects:

> **Tribunal's functions relating to the objects**
>
> To achieve the objects of this Act, the tribunal must—
>
> (a) facilitate access to its services throughout Queensland; and
>
> (b) encourage the early and economical resolution of disputes before the tribunal, including, if appropriate, through alternative dispute resolution processes; and

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46 *Reihana v Davern & Anor* [2014] QSC 127 at [13] per A Wilson J.

47 Applicant's submissions in reply, 19 November 2019, at 6.

48 *Reihana v Davern & Anor* [2015] QCA 42 at [3] per Holmes JA.

49 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act"), sch 3 (definition of 'the tribunal').

(c) ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice; and

(d) ensure like cases are treated alike; and

(e) ensure the tribunal is accessible and responsive to the diverse needs of persons who use the tribunal; and

(f) maintain specialist knowledge, expertise and experience of members and adjudicators; and

(g) ensure the appropriate use of the knowledge, expertise and experience of members and adjudicators; and

(h) encourage members and adjudicators to act in a way that promotes the collegiate nature of the tribunal; and

(i) maintain a cohesive organisational structure.

[90] Section 6(1) of the QCAT Act states that the QCAT Act provides for the tribunal's jurisdiction and related functions, and the practices and procedures for proceedings before the tribunal.

[91] The tribunal has jurisdiction to deal with matters it is empowered to deal with under the Act or an enabling Act.[50] Jurisdiction conferred on the tribunal is:

(a) Original jurisdiction; or

(b) Review jurisdiction; or

(c) Appeal jurisdiction.[51]

[92] I note that Part 2 of the QCAT Act refers to the practices and procedures of the tribunal, which includes section 28:

"Conducting proceedings generally

(1) The procedure for a proceeding is at the discretion of the tribunal, subject to this Act, an enabling Act and the rules.

(2) In all proceedings, the tribunal must act fairly and according to the substantial merits of the case.

(3) In conducting a proceeding, the tribunal—

(a) must observe the rules of natural justice; and

(b) is not bound by the rules of evidence, or any practices or procedures applying to courts of record, other than to the

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50 QCAT Act, s 9(1).
51 QCAT Act, s 9(2).

extent the tribunal adopts the rules, practices or procedures; and

(c) may inform itself in any way it considers appropriate; and

(d) must act with as little formality and technicality and with as much speed as the requirements of this Act, an enabling Act or the rules and a proper consideration of the matters before the tribunal permit; and

(e) must ensure, so far as is practicable, that all relevant material is disclosed to the tribunal to enable it to decide the proceeding with all the relevant facts.

(4) Without limiting subsection (3)(b), the tribunal may admit into evidence the contents of any document despite the noncompliance with any time limit or other requirement under this Act, an enabling Act or the rules relating to the document or the service of it."[52]

[93] Section 156 makes no distinction between any of the jurisdictions of the tribunal. There is no reason to read into section 156 of the QCAT Act any distinction between decisions of the original tribunal and decisions of the appeal tribunal. If the legislature so intended such a construction, then specific reference would have been made to carve out the appeal tribunal from section 156 of the QCAT Act.[53]

[94] The term "tribunal" in section 156 of the QCAT Act embraces the tribunal exercising its appeal jurisdiction.

Unless jurisdictional error can be shown, the applicant has no valid claim for relief under the JR Act

[95] Accordingly, pursuant to section 156 of the QCAT Act, unless jurisdictional error can be shown, the applicant has no valid claim for relief under the JR Act.[54]

[96] The applicant submits that in this case there were clear-cut instances of jurisdictional error. The applicant states in his addendum submission:[55]

> "For completeness sake, the matters that qualify as jurisdictional error as Alan Wilson J found at [15] of the ***Reihana v Davern*** case, can readily be transferred across to those allegations and grounds the applicant advocates in this judicial review namely:
>
> 1. "misconstrues the statute (s.28) which gives it power so that it misconceives the nature (compulsory fairness) of the function it is performing"

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52 QCAT Act, s 28.

53 It is noted that there are provisions in the QCAT Act that distinguishes decisions from the "tribunal" and the "appeal tribunal" – see QCAT Act, ss 149, 150.

54 *Medical Board of Australia v Judge Horneman-Wren & Leggett* [2013] QSC 339 at [10] per Dalton J.

55 Applicant's submissions in reply, 19 November 2019, at 7.

2. "disregarding the nature….of its functions or powers" (to be fair and consider all relevant materials)

3. "disregarding a matter the legislation (s.28) requires to be taken into account" (all relevant material)"

What is jurisdictional error?

[97] Not all errors made by decision makers will be "jurisdictional" ones.

[98] The term jurisdictional error necessarily connotes some mistake around a court's or tribunal's power affecting its proper functioning, either by it misapprehending or disregarding the nature or limits of its functions or powers or acting wholly outside that jurisdiction.[56] Errors may extend to include instances where a tribunal acts in the absence of a jurisdictional fact; disregards a matter the legislation requires to be taken into account (but only as a condition of jurisdiction); or, misconstrues the statute which gives it power so that it misconceives the nature of the function it is performing.[57]

[99] Whilst the categories of jurisdictional error are not closed,[58] it has been determined that jurisdictional error can include:[59]

(a) Identifying a wrong issue;

(b) Asking the wrong question;

(c) Ignoring relevant material;

(d) Relying on irrelevant material;

(e) In some cases making an erroneous finding or reaching a mistaken conclusion; and

(f) Failing to observe some applicable requirement of procedural fairness.

[100] In *Minister for Immigration and Multicultural Affairs v Yusuf,*[60] it was stated:[61]

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56 *Craig v South Australia* (1995) 184 CLR 163 at 176-177 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at 573-574 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

57 *Reihana v Davern & Anor* [2014] QSC 127 at [15] per A Wilson J.

58 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 455 [81] per Nettle and Gordon JJ, citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82] per McHugh, Gummow and Hayne JJ; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at 573 [71], 574 [73] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

59 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 455 [81] per Nettle and Gordon JJ, citing *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at 572 [67] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780 at 147 – 148 [70] – [72] per Edelman J.

60 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323.

61 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82] per McHugh, Gummow and Hayne JJ (footnotes omitted).

> "It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*, if an administrative tribunal (like the Tribunal)
>
> > "falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore some relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."
>
> "Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law."

[101] A finding of jurisdictional error is a conclusion that the decision maker has failed to comply with an essential pre-condition to, or limit on, the valid exercise of the particular statutory power. It reflects a distinction between acts unauthorised by law, and acts that are authorised.

