SUPREME COURT OF QUEENSLAND

CITATION:	*Melville & Ors v Townsville CC* [2003] QCA 456
PARTIES:	**PATRICIA MELVILLE AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MERCIA ELIZABETH BOYLE (DECEASED) AND WILLIAM FRANCIS POWER AND ELIZABETH RUTH POWER AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF ADA IRENE POWER (DECEASED)** (applicants/appellants) **v** **TOWNSVILLE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 5272 of 2003 LAC No 9 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from the Land Appeal Court
ORIGINATING COURT:	Land Appeal Court
DELIVERED ON:	24 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	5 September 2003
JUDGES:	Jerrard JA, Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow leave to appeal** **2. Set aside the order of the Land Appeal Court and in lieu thereof order that the Notice of Appeal was within the time prescribed by s 65(1) of the *Land Court Act* 2000 (Qld)** **3. The respondent pay the applicant's costs of the hearing before the Land Appeal Court and of the appeal**
CATCHWORDS:	STATUTORY INTERPRETATION – GENERAL RULES FOR INTERPRETATION OF INSTRUMENTS – where legislation repealed and replacing section uses different language – where new section requires service "within 42 days after the Court's decision is given to the party" – meaning of the words "given to the party" SECTION 65(1) OF THE *LAND COURT ACT* 2000 (QLD) – whether Notice of Appeal served by the applicant on 31

January 2003 was out of time

Administrative Decisions (Judicial Review) Act 1977 (Cth) s 11
Acts Interpretation Act 1954 (Qld) s 14C, s 39, s 39A
Land Act 1962 (Qld) s 44(11)(a)
Land Court Act 2000 (Qld) s 74(2), s 65(1)
Land Court Rules 2000 (Qld) r 5, r 41, r 42

Australian Foremen Stevedores Association v Crone (1989) 20 FCR 377, considered

COUNSEL: G J Gibson QC for the applicants/appellants
C L Hughes SC for the respondent

SOLICITORS: Russell & Co for the applicants/appellants
Suthers Taylor for the respondent

[1] **JERRARD JA**: In this matter I have had the advantage of reading the reasons of Philippides J, and I agree with those and the orders her Honour proposes. I think it is significant that Rule 41 of the *Land Court Rules* 2000 describes how an order of the Land Court is made, and Rule 42 describes how the court's reasons for making an order may be published. No provision of either the *Land Court Act* 2000 or the *Land Court Rules* specifically describes how an order is "given to a party".

[2] Rule 42(1)(b) and (c) will define how that result is achieved whenever the reasons so published include, describe, or are accompanied by, the order of the Court. Rule 42(1)(a) will define how that result is achieved whenever a party is present in court and the Registrar or Deputy Registrar gives a copy to that party.

[3] Rule 42(1)(a) does not imply by its terms that an order is "given to a party" when the court's reasons for making that order are delivered in court to the Registrar or Deputy Registrar to give to the other party, where that other party is known to be the only party who will be attending. The respondent argues for that construction, so that parties in the Land Court do not have differing commencement dates from which the 42 days within which to appeal will run. The undesirability of that situation becomes more apparent than real when it is noticed that r 42(1(c) specifically provides that, for a proceeding in which a decision is made without an oral hearing, the court's reasons may be published by a copy of those, signed by the member or judicial registrar making the order, being sent to each party. The effect of the provisions of the *Acts Interpretation Act* referred to by Philippides J will be that prima facie the commencement date of the appeal period for parties in such cases will depend on when each would receive that copy in the ordinary course of post. Differences in those dates can exist for parties who all reside within this State, let alone when they reside within very different parts of this Commonwealth.

[4] The decision was not in fact "given to" the appellant on 19 December 2002, the date it was made, and when it was actually given in fact to the other party. Since no provision of the Act or Rules deems that to constitute giving the decision to the appellant, since it was in fact received by the appellant on 23 December 2002, and since those Rules necessarily provide means of publishing reasons for orders which will potentially result in the parties receiving those on different dates, I agree with Philippides J that the proper construction of s 65 of the Act requires the conclusion

that the decision was "given to" the appellant when the appellant's solicitors received it in the post. It was undoubtedly given by the court when it was made and when the reasons were published, which all happened on 19 December, and given to the respondent that day; but not to the appellant. That completed transaction of giving is the one the Act specifies as the start of the 42 days, however incongruous the results may occasionally be.

[5] **DUTNEY J**: I have read the reasons of Philippides J and agree with those reasons and the orders proposed. I also agree with the additional reasons of Jerrard JA which I have also read.

PHILIPPIDES J:

Background

[6] The applicant seeks leave to appeal pursuant to s 74(2) of the *Land Court Act* 2000 (Qld) ("the Act") from a decision of the Land Appeal Court. It does so on the basis that the appeal raises an important question of law concerning the proper construction of s 65(1) of the Act. The parties were content that the hearing of the application for leave be treated as a hearing of the appeal, if leave were granted.

