SUPREME COURT OF QUEENSLAND

CITATION:	*Di Iorio v Norris* [2010] QCA 191
PARTIES:	**PETER DI IORIO** (applicant) **v** **JAMES NORRIS** (respondent)
FILE NO/S:	Appeal No 285 of 2010 SC No 2119 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave/Judicial Review Miscellaneous Application – Civil
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	29 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2010
JUDGES:	Chief Justice, Muir and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The amended application dated 8 April 2010, in respect of the order made in the Trial Division on 29 April 2009 dismissing the applicant's application for judicial review, is refused.** **2. The application for leave to adduce fresh evidence filed on the 5th of May 2010 is refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL – where the primary judge dismissed the present applicant's application for a statutory order of review of a decision of the Small Claims Tribunal – where the Small Claims Tribunal ordered the erection of a fence and retaining wall and that the present applicant pay half the sum of the fence and wall – where the applicant raised grounds within the purview of the *Judicial Review Act* 1991 (Qld) before the primary judge – where there was no evidence to support any of the grounds raised by the applicant – where the primary judge concluded that the

applicant's complaint was with the merits of the decision – where any appeal against the decision of the primary judge should have been instituted by 27 May 2009 – where the applicant filed an application on 8 January 2010 and amended the application on 8 April 2010 – where it is appropriate to treat the applicant's amended application as an application for extension of time – where applicant argues that there was a reasonable explanation for the delay – where applicant asserts a denial of natural justice but provides no particulars – whether the extension of time should be granted

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – ADMISSION OF FRESH EVIDENCE – IN GENERAL – where applicant swears that since the Tribunal's decision he has obtained fresh evidence in the form of a survey report – where the survey report concerns events that occurred prior to the hearings before the Tribunal and the primary judge – where the survey report could have been secured previously and put before the Small Claims Tribunal – whether proposed further evidence should be admitted on the hearing of any appeal

Dividing Fences Act 1953 (Qld), s 18(3A)
Judicial Review Act 1991 (Qld), s 20
Uniform Civil Procedure Rules 1999 (Qld), r 748, r 766(1)(c)

Clarke v Japan Machines Australia Pty Ltd [1984] 1 Qd R 404, cited
O'Callaghan v Hall & Anor [1993] QCA 297, applied

COUNSEL: The applicant appeared on his own behalf
The respondent appeared on his own behalf

SOLICITORS: The applicant appeared on his own behalf
The respondent appeared on his own behalf

[1] **CHIEF JUSTICE:** On the 29th of April 2009 the learned primary Judge dismissed the present applicant's application for a statutory order of review of a decision of the Smalls Claims Tribunal given on the 30th of January 2009. The order of the Tribunal, which was made under the *Dividing Fences Act* 1953 was in these terms;

"1) A new dividing fence and retaining wall is to be erected on the common boundary between the properties of the parties.

2) The fence is to be constructed in accordance with quote provided by AAA Fencing or a contractor provided by them.

3) The fence construction is to be arranged by the Claimant.

4) The construction of the fence is to be completed within three months.

5) The Respondent is to pay to the Claimant half the sum for fence and retaining wall within 14 days of being notified in writing by the Claimant of the completion of the fence."

In those orders the "claimant" is the present respondent and the "respondent" is the present applicant.

[2] His Honour gave reasons for his dismissal of the application. He recorded the applicant's contention that it was unfair that he should have to contribute to the cost of the retaining wall on the basis the wall was necessary because the respondent had built up the level of the respondent's land above natural ground level, and the Judge mentioned other complaints, as for example, concerning the height of the fence. Those matters were before the Tribunal. Although the applicant raised grounds within the purview of the *Judicial Review Act* 1991, there was no evidence to substantiate them. The Judge concluded that, "the applicant's complaint is with the merits of the decision."

[3] Any appeal against the Judge's order should have been instituted by the 27th of May 2009 (Rule 748 of the *Uniform Civil Procedure Rules*). The applicant filed an application on the 8th of January 2010, but it included no grounds. He amended that application to include grounds on the 8th of April 2010. In the amended application, the applicant sought leave to appeal from that Judgment. He needs, rather, to seek an extension of time within which to appeal. It is within the Court's discretion to grant an extension of time under rule 748. It is appropriate to treat the amended application as an application for that necessary extension of time.

[4] In determining an application for extension of time, the Court will ordinarily consider such factors as any explanation for the delay, the extent of the delay and any prejudice to the respondent were time to be extended, and attempt a preliminary and general assessment of the merit of the proposed challenge to the judgment.

[5] As to explanation for the delay, the applicant, who is self represented, has said in his affidavit that English is not his “first language”, although one notes he has been in business here for many years and the comprehensive, "reasons justifying the granting of leave" set out in his application read comprehensively. If he could not understand the process, he should have sought assistance and advice.

[6] The applicant relies on his not obtaining a transcript of the Judge's reasons for judgment until the 19th of February 2010. One queries why obtaining a transcript was essential prior to the filing of a notice of appeal: as dealt with by the Judge, the matter was of short compass, and the applicant was present in court when the Judge gave his short reasons. But in any event, the applicant has not explained how or when he went about seeking a transcript.

[7] Even when he obtained the transcript in mid February this year, he delayed without explanation, until the 8th of April in providing a sufficiently particularised application.

[8] The applicant refers to un-particularised enquiries of the Supreme Court to ascertain the procedure, and says that it was not until January this year that he was informed by a Magistrate conducting an enforcement hearing that he would need to appeal. There is no suggestion he sought appropriate advice in a timely way after the Tribunal's orders were made.

