SUPREME COURT OF QUEENSLAND

CITATION:	*Chapman v State of Queensland* [2012] QCA 134
PARTIES:	**HELEN CHAPMAN** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 9026 of 2011 QCAT No 181 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	22 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2012
JUDGES:	Muir and Fraser JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Paragraph 28 of the affidavit of the applicant sworn 13 March 2012, paragraph 7 of the affidavit of Cim Rogers sworn 14 March 2012, and paragraph 8 of and exhibit BK2 to the affidavit of Brian Kelleher sworn 9 May 2012 be received in evidence.** **2. The application for leave to appeal is refused with costs.**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where applicant and her daughter resided in an apartment building – where respondent applied for an order to terminate the applicant's tenancy – where such order was made – where various residents gave evidence that the applicant and her daughter were continually disruptive and abusive – where residents feared for their safety – where respondent sought an urgent determination of the matter – where applicant was self-represented – where applicant was given a short adjournment to seek legal representation – where representation was not obtained – where applicant then applied for a further adjournment – where further adjournment not granted – where applicant was illiterate – where the applicant applied for leave to appeal to QCAT – where leave was refused – where applicant seeks leave to

appeal to the Court of Appeal – where applicant submitted an appeal would have utility because it would allow the Court of Appeal to review the circumstances in which a disadvantaged litigant should be granted leave to be legally represented in QCAT and provide guidance as to how leave is to be practically implemented so as to afford procedural fairness to disadvantaged litigants – where applicant sought to rely on further evidence in the form of two affidavits – where respondent sought leave to read an affidavit in response – whether further affidavit evidence should be allowed – whether the applicant was denied procedural fairness – whether appeal has utility – whether applicant's submissions with respect to utility amounted to hypothetical questions that were inconsistent with the role of a court

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; [1992] HCA 10, cited
Bass v Permanent Trustee Company Ltd (1999) 198 CLR 334; [1999] HCA 9, considered
Luna Park Ltd v The Commonwealth (1923) 32 CLR 596; [1923] HCA 49, considered
Maher v Adult Guardian & Anor [2011] QCA 225, distinguished
Momcilovic v The Queen (2011) 85 ALJR 957; [2011] HCA 34, cited
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41; [2008] QCA 257, cited
R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361; [1970] HCA 8, cited
Taylor v O'Beirne & Ors [2010] QCA 188, cited

COUNSEL: G Coveney for the applicant (pro bono)
S McLeod for the respondent

SOLICITORS: Dibbs Barker for the applicant
Crown Law for the respondent

[1] **MUIR JA: Introduction** The applicant seeks leave to appeal against a decision of the President of the Queensland Civil and Administrative Tribunal (QCAT) on 6 September 2011 refusing leave to appeal from the decision on 18 May 2011 of a magistrate sitting as a QCAT ordinary member.

[2] The member's decision was made in a proceeding in QCAT's Minor Civil Disputes jurisdiction in which the respondent applied for an order terminating the applicant's tenancy in a Maroochydore apartment building on grounds of alleged objectionable behaviour by the applicant. The member ordered that the residential tenancy agreement between the parties be terminated as from 12 noon on 18 May 2011. The applicant was evicted from the unit on 24 May 2011.

[3] On the hearing of the application, the respondent tendered statements by nine residents of the apartment building, swearing to protracted, unseemly, disruptive and abusive behaviour on the part of the applicant and her daughter, who also

resided in the apartment for some of the period to which the evidence related. In cross-examination the applicant had difficulty in confining herself to questioning the witnesses, but, nevertheless, cross-examined most of them, sometimes robustly. Throughout this part of the hearing she had to be reminded not to argue with the witnesses and not to address argument to the Tribunal.

[4] The applicant gave evidence herself and called her daughter and another resident, Mr Little, as witnesses. The member accepted the evidence that the abusive and disruptive conduct of the applicant and her daughter had continued for a considerable period and that other residents had been "harassed and intimidated and abused" by the applicant causing "a serious nuisance to persons occupying premises nearby".

[5] Witnesses swore that the conduct of the applicant and her daughter caused them fear and distress and affected not only their enjoyment of their properties, but their physical and mental wellbeing. One witness deposed to vomiting from stress caused by the behaviour of the applicant and her daughter. Another witness swore to being woken late at night on many occasions by the applicant's fighting and shouting of abuse which caused him to fear for his safety and that of other residents. He stated that his spinal cord injury caused him severe pain and rendered sleep difficult at times even without such disturbances. Evidence was given by a further witness to the effect that she suffered from bone cancer and that the "ongoing stress" caused by the constant loud screaming, verbal abuse and arguments of the applicant and her daughter was having a "significant impact" on her health. She said that the situation had become "unbearable".