[102] In *Re Refugee Review Tribunal; Ex parte Aala*,[62] Hayne J observed:[63]

> "The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction

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62 (2000) 204 CLR 82.

63 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [163] per Hayne J; cited with approval in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 at 571 [66] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

> incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not".

[103] The applicant's submissions, in this case, are often anchored by an allegation of a breach of natural justice.[64]

[104] A failure to observe the rules of natural justice in QCAT is capable of amounting to jurisdictional error:

> "It may be accepted that QCAT has a statutory obligation to observe the rules of natural justice. A failure by it to do so is capable of amounting to jurisdictional error; as would be a refusal to exercise its statutory jurisdiction. Whether either of those actually occurred here turns on determination of precisely what the issues were before the first respondent, which in turn requires a close examination of: what was sought in the appellant's application to QCAT; the result of an interlocutory application for interim relief; and what was canvassed at the hearing before the first respondent." [65]

[105] Further, in the case of *Minister for Immigration and Multicultural Affairs v Bhardwaj,*[66] Gaudron and Gummow JJ stated:[67]

> "Procedural fairness, which is one aspect of the rules of natural justice, requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to answer it. The opportunity to answer must be a reasonable opportunity. Thus, a failure to accede to a reasonable request for an adjournment can constitute procedural unfairness".

[106] Procedural fairness ordinarily requires that an applicant for an exercise of administrative power has an opportunity to tailor the presentation of evidence and the making of submissions to the procedure to be adopted by the decision maker. Accordingly, procedural fairness ordinarily requires that an applicant be apprised of an event which results in an alteration to the procedural context in which an opportunity to present evidence and make submissions is routinely afforded.[68]

[107] The application of the rules of natural justice in administrative decision-making was summarised by Mason J in *Kioa v West*.[69] There, his Honour observed:[70]

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64 For example, in the Application for Statutory Order of Review / Ext. Time, 7 August 2019, the applicant states that the grounds of his application are, "a breach of natural justice under s (2) (a), given the clearly "menopausal" (bitchy, retaliatory, exaggerated, emotional, buck passing) degree of the decision given", and further that the second decision "must draw Certiorari because of the failures to take account and breach of natural justice in circumstance that arise out of the first respondent deciding to proceed with the substantive appeal hearing".

65 *Reihana v Davern & Anor* [2015] QCA 42 at [5] per Holmes JA, with whom Gotterson JA and Jackson J agreed (footnotes omitted).

66 (2002) 209 CLR 597.

67 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 611 [40] per Gaudron and Gummow JJ (footnotes omitted).

68 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 440 - 441 [29] per Bell, Gageler and Keane JJ.

69 (1985) 159 CLR 550.

70 *Kioa v West* (1985) 159 CLR 550 at 582 per Mason J.

> "It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of the benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it […] The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests."

[108] The "essence of natural justice is fairness – it is its root as a legal conception and it lies at the heart of its operation".[71] The concern of the law of natural justice is the avoidance of "practical injustice".[72]

[109] Moreover, natural justice is not fixed and rigid; it is flexible and depends upon the legislative framework and the circumstances of the case.[73]

[110] The role of "materiality" in assessing whether there has been jurisdictional error was recently canvassed in *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 ("*SZMTA*").

[111] In that case, notifications were made by the Secretary of the Department and Immigration and Border Protection ("the Department") to the Administrative Appeals Tribunal ("the AAT") under a provision of the *Migration Act 1958* (Cth), where the Minister had certified that disclosure of certain information would be contrary to public interest or that the information was given to the Department or to the Minister in confidence.

[112] In *SZMTA*, the question to be determined was whether the incorrect notification or lack of procedural fairness was sufficient in itself to give rise to jurisdictional error, or whether something more was required.

[113] In *SZMTA,* the majority held that for a breach of procedural fairness to constitute jurisdictional error, the breach must give rise to a "practical injustice".[74] The breach must result in a denial of an opportunity to make submissions and that denial must be material to the tribunal's decision.

[114] Thus, materiality is essential to the existence of jurisdictional error.[75] A breach is material to a decision only if compliance could realistically have resulted in a different decision:

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71 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at 392-393 [108] per Allsop CJ, Middleton and Foster JJ.

72 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 214 CLR 1 at 13-14 [37] per Gleeson CJ.

73 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 471 per McHugh J; *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504 per Kitto J.

74 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 443 [38] per Bell, Gageler and Keane JJ.

75 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [45] per Bell, Gageler and Keane JJ. The concept of materiality was, however, wholly rejected in the dissenting judgment of Nettle and Gordon JJ at 459.

> "Where materiality is in issue in an application for judicial review, and except in a case where the decision made was the only decision legally available to be made, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application."[76]

Member Howe's direction

[115] In my view, in relation to Member Howe's direction, the application must fail.

The application for judicial review of the direction is out of time

[116] The application for judicial review in relation to Member Howe's direction is grossly outside the 28 days limited by section 26(2) of the JR Act.

[117] This application for judicial review is made over a year after Member Howe's direction.

[118] Accordingly, as the applicant acknowledges, he needs to seek leave to extend time.[77]

[119] The applicant has provided some general explanation for the delay in bringing this application, namely impecuniosity and health issues.

[120] In relation to Member Howe's direction, it took the applicant over a year to make an application for judicial review. Essentially the applicant states that he was confused about whether the matter was a leave to appeal or an appeal, and had general confusion caused by the QCAT registry.[78]

[121] However, when Member Howe made the direction on 10 July 2018, the applicant was aware of the importance of bringing a judicial review application within the prescribed time frames.

[122] In *Reihana v Davern,* Alan Wilson J set out, in very clear terms, the relevant statutory provisions and the consequences for making a late application.[79] Alan Wilson J noted in that case that the applicant's application was many months late, and that barrier alone would be an insurmountable barrier for him.[80] The same can be said about the applicant's application in this case.

[123] Alan Wilson J in *Reihana v Davern* noted that:

> "[24] There will often be, of course, a natural concern that a self-represented party is not unfairly or inadvertently shut out of a remedy by confusion or misunderstanding about legislation."[81]

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76 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 445 [46] per Bell, Gageler and Keane JJ.

77 *Judicial Review Act 1991* (Qld), s 26(1)(b).

78 Transcript of Proceedings, 16 October 2019, at 4; Applicant's submissions, 30 October 2019, at 9, "Leave to review out of time is based on annexures "I" of Reihana's 2nd affidavit where the draconian hurdles of leave took all of 2018 to decipher, get confirmation upon from QCAT".