[7] By a decision dated 19 December 2002, the Land Court made a determination of the amount of compensation payable in respect of the value of certain land taken by resumption by the respondent, the Townsville City Council. Although the proceedings had taken place in Townsville, the decision of the Land Court was handed down on 19 December 2002 in the Land Court in Brisbane. Upon being notified by the Deputy Registrar that the decision would be handed down in Brisbane, the applicants' former solicitors, who were based in Townsville, enquired whether the court would require representation. They were advised that representation was not required and that the decision would be posted to them. Accordingly, while the respondent was represented when the decision was handed down, the applicants were not. A copy of the judgment, together with a covering letter dated 19 December 2002, was received by the solicitors on 23 December 2002.

[8] On 31 January 2003, a Notice of Appeal to the Land Appeal Court was served upon the Registrar and the respondent. The preliminary issue before the Land Appeal Court was whether the appeal period prescribed by s 65(1) of the Act had expired prior to the Notice of Appeal being served. It was common ground that if the time for appeal commenced on 19 December 2002, when the decision was handed down, the appeal period had expired prior to 31 January 2003, when it was served. However, it was contended by the applicant that if the time for appeal commenced upon the date of the receipt of the court's decision by the applicants' then solicitors, the Notice of Appeal was lodged in time. There is no provision in the Act to extend the appeal period.

The decision of the Land Appeal Court

[9] Section 65(1) of the Act provides:

> "A party intending to appeal against a decision of the Land Court must, *within 42 days after the court's decision is given to the party*, serve notice of appeal against the decision on –
>
> (a) all other parties to the proceeding on which the decision was made; and
>
> (b) the registrar of the Land Appeal Court." (emphasis added)

[10] The applicants' contention below was that the words "after the court's decision is given to the party" should be construed to mean after the time when the judgment, which was posted to the solicitors for the applicants, arrived in the ordinary course of the post. The respondent's submission below was that the words meant when the decision was delivered or handed down, in this case, 19 December 2002. The Land Appeal Court accepted the respondent's submissions and held that the Notice of Appeal was not served within the time provided for in s 65(1) of the Act.

[11] In considering the proper construction of the words in s 65(1) of the Act, the Land Appeal Court noted the differing language of s 44(11)(a) of the *Land Act* 1962 (Qld) ("the 1962 Act") the predecessor to s 65, which provided:

> "a party who desires to appeal to the Land Appeal Court from a decision of the Land Court shall serve notice of appeal on all other parties directly affected by the decision not later than 42 days *after the pronouncement of the decision* or … not later than 14 days after the refusal of the Land Court to rehear the matter, whichever time is the later to expire." (emphasis added)

[12] The Land Appeal Court rejected the argument pressed by the applicants that because of the change in language in s 65 and because of the provisions of the *Acts Interpretation Act* 1954 (Qld), the court ought to have concluded that the decision "was given" to the applicants only when, in the ordinary course of the post, a copy of the judgment and reasons was received by the applicants.

[13] The applicants had placed reliance on s 39 and s 39A of the *Acts Interpretation Act*. Section 39 of the *Acts Interpretation Act* provides:

> "(1) If an Act requires or permits a document to be served on a person, the document may be served –
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> (a) on an individual –
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> (i) by delivering it to the person personally; or
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> (ii) by leaving it at, or by sending it by post, telex, facsimile or similar facility to, the address of the place of residence or business of the person last known to the person serving the document; or
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> (b) on a body corporate – by leaving it at, or sending it by post, telex, facsimile or similar facility to, the head office, a registered office or a principal office of the body corporate.
>
> (2) Subsection (1) applies whether the expression 'deliver', 'give', 'notify', 'send' or 'serve' or another expression is used."

[14] Section 39A of the *Acts Interpretation Act* relevantly provides:

"(1) If an Act requires or permits a document to be served by post, service –

(a) may be effected by properly addressing, prepaying and posting the document as a letter; and

(b) is taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved.

…

(3) Subsections (1) and (2) apply whether the expression 'deliver', 'give', 'notify', 'send' or 'serve' or another expression is used."

[15] In rejecting the applicants' submission, the Land Appeal Court had regard to rules 41 and 42 of the *Land Court Rules* 2000, which provide:

"**Order**

41(1) An order of the Court is made by –

(a) the order being pronounced in court by the member or judicial registrar making the order; or

(b) the order being set out in a document, with or without reasons, and signed by the person making the order.

(2) An order takes effect on the day on which it is made.

(3) However, the court may order that an order takes effect from an earlier or later date.