[6] The applicant's application for leave to appeal to the appeal tribunal of QCAT specified the ground of appeal that:

> "[The] Tribunal continued with hearing of application to terminate my tenancy despite observing that I needed legal representation, my expressing that I wished to have legal representation and my seeking an adjournment to seek such representation."

[7] On 26 May 2011, Suncoast Community Legal Service Inc wrote to QCAT on behalf of the applicant stating that the applicant wished to expand upon the initial ground of her application and to add the following further ground:

> "…the Member failed to consider the consequences of the termination order in [the applicant's] individual circumstances (ie likely homelessness) in deciding what is 'fair and equitable to the parties to the proceedings'."

Ground 1 – Denial of procedural fairness

[8] The application to this Court for leave to appeal alleged that the applicant had been denied procedural fairness at first instance.

[9] On the hearing of the application, counsel for the applicant, who appeared *pro bono*, argued that the failure of the member to give the applicant adequate time within which to obtain legal representation constituted a denial of procedural fairness as the applicant, being illiterate, was at an obvious disadvantage which could have been overcome by an adjournment.

[10] The findings of the President relevant to this ground are:

> "[9] [The applicant] told the Magistrate that she had sought advice, and that she had been told to ask for a further adjournment. It appears that the learned Magistrate refused the adjournment because he understood that [the applicant] wanted representation through Legal Aid, even though Legal Aid did not offer assistance in these types of matters. The learned Magistrate was not aware of QPILCH, and he did not know that QPILCH might be able to represent [the applicant] at the hearing.
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> [10] The transcript of 16 May 2011 puts the learned Magistrate's decision to proceed in context: he was acutely aware of the need to provide natural justice; [the applicant] had the assistance of TAAS; and, she had already contacted a lawyer, who could not attend on 16 May 2011. The Magistrate advised [the applicant] that he did not think Legal Aid would be able to assist her. His decision on 16 May to allow only a short adjournment for two days was deliberate because of the serious nature of the conduct alleged against her, and her daughter, and the fact that [the applicant] should have sought advice 'a long time ago'.
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> [11] [The applicant] knew, or should have known, that the learned Magistrate would proceed with the hearing on 18 May 2011, whether or not she was represented. She had the benefit of legal advice prior to the hearing on 16 May 2011, and she was assisted by TAAS at that hearing.
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> [12] In all the circumstances, I am satisfied that the learned Magistrate did give [the applicant] a reasonable opportunity to be represented at the hearing on 18 May 2011 and, therefore, to ensure procedural fairness."

[11] It was submitted by counsel for the applicant that the finding in para [12] of the reasons was based on, and infected by, factual errors on the part of the President.

[12] I will deal with each of these alleged errors in the order in which they were raised in the applicant's outline of argument.

The applicant was not assisted by the Tenant Advisory and Advocacy Service (Qld) (TAAS)

[13] The applicant submitted that Ms Gillies of TAAS was not assisting the applicant on 16 May 2011 as she was in court that day for another matter and offered to assist in the applicant's case only once the matter had commenced and the applicant had asked for help in writing things down. A facsimile of 17 May stated that Ms Gillies had not been able to obtain legal representation or other assistance for the applicant in time for the hearing on 18 May and that TAAS was not able to act for her on that day. TAAS did not assist the applicant at the hearing on either 16 or 18 May and page 7 of the transcript of the 16 May hearing, referred to in footnote 11 of the President's reasons, showed that to be the case.

[14] The transcript of the hearing on 16 May[1] shows that Ms Gillies asked for the member's permission to assist the applicant and that such permission was given. Ms Gillies stated that she was from TAAS. Ms Gillies subsequently participated in a discussion with the member. The respondent's representative advised that she had an officer contact the applicant concerning the hearing and noted that the applicant said that "she was in touch with a solicitor to advise her" but that "… he couldn't attend because he had another matter to do". Asked what solicitor she was going to get, the applicant said that she would have to apply for Legal Aid. The member responded that he did not think Legal Aid would "get involved".