79 *Reihana v Davern* [2014] QSC 127 at [19] – [23] per A Wilson J.

80 *Reihana v Davern* [2014] QSC 127 at [23] per A Wilson J.

81 *Reihana v Davern* [2014] QSC 127 at [24] per A Wilson J.

[124] In this case, it could not be said that the applicant was under any confusion or misunderstanding about the importance of making a judicial review application within time, considering the comments made by Alan Wilson J in *Reihana v Davern* about the applicant.

[125] In this case, the application was over a year late; in my view an excessive time in the circumstances. However, it is also appropriate, despite this conclusion, to consider the merits of the applicant's application. A factor which is fundamental to exercising a discretion to extend time to allow this proceeding for a statutory order of review to proceed is the utility of any such proceeding.[82] In my view, there is no utility, as the proposed proceeding is without merit.

Member Howe's direction is not a reviewable decision pursuant to the JR Act

[126] A statutory order of review is available under the JR Act to "a person who is aggrieved by a decision to which this Act applies".[83]

[127] Pursuant to section 7(1)(a) of the JR Act, a person aggrieved by a decision includes a reference to a person whose interests are adversely affected by the decision.

[128] The applicant submits that the applicant's interests were not adversely affected by Member Howe's decision.[84] I agree.

[129] In my view, Member Howe's direction facilitated the conduct of the matter and, in the circumstances, the applicant's interests were not adversely affected by Member Howe's direction.

[130] The applicant was not denied the opportunity to be heard as to the issue of whether he could adduce further evidence. Indeed, later directions were given that set for this issue to be heard at the final hearing. However, the applicant failed to attend that hearing.

A side issue

[131] I raise one other matter that is connected with whether the JR Act applies to Member Howe's direction, i.e. whether Member Howe's direction was a "decision" as defined in the JR Act.

[132] The term " a decision to which this Act applies" means:

> (a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion).[85]

[133] To qualify as a "decision", the decision will generally, but not always, be final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration.[86]

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82 *Medical Board of Australia v Judge Horneman-Wren & Leggett* [2013] QSC 339 at [10] per Dalton J.
83 *Judicial Review Act 1991* (Qld), s 20(1).
84 Third Respondent's submissions, 6 November 2019, at 8 [5.2], 17 [13.1].
85 *Judicial Review Act 1991* (Qld), s 4(a).
86 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 per Mason CJ.

[134] An essential quality of a reviewable decision is that it be a substantive, rather than a procedural, determination.[87]

[135] It may be accepted that most decisions made preliminary to a hearing are properly classified as procedural.[88] Procedural determinations are not considered substantive and are not considered reviewable.

[136] No party considered whether Member Howe's direction did, or did not, finally decide the matters the subject of the proceeding - that is, whether Member Howe determined, one way or another, whether the applicant could adduce further evidence.

[137] I only raise this issue as an aside, and I will not consider or determine the issue, as neither party have provided me submissions on this point.

No jurisdictional error

[138] Member Howe's direction is not a reviewable decision pursuant to the JR Act.

[139] Even if it was, in my view there is no jurisdictional error.

[140] In relation to Member Howe's direction, the application states that this decision is deemed unlawful and an improper exercise of power, through an initial failure to take account of Member Gordon's "process and procedure setting" decision made on 29 January 2018.

[141] The applicant submitted that the direction of Member Howe is the "catalyst directions decision, which if [*sic*] erroneous; binds member Forbes 14th June 2019 decision under review here to refuse leave to appeal, as being a procedurally unfair and flawed too".[89]

[142] The applicant relies upon paragraph 109 of Member Gordon's decision:[90]

> "[109] In this particular case, in order for this reopening application to be dealt with as an appeal, it is necessary to convert it into an appeal and also to extend the time to bring the appeal so it can be validly accepted as an appeal without any further impediment arising from its lateness. The QCAT Act does not expressly provide a mechanism to achieve this. Can it be done under express or implied powers in the QCAT Act?"

[143] The applicant submits that Member Gordon, by changing the reopening application into an appeal, "put in place expectable parameters and protections for my position as an Applicant cum Appellant".[91]

[144] The applicant submits that:

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87 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 per Mason CJ; *Edelsten v Health Insurance Commission* (1990) 27 FCR 56 at 67 per Northrop and Lockhart JJ; *Walters v Drummond* (2019) 287 IR 153 at 161-162 [36] per Applegarth J.

88 *Lowis v Queensland Industrial Relations Commission* [2019] QSC 277 at [68] per Crow J.

89 Affidavit of Toni Colin Reihana affirmed 7 August 2019, at 4 [17].

90 *Beenleigh Show Society v Reihana* [2018] QCAT 97 at [109].

91 Affidavit of Toni Colin Reihana affirmed 15 October 2019, at 4 [18].

> APPLICANT: Yes. But they – they failed to take account of Member Gordon's –
>
> Member Gordon set the parameters for what was going to happen with the matter that Justice Boddice remitted back to them. Member Gordon decided, okay, we're going to turn this application to reopen into an appeal, but – clause 109 – without any further impediment arising from its lateness. So he's turned it into an appeal, but because it was late, he didn't want any impediments.
>
> So the hurdle and the impediment of expecting me to satisfy an application for leave to appeal is an impediment. QCAT's expectation that I seek leave to adduce new evidence that wasn't before the original decision-maker is also an impediment. Essentially, what Member Howe did on the 10th of July 2018 when he required me to satisfy leave to appeal and make an application for leave to adduce new evidence that wasn't before the decision-maker – it was in contradiction or adverse to the decision of Member Gordon on the 29th of January 2018.[92]

[145] The applicant further submits that:

> "Member Howe's 10th July 2018 Direction 1. (b) requesting "support of the application for leave to appeal" (confirmed by Forbes 14th June 2019 decision to refuse leave to appeal), and, Howe's Direction 4 that "Neither party will be allowed to rely upon evidence which was not before the original decision maker without leave of the appeal tribunal" – were both <u>further impediments arising</u> as if the applicant had fully participated in the original hearing, and that he was now appealing that first decision. And that is the mistake that has been made by the second respondent, and every other member that has touched the matter since him."[93]

[146] In response, the third respondent submits that:[94]

1. The applicant has misconstrued the wording of paragraph 109 of Member Gordon's decision because the listing of the proceedings as an appeal does not provide the applicant with a right, of itself, to rely upon evidence which was not before the original decision maker;

2. Given Member Howe seemingly made standard directions on 10 July 2018 on behalf of the appeal tribunal, the applicant did not suffer any procedural unfairness by simply having to comply with standard directions that were issued by Member Howe on behalf of the appeal tribunal. The third respondent says that this submission is supported by the fact that it took the applicant more than twelve months to even attempt to review that decision.

