SUPREME COURT OF QUEENSLAND

CITATION:	*Kingham v Yorkston & Ors* [2002] QSC 059
PARTIES:	**PATRICIA KINGHAM** **(applicant)** **v** **A L YORKSTON** **(first respondent)** **and** **MICHAEL LANGTON** **(second respondent)** **and** **AMANDA KIRKPATRICK** **(third respondent)**
FILE NO:	S3543 of 2001
DIVISION:	Trial Division
DELIVERED ON:	20 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2002
JUDGE:	Mullins J
ORDER:	**1. The order of referee A L Yorkston made in the Small Claims Tribunal at Gatton in claim numbers 71 of 2000 and 72 of 2000 on 31 January 2001 be quashed.** **2. The order of referee A L Yorkston made in the Small Claims Tribunal at Gatton in claim number 71 of 2000 on 22 March 2001 be quashed.** **3. The order of referee A L Yorkston made in the Small Claims Tribunal at Gatton in claim number 72 of 2000 on 22 March 2001 be quashed.** **4. The second and third respondents pay the applicant's costs of this application to be assessed on the standard basis.** **5. The second and third respondents be granted an indemnity certificate under the *Appeal Costs Fund Act* 1973 in respect of this application.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – application for review of decision of referee of Small Claims Tribunal – whether referee had jurisdiction to order re-hearing after making order disposing of dispute – whether jurisdiction under ss 23 or 34 of *Small Claims Tribunal Act* 1973

COSTS – DISCRETION – application for review of decision of referee of Small Claims Tribunal – no jurisdiction to order re-hearing – whether mistake of referee as to jurisdiction justified costs order against referee – whether mistake amounted to gross ignorance

Bancroft v Registrar and Referees of the Small Claims Tribunal [2000] QSC 427
City & Country Insurance Brokers Pty Ltd v Webster [2000] QSC 8
El Deeb v Magistrates Court of South Australia (1999) 72 SASR 596
Ex parte Blume; Re Osborn (1958) 58 SR (NSW) 334
Magistrates' Court of Victoria v Robinson [2000] 2 VR 233
Sankey v Whitlam [1977] 1 NSWLR 333

Appeal Costs Fund Act 1973
Judicial Review Act 1991
Small Claims Tribunal Act 1973
UCPR r 699

COUNSEL: N H Ferrett for the applicant
S A McLeod for the first respondent
Second respondent in person
Third respondent in person

SOLICITORS: A Ace Solicitors for the applicant
C W Lohe for the first respondent

[1] **MULLINS J:** This is an application brought by the applicant, Ms Patricia Kingham ("the applicant"), against orders made by the first respondent, Mr A L Yorkston ("the first respondent"), on 22 March 2001 in his capacity as referee of the Small Claims Tribunal ("the tribunal") at Gatton in claim numbers 71 of 2000 and 72 of 2000.

[2] The second and third respondents were the claimants in claim numbers 71 of 2000 and 72 of 2000 filed with the tribunal. Each claim related to the purchase of a Great Dane puppy by the second and third respondents from the applicant who is a breeder of Great Danes. In claim number 71 of 2000 the second and third respondents sought a refund of purchase price and payment of other moneys in the total sum of $1,490 in respect of the dog Quintessa Denethor. In claim number 72 of 2000 the second and third respondents sought a refund of the purchase price and payment of other moneys in the total sum of $990 in respect of the dog Quintessa Dagorrlad.

[3] After a hearing which took place before the first respondent on 8 November 2000 at which the applicant and the second and third respondents were present (without legal representation) and presented evidence, the first respondent made his order on 18 January 2001 in the following terms:

> "In relation to both matters, I order the two puppies be returned by the claimants to the respondent, Patricia Higham (*sic*), then, and only if they are returned, the respondent Patricia Higham (*sic*) is to pay the claimant the total sum of $1402-00, in relation to Claim 71/00 and also to pay the sum of $990-00 in relation to Claim 72/00."