Reasons for Order

42(1) The court's reasons for making an order may, if in written form, be published –

(a) by the reasons being delivered in court to the registrar or a deputy registrar to give a copy to each party; or

(b) by a copy of the reasons, signed by the member or judicial registrar making the order, being given to the registrar or deputy registrar to –

(i) deliver in court; and

(ii) give or send a copy to each party; or

(c) for a proceeding in which a decision is made without an oral hearing – by a copy of the reasons, signed by the member or judicial registrar making the order, being sent to each party.

(2) The court's reasons for a proposed order may be published before the order is made."

[16] The Land Appeal Court noted that an order (which under the Act includes a decision[1]) takes effect on the day on which it is made. It was also held that while r 42(1)(b) provides for circumstances in which the Registrar or Deputy Registrar who publishes the reasons may give or send each party a copy of such reasons, that rule was not the rule pursuant to which the reasons were published. Rather, it was found that the Land Court had delivered its reasons under r 42(1)(a) to the Deputy Registrar to give a copy to each party. The Land Appeal Court observed that what had occurred in this case was "that as a matter of courtesy the Deputy Registrar has posted a copy of the decision to the applicant who had not been present". The Land

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1 See dictionary meaning in r 5, *Land Court Rules* 2000.

Appeal Court thus concluded that s 39 of the *Acts Interpretation Act*, which was predicated on the basis that an Act requires or permits a document to be served on a person, did not apply to the circumstances under consideration, being "something quite different, namely the making of an order by the Court and the publication of the Court's reasons for such an order".

[17] The Land Appeal Court considered the applicant's submission based on the "significant difference" in the language used in the two provisions, but concluded that:

> "In their ordinary and natural sense, the words "after the court's decision is given to the party" are not, in our view, apt to refer to the time at which a decision is received, where a party receives the decision and reasons somewhat after their delivery and publication in the circumstances and for the reasons already described.
> … the language used [in s 65] is intended to convey in somewhat less formal words than were used in the earlier legislation the same thing. That is, we think the legislature has intended to refer to the delivery or handing down of the decision itself.
> The order took effect on the day on which it was made and the reasons were published upon their delivery in Court to the Registrar."

The submissions

[18] The applicants submitted that the Land Appeal Court erred in its construction of s 65 of the Act, in that it failed to have sufficient regard to the wording of s 65(1) of the Act and to the difference between that wording and the wording of its predecessor, s 44 (11)(a) of the 1962 Act. In support of this submission the applicants pointed to the following differences between the two provisions:

(a) The phrase "after the pronouncement of the decision" in s 44(11)(a) of the 1962 Act was replaced in s 65(1) of the Act with the words "after the court's decision is given ";
(b) the additional words " … to the party …" were included in s 65(1);
(c) the absence in the Act of the discretion in the court to extend the time for the service of the Notice of Appeal as had existed in s 44(11) of the 1962 Act.

[19] The applicants argued that the inclusion of the words "given to the party" in s 65(1) of the Act was not consistent with an intention to limit the operation of that provision to the "pronouncement" of a decision or an order in court. Rather, it was contended that the words must be taken to reflect a legislative intention that the decision is to be "given" to the party in the ordinary sense of that word, that is, of being "delivered" to or "handed to" the parties. It was submitted that s 65(1) contemplated the party being in receipt of the material necessary to enable that party to decide whether or not to appeal.

[20] The applicants argued that there was no material difference between the meaning of the phrase "given to the party" in s 65 of the Act and the phrase "furnished to the applicant" in s 11 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth),

which specifies that a time period runs from "the day on which a document setting out the terms of the decision is furnished to the applicant". Reliance was placed on the following statement of Pincus J in *Australian Foremen Stevedores Association v Crone*[2] concerning the construction of s 11:

> "… the expression "furnished to the applicant" [in s 11(1)(c)] appears to contemplate delivery of a document specifically to the applicant rather than a general publication of it; further, it contemplates its delivery by or on behalf of the decision-maker."

[21] The applicants contended that rr 41 and 42 of the *Land Court Rules* are not contrary to the above, because they recognise the distinction between on the one hand, the pronouncement of an order in court and on the other, the giving to a party of a copy of the reasons for the order. Rule 42, it was noted, was of particular relevance to the Land Court, which often sits in provincial areas and often determines applications in which either or both parties are self represented.

[22] The respondent argued that the major flaw in the applicants' submissions was that the applicants' submissions, if accepted, could result in different appeal periods applying to different parties in the Land Court. This, the respondent argued, would be an absurd outcome. Furthermore, it was argued that if the legislative intention was to ensure that the period of 42 days commenced to run when "received by" the relevant party rather than when the order was made pursuant to r 41(1)(a) of the Land Court Rules, that could have been expressly provided for in s 65. Instead, it was urged, the expression "given to the party" was used, adopting the transitive verb "give". It was argued that the word "given" described the positive act of the Court in handing down or making the decision, rather than the passive act of the receipt of the decision by a party. Thus the respondent contended that adverting to the changes between s 65 and its predecessor did not assist; there was no material difference between the "pronouncement" of a decision and the "giving" of a decision, because of the use of the transitive verb "to give", which has as its object the judgment which is given.