3. Notwithstanding the applicant's complaint about having to seek leave to rely on evidence which was not before the original decision maker,

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92 Transcript of Proceedings, 16 October 2019, at 27, line 20 – 33.
93 Applicant's submissions, 30 October 2019, at 9.
94 Third Respondent's submissions, 6 November 2019, at 16 [12], 17 [13.1].

> the applicant was still provided with an opportunity to prepare submissions detailing the alleged errors of fact and law made by the original decision maker, which is again what the applicant was seeking to achieve.

[147] Member Gordon found that the best way to reconsider the matter was by way of appeal, not by way of a reopening, as submitted by the applicant, and that directions would be given by the appeal tribunal for the furtherance of the appeal.

[148] The appeal tribunal may do all things necessary or convenient for exercising its jurisdiction.[95]

[149] Accordingly, Member Fitzpatrick made directions on 27 March 2018 that provided time frames for the parties to file submissions and included the order that neither party will be allowed to rely upon any evidence which was not before the original decision maker without leave of the appeal tribunal. The applicant makes no complaint about these directions.

[150] The applicant then failed to comply with these time frames, as stipulated in Member Fitzpatrick's directions, with the knock on effect that the third respondent failed to file their submissions in reply in compliance with Member Fitzpatrick's order.

[151] The third respondent then had to seek an extension of time to comply with the orders.

[152] On 5 July 2018, an application was made by the applicant to adduce new evidence.

[153] Member Howe extended the time frames for the parties' submissions to be filed in his order of 10 July 2018 and maintained Member Fitzpatrick's order that neither party would be allowed to rely upon any evidence which was not before the original decision maker without leave of the appeal tribunal.

[154] After receiving the directions made by Member Howe on 10 July 2018, the applicant emailed the QCAT case manager on 12 July 2018:[96]

> "For a third separate time – I need and want to seek leave to adduce evidence which was not before the original decision maker
>
> Now – Mel Motuvali sent me the requisite form a couple of weeks ago, and I sent it back completed attached to an email, being an Application for Leave to Adduce Evidence Not Before the Original Decision Maker.
>
> I have got a copy of the email and attached application form in front of me!
>
> So what is happening with that above leave application ask Member Howe, because I need an answer to that application before I can draft my comprehensive submissions

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95 QCAT Act, s 9(4).

96 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit I (email dated 12 July 2018).

> The original hearing was heard in my absence while I was in New Zealand, so everything I have to say or submit is going to be evidence that was not before the original decision maker – I had absolutely no input
>
> maybe get this email to Member Gordon because that person seems to be the only one who has their shit together
>
> And rushing me into some 2 week time limit to file my submissions is the masculine equivalent of cow pats !"

[155] The third respondent's solicitor emailed QCAT on 16 July 2018 stating that their view is that their client complied with all relevant requirements that led to the termination of the applicant's tenancy. Accordingly, the third respondent did not consider that the applicant should be granted leave to provide new evidence to support his appeal/application.[97]

[156] Member Howe then made a further order on 17 July 2018 directing that the leave to adduce new evidence would be determined after the parties had filed their submissions in compliance with his order on 10 July 2018.[98]

[157] A further order was made by Senior Member Howard on 17 September 2018, stating that the applicant's application to adduce new evidence would be determined with the application for leave to appeal, and if successful, the appeal. The final hearing occurred on 6 June 2019, and the applicant did not appear at this hearing. He was given the opportunity to provide submissions as to this issue, however he did not appear at this hearing.

[158] In my view, the applicant was afforded procedural fairness and there are no grounds of jurisdictional error.

[159] On 10 July 2018, Member Howe made standard directions. Member Howe did not determine one way or another whether the applicant could adduce fresh evidence. In my view, the applicant was not denied procedural fairness.

[160] The term jurisdictional error necessarily connotes some mistake around a court's or tribunal's power affecting its proper functioning, either by misapprehending or disregarding the nature or limits of its functions or powers or acting wholly outside that jurisdiction; none of those things can be argued here.

[161] In my view, even assuming that the direction qualifies as a reviewable "decision", no jurisdictional error has arisen in relation to the direction.

Member Dr Forbes' first decision and second decision – out of time

[162] The application for judicial review of the first and second decision of Member Dr Forbes is also outside the 28 days; however, not nearly as excessive as the time it took for the applicant to make a judicial review application in relation to the direction of Member Howe.

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97 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit I2 (email dated 16 July 2018).

98 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019, Exhibit BMS-15 (QCAT Appeal Tribunal Order, Member Howe, 17 July 2018).

[163] The first decision was made on 6 June 2019.

[164] The second decision was made on 14 June 2019.

[165] The applicant was informed of both decisions on 21 June 2019 and emailed QCAT on 12 July 2019 to state that he would be making an application for judicial review of the decisions.[99]

[166] The applicant cites impecuniosity, health reasons and personal issues for his failure to make the application within time.

[167] Although the third respondent accepted that the applicant had provided some explanation for delay, namely impecuniosity and health issues, the third respondent submitted that there is no utility in the Court exercising a discretion to extend time to allow the proceeding for review to proceed because the proposed proceedings are without merit.[100]

[168] After considering the merit, or lack of merit, of the applicant's case, I agree with the third respondent.

Member Dr Forbes' first and second decision - the JR Act applies

[169] The first decision relates to Member Dr Forbes' decision to not allow the adjournment.

[170] The second decision relates to Dr Member Forbes dismissing the application for leave to appeal.

[171] The third respondent submits that the second decision seems to be a decision of an administrative character pursuant to the QCAT Act and pursuant to section 4 of the JR Act.[101]

[172] As an aside, I note that the third respondent has not considered whether:

1. The first decision was a procedural matter not resolving a substantive issue and lacking the quality of finality;[102] and

2. The second decision was of a judicial character and therefore the JR Act does not apply. [103]

[173] As neither of these issues were raised by any party, I also will not consider, or determine, these matters.

First decision - no jurisdictional error

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99 Affidavit of Toni Colin Reihana affirmed 7 August 2019, Exhibit C (email dated 12 July 2019).

100 The third respondent makes this submission by analogy to *Medical Board of Australia v Judge Hornemann-Wren & Leggett* [2013] QSC 339.