[4] The two dogs had been euthanased a few days before the first respondent's decision was given, but the second and third respondents had not sought to inform the referee of that fact before his decision was given and the order made on 18 January 2001. The second and third respondents made a request to the Registrar of the tribunal that both claims be re-opened. The Registrar issued a notice in claim numbers 71 of 2000 and 72 of 2000 to the applicant dated 31 January 2001 which stated that a re-hearing had been ordered and that the re-hearing would take place before the referee on 22 March 2001. The further hearing took place on that date. The first respondent made the following orders:

> "In relation to claim 71/2000 I order respondent pay claimant the total sum of $1,402.00."
>
> "In relation to claim 72/2000 I order respondent pay claimant the total sum of $990.00."

[5] By application filed on 20 April 2001 the applicant sought a statutory order of review in respect of the orders made by the first respondent on 22 March 2001 on the basis that the first respondent failed to afford the applicant natural justice and that the first respondent had no jurisdiction to make the decision. At the hearing of the application on 8 March 2002, the applicant obtained leave to file an amended application seeking a review of the orders pursuant to s 43 of the *Judicial Review Act* 1991, on the basis that the first respondent lacked the jurisdiction to re-hear the claims on 22 March 2001 or, alternatively, that during the course of that hearing there was a breach of the rules of natural justice.

[6] The first respondent was represented at the hearing of the application by Mr McLeod of counsel who advised that the first respondent would abide by the order of the court, but sought to be heard on the question of costs.

Lack of jurisdiction

[7] As the tribunal is set up under the *Small Claims Tribunal Act* 1973 ("*SCTA*"), the source of the first respondent's jurisdiction which was sought to be exercised on 22 March 2001 must be found within the *SCTA*. After a claim proceeding has been concluded and an order made, ss 23 and 34 of the *SCTA* provide for further consideration of the claim in the circumstances set out in each of those provisions.

[8] Section 23 of the *SCTA* provides:

> "**Renewal of proceeding when order not complied with**
>
> **23.(1)** Upon making any order a small claims tribunal may adjourn the proceeding to a fixed date or without fixing a date and in either case may give leave to the person in whose favour the

order operates to renew the reference of the claim in the proceeding if the order is not complied with.

(2) A reference shall be renewed by the person who seeks it notifying the registrar in the prescribed form that the order in question has not been complied with whereupon the registrar shall take such steps in respect thereof as the registrar is required by this Act to take in respect of a claim referred to a small claims tribunal.

(3) Upon renewal of a reference the tribunal may make any other order it is empowered by this Act to make."

[9] It is apparent from the first respondent's reasons given on 18 January 2001 in support of the order that was made on that date in relation to both claims, that the first respondent did not make an order that is contemplated by s 23(1) of the *SCTA* which would have permitted the first and second respondents to renew the claims under s 23 of the *SCTA*. Section 23 of the *SCTA* could not be the basis on which the re-hearing on 22 March 2001 was conducted.

[10] Section 34 of the *SCTA* provides that:

"**Tribunal to act on evidence available**

34.(1) Subject to the provisions of this section, where the case of any party to a proceeding before a tribunal is not presented to the tribunal the issue in dispute in the proceeding shall be resolved by the tribunal on such evidence as has been otherwise adduced before it and an order made by the tribunal therein shall be lawful and as effectual as if the party whose case was not presented had been fully heard.

(2) Where an issue in dispute has been resolved in the absence of any party to the proceeding, a referee, on application in writing made to and received by the registrar –

(a) within 28 days after resolution of the issue; or

(b) within such extended period (not exceeding a further 28 days) as a referee may allow in a particular case;

may, if the referee is satisfied that there was sufficient reason for the party's absence, order that the claim be re-heard.

(2A) A referee shall not allow an extension of time for making application under subsection (2) unless the referee is satisfied of the existence of sufficient reason that justifies –

(a) the failure to make application within the period of 28 days; and

(b) any delay in making application for an extension of that period.

(3) When it is ordered that a claim be re-heard –

(a) the registrar shall notify all parties to the proceeding that related to the claim of the making of the order and, where practicable, of the time and place appointed for the re-hearing;

(b) the order of the tribunal made upon the first hearing shall thereupon cease to have effect unless it is restored pursuant to subsection (4).