[15] The member had a discussion with the applicant with a view to ascertaining the extent to which the applicant was aware of the nature of the proceedings and her ability to deal with them. After discussion and after the member noted, not for the first time, his concern that procedural fairness be extended to the applicant, he said that he was prepared to give the applicant "…a short period of time to get some legal advice and get to a solicitor so he can come and argue for [her]". Ms Gillies queried whether QCAT permitted such legal representation at hearings and was told by the member that a party could apply to be represented but that he "very rarely allowed it". The member observed to the applicant, in effect, that she should have sought advice "a long time ago". He then stood the matter down so that the applicant could approach Legal Aid immediately.

[16] As the above discussion shows, there was no inaccuracy in the observation of the President that the applicant had the assistance of TAAS. The President did not indicate the nature or extent of the assistance rendered. The observation, in any event, is of little significance as it dealt only with events on 16 May 2011 and not with the hearing on 18 May and the refusal of an adjournment on that day.

The applicant did not have "a long time" to obtain legal advice

[17] These points were made on behalf the applicant. The respondent's application was forwarded to the applicant on or around 5 May 2011. It is not clear when the respondent's material was served on her, but it is unlikely that the applicant received it prior to 9 May, which was a week before the hearing. She was unable to read and had to wait for her daughter to return home to read the material to her. The applicant was of limited means and relied either on Legal Aid or some other community legal organisation for assistance. There is evidence in the transcript of the proceedings on 16 May that the applicant had been told by the respondent that she was not allowed to be legally represented. She was thereby dissuaded from attempting to have a representative present in court. Consequently, there was no evidence to suggest that the applicant should have sought advice a long time before the hearing and the President erred in law in making this finding.

[18] This challenge distorts the President's findings.

[19] In para [10] of his reasons, the President analyses the member's reasons for allowing only a short adjournment on 16 May. The President did not find that the applicant had "a long time" within which to obtain legal advice. He was merely adverting to the reasons given by the member in the presence of the applicant. The member's observations about times have to be seen in the context of the proceedings. The respondent was pressing for an urgent determination of the

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1 At page 7.

matter. The gravity of the allegations made by other tenants and their evidence as to the detriment being suffered by them justified an expeditious hearing and determination.

The applicant did not know that the proceeding would proceed on 18 May 2011 irrespective of whether she had obtained legal representation

[20] It was submitted by the applicant that the only indication given by the member on 16 May was that the proceeding was being adjourned to allow the applicant to obtain advice and to have a solicitor appear on her behalf. The member's observation to the applicant, "I'm prepared to give you a short period of time to get some legal advice and get to a solicitor so he can come and argue for you", it was argued, could not be interpreted reasonably to mean that if the applicant was not able to obtain representation by that time she would be forced to conduct the trial on her own.

[21] Counsel further submitted that by this time, the applicant's inability to represent herself effectively had been made manifest. If the trial were to proceed on 18 May 2011, the applicant would be left to conduct the trial without the ability to make notes or to read the affidavits tendered on behalf of the respondent on which she was to cross-examine. There was, thus, no evidence upon which the President could reasonably have found that the applicant knew or should have known that the trial would proceed irrespective of whether she was able to obtain legal representation.

[22] The tenor of many of the member's statements in the hearing of 16 May was that the member regarded it as necessary that the proceeding be determined swiftly and that any adjournment to be granted on 16 May would be extremely brief. He observed to the respondent's representative towards the end of the hearing, "I'm going to give her the adjournment but it's for a short period of time. I don't think that she's going to get Legal Aid by Wednesday".

[23] The member had reinforced his requirement that the matter be determined as soon as possible by insisting that the applicant make an appointment with Legal Aid that day and return to him immediately with written evidence of it.

[24] The President referred to the assistance of TAAS in his reasons implicitly making the point that if the applicant would otherwise have been under any misapprehension about the likely sequence of events, Ms Gillies would have been likely to have disabused her of it.

[25] At the commencement of proceedings on 18 May, the member asked if Ms Gillies was coming and was told by the applicant that Ms Gillies had asked her to request a further adjournment because "she couldn't find a solicitor at the moment". The member asked "Who's QPILT? (sic)". He noted that the applicant had an appointment with them at 3 pm on the previous day and was told by the applicant that "…they don't do this sort of case". He then asked the applicant if she wanted the matter to proceed that day. The applicant replied, "Not really I don't".