101 Third Respondent's submissions, 6 November 2019, at 8 [5].

102 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 per Mason CJ.

103 *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245 at 258 per Mason CJ, Brennan and Toohey JJ; *Medical Board of Australia v Judge Horneman-Wren & Leggett* [2013] QSC 339 at [11] per Dalton J.

[174] In the circumstances of this case, there must be jurisdictional error for the JR Act to apply.

[175] In my view, this first decision by Member Dr Forbes could not arguably be impugned on the basis of jurisdictional error.

[176] The applicant raises a number of complaints about Member Dr Forbes' decision including:

1. Member Dr Forbes knew that he did not have hard copies of the documents;

2. Member Dr Forbes stated, in error, that the applicant had copies of the documents;

3. Member Dr Forbes made no reference to the applicant's grounds as to why he was seeking an adjournment as set out in the applicant's miscellaneous application and the email sent on 5 June 2019;[104]

4. In all of the circumstances, there was a denial of natural justice in refusing the adjournment application.

[177] The applicant was then sent an electronic copy of the documents he requested by a QCAT officer on 3 June 2019. The applicant sets out the difficulties he had in accessing these documents attached to this email.[105]

[178] The applicant was sent a hard copy of the documents, however, the applicant states that he did not receive these until after he collected them from his post box at the end of the day on 6 June 2019 (i.e., after the hearing).[106] This does not seem to be contested by the third respondent.

[179] At the hearing of this matter, the applicant explained the problems and the delays in obtaining the documents:

> "[…] and the problem was – and – and we'll get to them later in the affidavit, is my various communications with QCAT to inspect the QCAT file and obtain copies of documents off the file. In the four times I asked QCAT, and the three times they responded, they never ever mentioned anything about having to pay fees – photocopy fees or anything of that nature. And later on in my affidavit I confirmed that, and all the other instances I've attended QCAT to obtain documents off the file, there was never any fees payable, and I never paid or wasn't advised of any fees payable. So simply what I'm saying is – in this application is QCATs failure to advise me of the fees and – and me having to make an application for the waiver of the fees, by the time QCAT approves the waiver of the fees for the photocopying and decided to post them out to me".[107]

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104 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit C (email sent 5 June 2019).
105 Applicant's submissions in reply, 19 November 2019, at 1.
106 Affidavit of Toni Colin Reihana affirmed 15 October 2019, at 3 [13].
107 Transcript of Proceedings, 16 October 2019, at 13, line 6 – 16.

[180] However, the applicant did receive the documents in electronic form as an attachment in an email from QCAT.[108] I note that the applicant produced a number of emails attached to his second affidavit, yet failed to produce this email.

[181] The applicant received the email attaching the documents. I note, he responded to QCAT less than 4 hours later seeking an adjournment.

[182] The applicant submits the fact that he was sent electronic copies of the documents is a red herring as QCAT is "bound by the die they have cast, in offering the hard copy of inspected documents to the applicant on the 3rd June 2019."[109] However, in my view, the fact that he was offered hard copies on 3 June 2019 did not mean that the applicant's adjournment application was a fait accompli.

[183] On 4 June 2019, the applicant filed an application for miscellaneous matters, seeking to vacate the hearing on 6 June 2019. This application stated:

> "I, Toni Reihana (appellant) apply to the tribunal for the following directions (set out in numbered paragraphs): vacate 6 June 2019 appeal hearing of APL 043/18 due to the delay cause by QCAT staff failing in four opportunities to advise Reihana fees were payable to aspect and print file extracts – necessitating fee waiver action.
>
> (1) Said fee waiver action has only just been decided but more shortcomings -
>
> (2) I need hard copies – why I travelled from Gold Coast to Brisbane QCAT on 23rd May 2019 by train.
>
> (3) The delay in receiving hard copies in next two days, to then prepare submissions upon property is too short a time frame why QCAT must vacate the appeal hearing.
>
> (4) QCAT's failure to advise of fees payable for inspection and copying has caused a two week delay in my starting to prepare appeal submissions from my 23rd May attendance at QCAT's Brisbane office."[110]

[184] On 5 June 2019, Member Dr Forbes made the following directions:

> "THE APPEAL TRIBUNAL DIRECTS THAT:
>
> 1. The Appeal Hearing listed at 9:30am on 6 June 2019 is confirmed.
>
> 2. The application for miscellaneous matters filed on 3 June 2019 will be considered further at the Appeal Hearing.

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108 Affidavit of Benjamin Matthew Schefe affirmed 18 March 2020, Exhibit BMS-1 (email dated 3 June 2019).

109 Applicant's submissions in reply, filed 19 November 2019, at 3 – 4.

110 Affidavit of Benjamin Matthew Schefe affirmed 2 October 2019, Exhibit BMS-17 (Application for miscellaneous matters, filed by the applicant on 4 June 2019).

3. If Toni Reihana does not attend the Appeal Hearing the Tribunal will consider striking out the matter due to non-compliance with these Directions, without further notice to the parties."

[185] Those directions were sent to the applicant by email on 5 June 2019 at 2:23pm.

[186] In response, the applicant sent an email to QCAT on 5 June 2019 at 2:47pm:[111]

> "Wot the fff is going on there rick
>
> tell dr forbes he is abusing his decision making power like all the QCAT incompetentes i have dealt with before him
>
> why the fff would i come to an appeal hearing that i am seeking to vacate – when i still havent received or obtained the documents i sought inspection upon for the preparation of submissions for the appeal hearing on that same day
>
> tell forbes the big threatening stick bullshit doesnt work on Kiwi Maori NIGGERS !!!!!
>
> tell forbes i will see him in supreme court review if he thinks he can pull the power abusing stunt and strike out this appeal when QCAT incompetence / failure to advise about fees due for inspected / printed documents (or a waiver) is at the bottom of the delay to me obtaining inspected documents for this full of shit (now) appeal
>
> GFAD."