(4) If the party on whose application a re-hearing is ordered does not appear at the time and place appointed for the re-hearing or upon any adjournment of the proceeding therein the tribunal, if it thinks fit and without re-hearing or further re-hearing the claim, may direct that the order made upon the first hearing of the claim be restored, and that order shall be thereby restored to full force and effect and shall be deemed to have been of effect at all times since the time of its making."

[11] The jurisdiction under s 34 of the *SCTA* can therefore be invoked only by a party who was not present at the original hearing and who seeks a re-hearing. As all parties to claim numbers 71 of 2000 and 72 of 2000 participated at the hearing before the first respondent on 8 November 2001, there was no jurisdiction for the first respondent to act under s 34 of the *SCTA* in relation to granting a re-hearing, conducting that re-hearing on 22 March 2001 and making orders on the re-hearing.

[12] As the first respondent lacked jurisdiction to proceed on 22 March 2001, the orders made on that date must be quashed. Although not specifically requested in the application, it also follows that the order for re-hearing made by the first respondent on 31 January 2001 should also be quashed.

[13] As the tribunal lacked the jurisdiction to re-hear the claims on 22 March 2001, it is not necessary to deal with the natural justice issue.

Costs

[14] Submissions on costs were made at the hearing on 8 March 2002 in respect of the order made for reserved costs by Douglas J on 10 December 2001, whether a costs order in favour of the applicant should be made against the first respondent and whether an indemnity should be granted under the *Appeal Costs Fund Act* 1973, if a costs order were made in favour of the applicant against the second and third respondents.

[15] The applicant sought a costs order primarily against the first respondent, on the basis that the lack of legislative authority for the re-hearing ought to have been obvious to the first respondent and that amounted to gross ignorance which is a basis on which it might be considered appropriate that a costs order should be made against the first respondent: *Sankey v Whitlam* [1977] 1 NSWLR 333, 363.

[16] The discretion to order costs on an application for review against the party against whom the applicant has successfully obtained a prerogative order is wide. In exercising that discretion, it is in order, however, to consider the practice that has been followed in other cases where the decision of a magistrate or other similar officer has been set aside by way of judicial review or similar proceeding: *El Deeb v Magistrates Court of South Australia* (1999) 72 SASR 596, 599.

[17] The passage relied upon by the applicant from *Sankey v Whitlam* has its source in the following statement in *Ex parte Blume; Re Osborn* (1958) 58 SR (NSW) 334, 339:

> "If misconduct is charged against a magistrate he is entitled to appear but even where prohibition is ordered an order for costs is not ordinarily made against him unless there is a clear case of serious misconduct: *Ex parte Cox.* The rule has been stated that the magistrate must have been perverse or guilty of corruption or gross ignorance: *Re Starr*. But even if he falls into what the Court characterized as an astonishing blunder, he does not necessarily act perversely: *Ex parte Vincent*." *(footnotes omitted)*

[18] Recent examples of this approach being followed in Queensland where an application for a prerogative order was successfully obtained against a magistrate or referee are *City & Country Insurance Brokers Pty Ltd v Webster* [2000] QSC 8 and *Bancroft v Registrar and Referees of the Small Claims Tribunal* [2000] QSC 427. An award for costs against a magistrate was upheld by the Victorian Court of Appeal in *Magistrates' Court of Victoria v Robinson* [2000] 2 VR 233. That was an instance of serious misconduct which was described at 240 as "a flagrant instance of disregard for the elementary principles which every court ought to obey … or a flagrant violation of a principle of natural justice.". The magistrate's behaviour throughout the relevant proceeding was described as "overbearing, indeed bullying" (244).

[19] Where there is a claim that falls within the jurisdiction provided for by the *SCTA*, the primary function of a referee constituting a tribunal is to attempt to bring the parties to a settlement acceptable to all parties (s 10(1) *SCTA*). It is only when it appears to the referee that it is impossible to reach such a settlement, that the referee must proceed to make an order to dispose of the issue in dispute "as is fair and equitable to all the parties to the proceeding" (s 10(2) *SCTA*). It is not usual for there to be legal representation before a tribunal. The proceeding before a tribunal (other than a proceeding about a tenancy application) is in private (s 33(1) *SCTA*). The tribunal is not bound by rules or practice as to evidence, but may inform itself on any matter in such manner as it thinks fit (s 33(3) *SCTA*). The tribunal is required, however, to have regard to natural justice and has control of its own procedures (except to the extent that the procedure is prescribed) (s 37 *SCTA*).