[26] After a brief discussion, the member refused the application for an adjournment. He then made sure that the applicant understood the nature of the application and the grounds upon which it was brought. He ascertained that the applicant's daughter was present; that she could read and write and that she was able to assist. He asked whether there was somebody else the applicant wanted to be at court. She inquired "…what about my other witness?" The applicant's daughter said:

> "We do [have] another witness that will arrive within the next five to 10 minutes. I've given him a call. I've asked him to meet us at the court house on this level if that's okay."

[27] The member asked what the witness would say and was told that he was "going to tell you the facts what happened there that day". The member then wrote down Ms Gillies' telephone number and suggested that the applicant telephone her and tell her that the application for an adjournment had been refused and that he was allowing her half an hour within which to obtain assistance.

[28] A Ms Field then spoke. It appears that she was a friend of the applicant's daughter and was there to assist the applicant by note taking. The member had the respondent's representative identify the affidavits she was relying on and ascertained that they had been read to the applicant. He inquired of Ms Field whether she wanted to read them all before the proceeding commenced or deal with them as they proceeded. Ms Field indicated that the latter course suited her.

[29] It was tolerably clear from the foregoing that the applicant had taken steps to be in a position to proceed with the hearing on 18 May if her application for an adjournment was refused. That provides further support for the finding that the applicant knew, or should have known, that the member would proceed with the hearing on 18 May whether or not she was represented.

[30] The complaint about the applicant's inability to make notes and read affidavits lacks substance. As noted above, the affidavits had been read to the applicant before the hearing.

[31] Ms Field and the applicant's daughter were available to make notes, assist and further read the contents of affidavits. In this regard, the President, with respect, accurately observed:

> "It is compelling, from the transcript, that despite [the applicant's] inability to read or write, she was able to present her case; and, that the learned Magistrate was at pains to ensure she had a fair opportunity to do so."

Conclusion

[32] For the above reasons, the applicant has failed to establish an error of law. It is thus strictly unnecessary to consider the submission that there was a substantial injustice to be corrected. In that regard, the applicant argued that by allowing only two days for her to obtain legal representation, the purpose of allowing the representation in the first place was not satisfied. It was further submitted that as the consequences for the applicant of failure in the proceedings were grave (the immediate termination of her tenancy) she was at a decided disadvantage. That disadvantage should have been reduced by an adjournment of sufficient duration to allow her to obtain appropriate representation. The applicant was thus denied procedural fairness.

[33] The member had before him an email from a person described as "Solicitor, Self Representation Service (QCAT)" under that "Queensland Public Interest Law Clearing House Incorporated". It explained that:

> "The Service has been established to provide free legal assistance in a number of areas, including residential tenancy, within the Queensland Civil and Administrative Tribunal's jurisdiction to people who cannot afford a lawyer. It is important to note that QPILCH provides a self representation service. We do not act as a legal representative. Our role is to assist people to understand the legal process and law."

[34] It did not appear from that communication that QPILCH would assist the applicant at the actual hearing. Moreover, the member did not know, and had no means of knowing, on 18 May, how long it would take for legal representation to be obtained or for that matter, whether it would be possible for legal representation to be obtained. He was aware that the applicant had been "in touch with a solicitor to advise her" prior to the appearance on 16 May and that this solicitor had been prevented from appearing that day because of "another matter". When considering the disadvantage to the applicant of having to proceed with the hearing without legal representation he was entitled to have regard to the possible consequences of the delay for residents of the apartment building. It was necessary for that matter to be balanced against the considerations favouring an adjournment. The matters in issue in the proceedings were not complex in any way and the member made sure that the applicant understood them. It was apparent from the transcript that she did. In the circumstances, although the applicant was at a disadvantage in not having legal representation on the hearing on 18 May, she was not denied natural justice.

[35] There is another matter relevant to the question whether leave to appeal should be granted. The respondent argued that, if there was any error on the part of the President, the applicant failed to show that it caused substantial injustice.[2] The tenancy had been terminated, no order was sought with a view to restoring the applicant's occupancy and it was contended that any appeal would lack utility.

[36] Counsel for the applicant submitted that the appeal did have utility as:

(a) the applicant's future access to public housing may be affected by the fact that the subject tenancy was terminated;

(b) a review of the circumstances in which a disadvantaged litigant should be granted leave to be legally represented in the QCAT may have a beneficial effect on future proceedings in that Tribunal; and

(c) guidance as to how leave is to be practically implemented so as to afford procedural fairness to a disadvantaged litigant is likely to be of benefit to the public and the QCAT.