[187] The applicant states that this email advised Member Dr Forbes that the inspected QCAT documents still hadn't been received by the applicant within sufficient time for the applicant to research, investigate and prepare submissions for the appeal hearing and that the appeal hearing couldn't go ahead in any event and needed to be adjourned.[112]

[188] The applicant states that Member Dr Forbes ignored this email:

> "It is submitted that it was procedurally unfair of member Forbes to deliberately ignore the relevant parts of the applicant's abovementioned 5th June email to him, and to similarly ignore the stated grounds pled for in the applicant's Miscellaneous Matters application form – when member Forbes concocted his own version of reality at [16] of Forbes reasons document."[113]

[189] Member Dr Forbes deals with the applicant's adjournment application in this way:[114]

> "[16] Just two days before 6 June the Applicant sought yet another adjournment, on the ground that he had just obtained copies of unspecified documents from the Tribunal's files. Despite his considerable experience of Tribunal

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111 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit C (email sent 5 June 2019).
112 Transcript of Proceedings, 16 October 2019, at 15 – 17.
113 Applicant's submissions, 30 October 2019, at 2.
114 *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [16] – [20] (footnotes omitted).

procedures, the Applicant apparently believes, or purports to believe, that a mere demand secures an adjournment: 'QCAT must VACATE the appeal hearing'. But trial dates are set by the Tribunal, not by the *fiat* of a party. The Tribunal cannot be paralysed simply by an application for an adjournment. The allowance or refusal of such requests or demands is in the discretion of the Tribunal.

[17] The onus was then upon him to appear in person at the time set for the hearing, and then and there to make his case for an adjournment. He had insisted upon an oral hearing, and this time he was in or near Brisbane. But paradoxically, while the Applicant nurses a powerful sense of grievance, he repeatedly postpones a resolution.

[18] In order to ensure the Applicant's personal appearance, the Tribunal gave him a Direction to do so – a step that he was already obliged to take. The Direction included a standard term, warning that failure to comply could result in termination of the case without further notice.

Non-compliance with direction

[19] The Applicant's only response was an incoherent, scurrilous and contemptuous message to the effect that he would not attend. I shall not dignify that communication by quotation. Nor shall I particularise the Applicant's several, similarly abusive messages to various members of the Tribunal and its administrative staff. Anything but immediate and complete concurrence risks being met with vituperation. The abusive items sit upon the files for perusal if required. They are graphic evidence of the Applicant's attitude to the Tribunal, which may be described, in an excess of charity and delicacy, as cavalier.

[20] The Applicant absented himself from the hearing on 6 June 2019, when the Respondent's submissions were heard. If the Applicant had deigned to attend he may have been able to (a) identify the documents vaguely referred to in his adjournment application, mentioned; (b) demonstrate their relevance, if any to the natural justice issue, and (c) subject to satisfactory answers to (a) and (b), show that the documents, for whatever they may be worth, were not reasonably available earlier in the proceedings. But he rejected the opportunity to do so."

[190] The applicant submitted that nowhere in the directions are the grounds and reasons for him seeking the adjournment to be "found, argued, countered, or dispatched with – factually, leading to a failure by Forbes to take account of the pivotal considerations that those grounds and reasons for the Application for Miscellaneous Matters were",[115] and that the directions of 5 June 2019 "clearly show that member Forbes was still going to forge ahead with the substantive Appeal Hearing [...] irrespective of what Forbes decided would happen with [the applicant's] miscellaneous matters application at the same Appeal Hearing event".[116]

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115 Affidavit of Toni Colin Reihana affirmed 15 October 2019, at 1 [2].

116 Affidavit of Toni Colin Reihana affirmed 15 October 2019, at 1 [3].

[191] The applicant focuses on paragraph 16 of the reasons, in particular, where Member Dr Forbes states:

> "Just two days before 6 June the Applicant sought yet another adjournment, on the ground that he had just obtained copies of unspecified documents from the Tribunal's files."[117]

[192] The applicant states that this is an error as he had not received the hard copies of the documents and that Member Dr Forbes would not have known that he was provided with the documents by email.[118]

[193] The applicant submitted:[119]

a. "For the first respondent to fabricate a competing "reality" as to why he perceived the applicant himself was making the adjournment application is fatal, that Forbesy never had his statutory power of decision faculties about him, and his whole decision making task was inexcusably tainted by this blunder;

b. The applicant's non-appearance wasn't just for the sake of simply not appearing as the cited case law tends to require, that because the applicant's "latter email in reply" sent to member Forbes on 5th June 2019, advised him that the inspected QCAT documents still hadn't been received by the applicant within sufficient time for the applicant to research, investigate, and prepare submissions for the Appeal Hearing, that the Appeal Hearing couldn't go ahead in any event, and needed to be adjourned;

c. And as further grounds for the applicant's adjournment application, it was precisely specified to the first respondent who was to blame for that delay for the applicant receiving the inspected QCAT documents in a timely manner, through that latter 5th June email, and the grounds within the application for adjournment"

[194] However, in my view, Member Dr Forbes had not, in paragraph 16, ignored relevant material or made an erroneous finding or reached a mistaken conclusion.

[195] It is accepted by the applicant that he did obtain copies of the documents in electronic form on 3 June 2019. QCAT emailed them to him on 3 June 2019.

[196] I note that Member Dr Forbes had access to the file in determining this adjournment application as he referred to the applicant's emails and the QCAT file in his reasons.

[197] Member Dr Forbes referred to the applicant's adjournment application and his 5 June 2019 email in his reasons. When this email was discussed at the hearing, the applicant stated:

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117 *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [16] (footnotes omitted).
118 Affidavit of Toni Colin Reihana affirmed 15 October 2019, at 2 [6].
119 Applicant's submissions in reply, 19 November 2019, at 4.

> "APPLICANT: Well, everything that's said in the email. Everything he needed to know. A, that I didn't have the documents as yet – and why I would I go to an appeal hearing when I hadn't received the documents as yet? And as I say further in my affidavit, I didn't get the documents to my post box until the following day, at the end of the day, after the appeal hearing would have been heard. So it was all too little, too late, like I say, in regards to getting the documentation from QCAT.
>
> And I must explain the bit about how I worded my email is – I could see that Member Forbes, as a public servant, sort of threatening me and trying to force me to do something when the facts, as far as I knew them, where I couldn't do what he wanted, well, it would have been a futile exercise for me to go to an appeal hearing when I still hadn't received the documentation from QCAT. And because it was QCAT's fault, as well, because of the delay and failure to advise, that those were sufficient grounds why the adjournment should have been given. But all I can see was this – holding a big stick above my head, "Do this. Do this now or such-and such is going to happen".[120]

[198] The third respondent submitted that the applicant was well advised in advance of the date of the hearing, and upon receiving the directions with respect to the adjournment request on 5 June 2019, the applicant was still advised that his presence was required at the hearing on 6 June 2019 where his adjournment request would be heard, and that a decision may be made adverse to his interests if he did not attend.

[199] The third respondent submitted that the facts of *Minister for Immigration and Multicultural Affairs v Bhardwaj*[121] ("Bhardwaj") can be contrasted with the facts in the current matter.