[9] The applicant's explanation for almost one year's delay in instituting his proceeding is scrappy and unconvincing. That leaves a substantial extent of that delay as a highly significant feature against the granting of the extension needed. In

O'Callaghan v Hall & Anor [1993] QCA 297 at page 7, where the delay was of the order of 18 months and was not satisfactorily explained, the court said this:

> "It is desirable that, as far as practicable, the Courts discourage undue and unnecessary delay. The notion that the rules setting time limits should be treated as of no importance is one which if accepted would be destructive of the proper administration of justice… Only in the most extraordinary circumstances, and to avoid a plain injustice, could this Court consider granting an extension of time to appeal after such a long and unjustifiable delay as has occurred here."

[10] As to the question of prejudice to the respondent were time extended, it is necessary to say a little of the history of the matter. Realising the need for the erection of a dividing fence, the respondent obtained a quote in June 2008 and sought the applicant's co-operation, which was not forthcoming. The respondent wrote to the applicant on the 17th of July 2008 formerly invoking the *Dividing Fences Act*, but without response. On the 20th of August that year, the respondent accordingly lodged a claim before the Small Claims Tribunal.

[11] That Tribunal conducted the hearing and made orders for the erection of a fence, on the 17th of October 2008. The respondent commenced constructing a fence, but had not completed it by the time of the second Tribunal hearing on the 30th of January 2009, when the Tribunal ordered the erection of not only a fence but a retaining wall as well. It is that order which came before the Judge. The applicant immediately wrote to the Tribunal seeking that the order be overturned.

[12] The fence and wall were erected. The applicant has failed to pay his share. That led to other proceedings, including an oral examination hearing appointed for the 28th of September 2009 at which the applicant failed to appear, resulting in his arrest.

[13] A measure of the applicant's general attitude to the process may be gathered from his scurrilous letter to the Magistrates Court of the 8th of November 2009.

[14] The respondent has undoubtedly been put through the mill by all of this. The matter has been unduly protracted. The respondent should be left in a position where the fence and the wall are recognised as established features, lawfully constructed and for which the applicant pays his share as ordered. Leaving issues unresolved for any further period will be prejudicial in a relevant sense to the respondent.

[15] I turn to the applicant's prospects of success were there to be an appeal. In his application, the applicant identified three grounds of complaint:

1. It was the respondent's artificial raising of the level of his land which necessitated the construction of the retaining wall, yet the applicant has to bear one-half of the cost of it.

2. Over 30 metres, there is no retaining wall, and water flows onto the applicant's property, diminishing its value. The respondent should be compelled to construct a wall over that distance.

3. The fence is not flush with the ground, and gaps have been chocked in an unsightly way with rocks, etc.

[16] The applicant says, "I have raised all these matters with the Tribunal at various times."

[17] I pause to note that unsurprisingly there is another side to those claims, covered in the respondents' material, but there is no need to go into that.

[18] Even though section 18, subsection (3A) of the *Dividing Fences Act* provides that decisions of the Magistrates Court sitting as the Smalls Claims Tribunal, "shall be final and conclusive", that does not exclude applications for review under section 20 of the *Judicial Review Act*.

[19] Nevertheless, it is abundantly plain, from paragraph 10 of the "reasons," set out in the instant application, and the applicant's supporting affidavit sworn on the 8th of April 2010, that the applicant is complaining about the correctness or merit of the decision made by the Tribunal. He was given a hearing, and the opportunity to raise all of his matters of response and complaint, paragraph 24 affidavit, of which he availed himself. While he asserts the denial of natural justice, he gives no particulars let alone swearing to any deficiency.

[20] The learned Judge's approach was correct.

[21] The applicant has filed an application for leave to adduce further evidence on any appeal. He has sworn that since the Tribunal's decision of the 30th of January 2009 he has obtained quite "fresh evidence to confirm that [the respondent] artificially filled the land." In a proposed notice of appeal, he contends:

> "9. The Appellant has fresh evidence obtained since 30 January 2009 corroborating his photographs and contour plan demonstrating that the Respondent has artificially increased the level of his land. That evidence is a survey report from Michelle Group Services Surveyors, dated the 1st of May 2009 to the developer of the estate and a letter from the developer Lechaim Pty Ltd to the appellant dated 6 May 2009."

[22] The applicant filed an application for, "Leave to adduce fresh evidence," on the 5th of May 2010 supported by his affidavit exhibiting the survey report and other material including photographs of the land and the fence and the wall.

[23] The court, on any appeal from this judgment, could receive further evidence "on special grounds", Rule 766(1)(c). The survey report concerns events which occurred prior the hearings before the Tribunal and the Judge, that is, any artificial lifting of the contour which occurred. That is the relevant event, not any subsequent expert assessment of it. With reasonable diligence that assessment could have been secured previously and put before the Small Claims Tribunal, were that desired. The same goes for the other material raised by the affidavit.

[24] Consistently, with the principles expressed in *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408, this proposed further evidence would not be admitted on the hearing of any appeal.

[25] In all these circumstances the Court should exercise its discretion against extending time for the institution of an appeal. The application for leave to adduce fresh evidence filed on the 5th of May 2010 should also be refused.

[26] The orders of the Court are:

1. the amended application dated the 8th of April 2010, in respect of the order made in the Trial Division on the 29th of April 2009 dismissing the applicant's application for judicial review, is refused; and

2. the application for leave to adduce fresh evidence filed on the 5th of May 2010 is refused.

[27] **MUIR JA:** I agree.

[28] **CHESTERMAN JA:** I agree.