[37] Having regard to my conclusion that the applicant has failed to show any error of law on the part of the President, it is unnecessary to address these arguments. However, counsel for the applicant submitted that the grant of leave to appeal was merited by the matters raised in paras [37] (b) and (c) above. I am unable to accept that submission. It is inconsistent with the role of a court.

[38] In *Bass v Permanent Trustee Company Ltd*,[3] Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ observed that it was central to the purpose of a judicial determination that it "…includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy".

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2 See *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41 at 46.

3 (1999) 198 CLR 334 at 355.

[39] Their Honours then said:[4]

> "In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*,[5] Kitto J said:
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> > '[J]udicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons … [T]he process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which … entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.'
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> Similarly, Professor Borchard in his pioneering work, *Declaratory Judgments* stated:
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> > 'A judgment of a court is an affirmation, by the authorized societal agent of the state … of the legal consequences attending a proved or admitted state of facts. It is a conclusive adjudication that a legal relation does or does not exist. The power to render judgments, the so-called "judicial power", is the power to adjudicate upon contested or adverse legal rights or claims, to interpret the law, and to declare what the law is or has been. It is the final determination of the rights of the parties in an action which distinguishes the judgment from all other public procedural devices to give effect to legal rights.' [Footnotes omitted]
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> Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions[6] or to give advisory opinions."

[40] In *Luna Park v The Commonwealth*,[7] to which their Honour's referred with apparent approval, Knox CJ, with whom the other members of the Court agreed, said:

> "It has always been the rule that the Court does not answer questions based on a hypothetical state of facts. If authority were needed for that, it will be found in the case of *Glasgow Navigation Co. v. Iron*

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4 At 355 – 356.

5 (1970) 123 CLR 361 at 374.

6 *Luna Park Ltd v The Commonwealth* (1923) 32 CLR 596 at 600, per Knox CJ; *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442 at 451, per Isaacs J; *The University of NSW v Moorhouse* (1975) 133 CLR 1 at 10, per Gibbs J.

7 (1923) 32 CLR 596 at 600.

> *Ore Co.*, where Lord Loreburn L.C. stated that it was not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts. If this declaration were made, it would have no binding effect in the true sense at all. It would be no more than an abstract opinion in the nature of advice that, if the company did certain things, it would or would not become liable to pay a certain tax."

[41] The principles articulated in *Bass* have been constantly applied.[8] Counsel for the applicant relied on the decision of this Court in *Maher v Adult Guardian & Anor*.[9] In that case, the Court granted leave to appeal and dealt with the appeal despite acknowledging "the absence of a subject matter of legal controversy". The Court took this approach at the request of the applicant and with the support of the only other party represented before it. This explains what was done. Whether the Court's approach was justified in light of the authorities was not the subject of argument and need not be addressed here.

[42] There is one remaining matter. The applicant sought to rely on an affidavit sworn by herself and another sworn by Ms Rogers (neé Gillies). Counsel for the applicant properly conceded that there was no proper basis for admissibility of the further evidence except to the extent that:

(a) the applicant's affidavit in paragraph 28 dealt with the applicant's future accessibility to public housing; and

(b) Ms Roger's affidavit in paragraph 7 dealt with an error in the transcript of the proceedings on 16 May.

[43] The respondent sought leave to read an affidavit of Mr Kelleher in response. It accepted the accuracy of Ms Roger's evidence concerning the transcript and swore to the respondent's housing policies in paragraph 8 and exhibit BK2.

[44] I would receive only these parts of the affidavits in evidence.

[45] For the above reasons, I would order that:

(1) paragraph 28 of the affidavit of the applicant sworn 13 March 2012, paragraph 7 of the affidavit of Cim Rogers sworn 14 March 2012, and paragraph 8 of and exhibit BK2 to the affidavit of Brian Kelleher sworn 9 May 2012 be received in evidence; and

(2) the application for leave to appeal be refused with costs.

[46] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour.

[47] **MARTIN J:** I agree, for the reasons given by Muir JA, with the orders he proposes.

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[8] e.g. *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582; *Momcilovic v The Queen* [2011] HCA 34; and *Taylor v O'Beirne & Ors* [2010] QCA 188.

[9] [2011] QCA 225.