[200] In Bhardwaj,[122] the original application was to be dealt with on 15 September 1998, but on 14 September 1998, the respondent sent a letter to the tribunal stating that the respondent was ill and would be unable to attend the next day and requested an adjournment. However, through an administrative oversight, the letter did not come to the attention of the tribunal, who dealt with the matter on 15 and 16 September 1998 adversely to the respondent, and notified the respondent and his agent on 17 September 1998.

[201] Here the applicant was advised well in advance of the date of the hearing, and upon receiving the applicant's adjournment request on 5 June 2019, the applicant was still advised that his presence was required at the hearing on 6 June 2019, where his adjournment request would be heard, and that a decision may be made adverse to his interests if he did not attend.

[202] However, the applicant refused to attend the hearing. At the hearing, the applicant stated:

> "APPLICANT: But to my mind, it was a, "You come to court or else". Like a threat. It was threatening. I took it as a threat that if I didn't come to

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120 Transcript of Proceedings, 16 October 2019, at 17, line 31 - 46.
121 (2002) 209 CLR 597.
122 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

> court for the appeal hearing, the hearing of the appeal, which sort of over-arched everything for me, that he was going to strike – but I couldn't go, because I hadn't received the documents from QCAT, because of their delay.
>
> HER HONOUR: But you could have gone to the hearing, couldn't you, and told the hearing that you hadn't received the documents?
>
> APPLICANT: Well, actually, later on in the affidavit, here, too, there's actually – sort of like an undercurrent that if I did go, he was going to spring something on me like, "Why didn't get you get the documents earlier?"[123]

[203] The third respondent submitted that the applicant was given an opportunity to prosecute the applicant's appeal before QCAT. Therefore, the third respondent submitted, that it was reasonable in all of the circumstances for Member Dr Forbes to deny the applicant's adjournment request, because the applicant was advised that his application may be dismissed if he did not attend the hearing, and yet he made the proactive decision not to attend the hearing. Accordingly, the third respondent submitted that the applicant did not receive any procedural unfairness in these circumstances. In the circumstances of this case, I agree with the third respondent's position.

[204] Member Dr Forbes stated at paragraph 20 of his reasons that if the applicant had attended the hearing he may have been able to:

> (a) Identify the documents vaguely referred to in his adjournment application, mentioned;
>
> (b) Demonstrate their relevance, if any to the natural justice issue, and
>
> (c) Subject to satisfactory answers to (a) and (b), show that the documents, for whatever they may be worth, were not reasonably available earlier in the proceedings.[124]

[205] In my view, these are all relevant considerations as to the adjournment application.

[206] Further, the applicant states that paragraph 20 of Member Dr Forbes' reasons ignored his 5 June 2019 email. This is not the case. The applicant's 5 June 2019 email has potentially only one relevant line:[125]

> "why the fff would I come to an appeal hearing that I am seeking to vacate – when I still haven't received or obtained the documents I sought inspection upon for the preparation of submissions for the appeal hearing on that same day."

[207] The rest of the email is abuse.

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123 Transcript of Proceedings, 16 October 2019, at 15, line 3 - 14.
124 *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [20] (footnotes omitted).
125 Affidavit of Toni Colin Reihana affirmed 15 October 2019, Exhibit C (email sent 5 June 2019).

[208] Further, when the applicant states that he still hadn't received or obtained the documents, this needs to be put into the context that the applicant had received electronic copies of the documents on 3 June 2019. The applicant never explains, in his application for adjournment, or his 5 June 2019 email, why he needs hard copies of the documents. If the applicant attended the hearing he could have done so. The applicant was advised the day prior to the hearing that his adjournment request would be considered at the hearing, and a decision may be made adverse to his interests if he did not attend.

[209] When asked at the hearing directly why he did not show up, it was stated:

> HER HONOUR: Yes, that's exactly what it said, so why didn't you show up for the miscellaneous application and say – the hearing date was going ahead, it wasn't going to vacate the hearing date, but he said that application for adjournment in direction number 2, that will be heard then. Why didn't - - -
>
> APPLICANT: Well, to tell you the truth, I smelled a rat. I didn't trust him.
>
> […]
>
> APPLICANT: Yes, but, well, overall, my dealings with QCAT – I am constantly suspicious of them. I've seen their bumbling registry staff send along documents, neglect to do this, neglect to invite this – it's just – it's ongoing. But through it all, my email of the 5th of June to Member Forbes spelled everything out. A, that I didn't have the documentation and I couldn't go to the appeal hearing, and also that it was QCAT's staff's fault why I hadn't received the documents. He didn't need me to go to an adjournment hearing to tell him those two very same things, because that's exactly – if I had attended the adjournment hearing, I would have told him, but I had already told him on the 5th of June in my email.
>
> HER HONOUR: But he says, in paragraph 20, that if you attended you would have been able to identify the documents and [indistinct] to a new adjournment application; you would demonstrate their relevance, if any, to the natural justice issue; and, subject to satisfactory answers to A and B, show the documents, for whatever they may be worth, were not reasonably available earlier in the proceedings.
>
> APPLICANT: Yes. That's the suspicious part. He more or less confirmed it by writing it. But, I mean – the scales tip in my favour, the fact that he doesn't mention any of those evidentiary pillars that were contained in the application for the adjournment, which was QCAT's fault for the delay, and then the fact that I hadn't received the documents on the eve of the hearing, on the 5th of June. Now, he doesn't mention those, but they should have been in there.
>
> This – what I'm saying is it tips in my favour, the fact that he doesn't include them and doesn't mention them, deliberately. I've said in my pleadings something to the effect of misfeasance-afflicted decision making. That is to say that I contend that the Member deliberately left

> those evidentiary elements out of his decisions because his decision wouldn't have been sustainable otherwise."[126]

[210] I am satisfied that the applicant was afforded sufficient procedural fairness with respect to this decision.

[211] Whilst the applicant had not received hard copies of the documents, the applicant was aware that the hearing was to go ahead, and was afforded the full opportunity to present his argument as to his adjournment application in person at the hearing. However, the applicant decided not to attend as he "smel[t] a rat".

[212] I am satisfied that the refusal of an adjournment application was not a denial of natural justice.

[213] I am satisfied that, in all of the circumstances, in refusing the adjournment application Member Dr Forbes did not fall into an error of law which caused him to identify a wrong issue, to ask himself a wrong question, to ignore relevant material, to rely on irrelevant material, to make an erroneous finding or to reach a mistaken conclusion.[127]

Member Dr Forbes' second decision - no breach of natural justice

[214] The second decision dismisses the application for leave to appeal. The applicant's submissions again focus on a denial of natural justice to found jurisdictional error. The making of the second decision is connected to the first decision.