[20] According to the submissions of the second and third respondents, the delay between the hearing by the first respondent on 8 November 2000 and the giving of the decision on 18 January 2001 was due to the first respondent's being absent with a back problem. When the first respondent gave his decision on 18 January 2001 (in the absence of the knowledge that the subject dogs had been put down) the intended operation of the order made on that date was deprived of effect. The order was obviously premised on the dogs' being able to be returned by the second and third respondents to the applicant. This was an unusual set of circumstances.

[21] The first respondent's reaction to the request by the second and third respondents to order a re-hearing was obviously an endeavour to implement the objects of the *SCTA* in relation to the subject dispute in the light of the changed facts. The mistake made by the first respondent was that he was *functus officio* in relation to the dispute, as a result of having made his order on 18 January 2001 and in the absence of any basis for invoking the further jurisdiction provided for in ss 23 and 34 of the *SCTA*.

[22] The first respondent made a mistake, but not in circumstances which can result in his conduct being described as perverse or showing gross ignorance or showing flagrant disregard of elementary principles.

[23] In the circumstances of this mistake, it is not an appropriate case for exercising the discretion to order costs against the first respondent.

[24] The second and third respondents as the parties to the claims before the first respondent who have unsuccessfully endeavoured to maintain the first respondent's orders should therefore pay the costs of the applicant of this application. The second and third respondents submitted that they should receive the benefit of an indemnity certificate under the *Appeal Costs Fund Act* 1973. I am satisfied that as this application for review has succeeded on a question of law, in circumstances where the error was made by the first respondent when all parties before him were unrepresented, it is appropriate that such indemnity certificate should be granted under s 15 of the *Appeal Costs Fund Act* 1973.

[25] The only question that remains to be resolved in respect of costs is whether an order should be made pursuant to r 699 of the *UCPR* to preclude the applicant's recovering the costs reserved on the hearing of this application before Douglas J.

[26] It was common ground that the application came on for hearing before Douglas J on 10 December 2001 on which occasion the application was adjourned and an order made that the costs of the hearing on 10 December 2001 be reserved.

[27] Neither the applicant nor the second and third respondents sought to rely on any affidavit which dealt with the factual matters which could be relevant to the exercise of the discretion in respect of disposing of those reserved costs. Both Mr Ferrett of counsel on behalf of the applicant and the third respondent on behalf of the second and third respondents made oral submissions adverting to some factual matters which may be relevant to disposing of these reserved costs.

[28] It appears that the application was not ready to proceed on 10 December 2001. I note that the applicant's affidavit which was that primarily relied on at the hearing on 8 March 2002 was not filed until 10 December 2001. It was common ground that the second and third respondents were not given notice of the hearing on 10

December 2001 until at least the evening before. The explanation for that offered on behalf of the applicant was that the second and third respondents had moved from their address on the record. That was not denied by the second and third respondents. Because of the natural justice issue raised by the application, as originally filed, the second and third respondents wished to subpoena a witness who was not available for the hearing on 10 December 2001.

[29] The effect of an order reserving costs is that it follows the outcome of the proceeding, unless the court orders otherwise. I am not satisfied on the basis of the material that was before me on this issue that it is appropriate to preclude the usual operation of r 699 of the *UCPR* in relation to those reserved costs.

Orders

[30] It is therefore ordered that:

1. The order of referee A L Yorkston made in the Small Claims Tribunal at Gatton in claim numbers 71 of 2000 and 72 of 2000 on 31 January 2001 be quashed.

2. The order of referee A L Yorkston made in the Small Claims Tribunal at Gatton in claim number 71 of 2000 on 22 March 2001 be quashed.

3. The order of referee A L Yorkston made in the Small Claims Tribunal at Gatton in claim number 72 of 2000 on 22 March 2001 be quashed.

4. The second and third respondents pay the applicant's costs of this application to be assessed on the standard basis.

5. The second and third respondents be granted an indemnity certificate under the *Appeal Costs Fund Act* 1973 in respect of this application.