[23] In addition, the respondent argued that the difference between the 1962 Act and the present Act in respect of the removal of the discretion to extend time for the service of the Notice of Appeal is equivocal as consistent with the legislature expressing a determination to ensure timely finality in proceedings.

Leave to Appeal

[24] The issue raised on this appeal concerns an important issue of law in respect of the construction of s 65 of the Act. I would grant leave to appeal.

When does time commence to run under s 65 of the Act?

[25] I accept the appellants' submission that there is both a significant and a material difference between the phrases "after the pronouncement of the decision" in s 44 of the 1962 Act and "after the court's decision is given to the party" in s 65 of the Act. The different terminology cannot be explained as directed to the use of a clearer or

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2 (1989) 20 FCR 377 at 385.

simpler style. The term "pronouncement", while sufficient under the 1962 Act to refer to the making of a decision, is not sufficient to encompass all means of making decisions under the Act, because r 41 envisages that a decision may be made either by pronouncement in court or by the signing of a written document setting out the decision. Had it been the intention of the legislature to retain in s 65 the formula of s 44, one would not have expected to see such markedly different language in the Act, but rather a formula stating that time was to run from "the date of the decision"[3] or the date the decision was "made". It cannot be accepted that the language used in s 65 was merely a different legislative drafting practice intended to express "the same idea" as that formerly expressed in the 1962 Act in "a clearer or simpler style", i.e. in less formal words. Accordingly, s 14C of the *Acts Interpretation Act* has no application. The use of significantly different wording signifies a legislative intention to convey a different meaning.

[26] It follows that I do not accept the submission that the word "given" in s 65 refers to the "making" of the decision by pronouncement in court. Such an interpretation would have had merit if the wording in s 65(1) said only "after the court's decision is given". However, the submission is contrary to the natural and ordinary meaning of the words in s 65, in that it gives no effect to the additional words "to the party" which appear in the section.

[27] The words "given to the party" have the ordinary meaning of "delivered" or "handed over".[4] I accept the appellants' submission that the phrase "given to the party" necessarily implies notification to the party. It contemplates the party being in receipt of the material necessary to enable that party to decide whether or not to appeal. Whilst the interpretation of s 65 of the Act is not to be governed by the interpretation of the rules, being subordinate legislation[5], the wording of rr 41 and 42 of the *Land Court Rules* is of assistance, in so far as it reflects a distinction acknowledged by the legislature between the making of a decision and its publication and notification by giving or sending a copy of the reasons for the decision.

[28] Nor does it follow, from the fact that s 65(1) of the Act may thus result in different appeal periods in some cases, that the length of those appeal periods is uncertain. In the case where the decision is "given to" a party by post, i.e. served by posting the document as a letter, service is taken to be effected at the time when the letter would be delivered in the ordinary course of the post, unless the contrary is proved (see ss 39 and 39A of the *Acts Interpretation Act*).

[29] As the appellants acknowledged, it may be unusual for an appeal period in court proceedings to be calculated by reference to the date on which the court's decision is "given to" the parties, however it does not follow that the outcome thus achieved is absurd, such as to require a moderation of the literal interpretation of s 65.[6] There may well be good reason that time commences to run from the date a decision is given, in the sense of received, where as may be the case under the Act

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3 See for example r 748 of the *Uniform Civil Procedure Rules* 1999.

4 See Shorter Oxford Dictionary; The Macquarie Dictionary.

5 See s 21(5) of the *Land Court Act* 2000.

6 See Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed at paras 2.4 and 2.30.

the making of an order, i.e. a decision, and its publication do not occur simultaneously.[7]

Was the notice of appeal served within the time prescribed by s 65(1)?

[30] A copy of the decision of the Land Court was forwarded to the appellants in Townsville by the Deputy Registrar in Brisbane on 19 December 2002. Affidavit evidence indicates that it was received on 23 December 2002. There is nothing to indicate that that date does not represent the date on which it would have been received in the ordinary course of post. However, in any event the affidavit evidence provides proof of receipt by post for the purposes of s 39A of the *Acts Interpretation Act*. In the circumstances, the Notice of Appeal was served within 42 days after the decision was given to the appellants.

Orders

[31] I would allow leave to appeal, set aside the order of the Land Appeal Court and in lieu thereof order that the Notice of Appeal was within the time prescribed by s 65(1) of the Act.

[32] I would order that the respondent pay the applicants' costs of the hearing before the Land Appeal Court and of the appeal.

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[7] See rr 41 and 42 of the *Land Court Rules* 2000; see also s 41(1) of the Act - a decision may be "made" in chambers by signing of the decision before notification.