[215] The applicant states in his application:

> "Member Forbes "secondary" 14th June 2019 decision above, made upon one side of the appeal subject matter, in the Applicant's absence, must draw Certiorari because of the failures to take account and breach of natural justice circumstance that arise out of the first respondent deciding to proceed with the substantive appeal hearing on 6th June 2019 – when for a second time (since the 16th April 2013 instance) a QCAT decision would be made upon this tenancy termination application business without the Applicant being present to put his side of the story to the decision maker;"[128]

[216] As already stated, the applicant was afforded every opportunity to attend the hearing on 6 June 2019 and put his case forward with respect to his appeal; he declined to do so. There has been no breach of natural justice.

[217] I am satisfied that in dismissing the application for leave to appeal, Member Dr Forbes did not fall into "an error of law which causes [him] to identify a wrong issue, to ask [himself] a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstance, to make an erroneous finding or to reach a mistaken conclusion."[129]

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126 Transcript of Proceedings, 16 October 2019, at 24 – 25.

127 *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

128 Application for Statutory Order of Review / Ext. Time, 7 August 2019, at 2 [5].

129 *Craig v South Australia* (1995) 184 CLR 163 at 179 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[218] I further note that Member Gordon's decision to turn the reopening into an appeal hearing was based on Member Gordon's preliminary findings whereby he had serious concerns whether the tribunal had jurisdiction to make the termination order ("the jurisdiction issue").

[219] However, I note that Member Dr Forbes set out the grounds of the substantive appeal in this way:[130]

> "[12] The renovated application for leave to appeal alleges that the proceedings on 16 April 2013 were contrary to natural justice:
>
> > In connection and [*sic*] a determination of T749/13 [I ask that] the final decision to terminate my tenancy be renewed [*sic*]. The decision ... is faulty when considering the breadth of natural justice issues, and only one side of story heard by tribunal."

[220] Member Dr Forbes makes it clear that the substantive appeal did not involve an initiating process that is said to have gone astray.[131]

[221] Member Dr Forbes did not refer to the jurisdiction issue to dismiss the application for leave to appeal. Rather, Member Dr Forbes decided the substantive issue on the grounds as set out in paragraph 12 of his reasons.

[222] No party has argued before me that any error occurred because Member Dr Forbes did not entertain the jurisdiction issue raised earlier by Member Gordon.

The applicant's allegation of bias

[223] The applicant also submitted that Member Dr Forbes was biased:

> "In what looks like a classic case of "little people" affliction, member Forbes decision of 14th June totally ignores or turns a blind eye at [19] to my pivotal email "C" of 5th June 2019 advising that I hadn't yet received the inspected QCAT documents I urgently needed to prepare my conclusive appeal submissions upon for the appeal hearing the next day, instead [19] shows Forbes ranting and raving in an undeniably BIASED fashion about totally irrelevant considerations as to what is relevant to whether the Appeal Hearing adjournment ought to have been granted or not, and, again, what is found by Forbes at [16] is all the proof we need to show Forbes was oblivious (or pig ignorant) to the facts and realities relevant at that time, to whether the Appeal Hearing adjournment should have been granted"[132]

[224] This submission was repeated at the hearing:

> "But Member Forbes has got to be biased. He must have – human nature, he must have taken unkindly to the bit about the Kiwi […] not being affected or over-awed by the big, threatening stick – the Crown's big,

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130 *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [12].
131 *Reihana v Beenleigh Show Society* [2019] QCATA 91 at [21].
132 Affidavit of Toni Colin Reihana affirmed 15 October 2019, at 3 [14].

> threatening stick, I might emphasise. It doesn't work. It doesn't work on us. He's taken offense to that, and it's permeated his whole decision.
>
> …
>
> Nothing else has happened since in regard to that termination application by the third respondent, so all of this ranting and raving by Dr Forbes, the $60,000 cost to date, that's got nothing to do with the termination of my tenancy application. It's all irrelevant. But it's the tenor – it's the tenor of the language he's using, the tenor of the exaggeration, it's all – it's got to be biased. It can be nothing else but biased."[133]

[225] In this case, the applicant sought an adjournment application.

[226] Member Dr Forbes then issued directions that the adjournment application would be considered further at the appeal hearing.

[227] In the applicant's view, he should have been granted an adjournment and he took offence[134] at this Direction and thus sent an abusive email in reply.

[228] The crux of the applicant's submission seems to be that as the applicant sent an abusive email, Member Dr Forbes must be biased against the applicant

[229] Member Dr Forbes described the 5 June 2019 email as incoherent, scurrilous and contemptuous. In the circumstances that is a fair description.

[230] The applicant failed to attend the hearing. Member Dr Forbes refused the adjournment application and then dismissed the leave to appeal. There is nothing in the actions of Member Dr Forbes, or in his reasons, which show:

1. That he was so committed to a particular outcome that he would not alter the outcome, regardless of what evidence or arguments were presented.[135]

2. That a fair-minded lay observer might reasonably apprehend that he might not bring an impartial mind to the resolution of the question he is required to decide.[136]

[231] I find that Member Dr Forbes' reasons do not found any basis of allegations of bias against Member Dr Forbes.

Conclusion

[232] For the reasons as set out, the application has no basis. Accordingly, I will dismiss the application.

[233] The applicant has not been successful on any ground. The third respondent seeks an order that the applicant pay the third respondent's costs of these proceedings.

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133 Transcript of Proceedings, 16 October 2019, at 22.
134 Transcript of Proceedings, 16 October 2019, at 18.
135 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at 531-532 [72].
136 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6].

[234] The general rule for costs is r 681 of the *Uniform Civil Procedure Rules 1999* (Qld) which provides that:

> (a) "Costs of a proceeding, including in an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise."

[235] I will give the parties an opportunity to consider these reasons before they are required to file and serve short written submissions (maximum 5 pages) on the question of costs.

[236] If it is appropriate, then I will deal with the question of costs on the papers, unless either party requests a hearing.

[237] In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

Order

1. The application for judicial review filed 7 August 2019 is dismissed.

2. The question of costs is adjourned to a date to be fixed.

3. The respondents are required to file and serve short written submissions as to costs by 15 April 2020.

4. The applicant is required to file and serve short written submissions as to costs by 1 May 2020.

5. If either party cannot meet this timeframe as to costs submissions, then they must inform the Supreme Court registry by 8 April 2020.