SUPREME COURT OF QUEENSLAND

CITATION:	*Hope & Anor v Brisbane City Council* [2013] QCA 198
PARTIES:	**ROY HOPE** **DELIA HOPE** (applicants) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 743 of 2013 LAC No 7 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from the Land Appeal Court
ORIGINATING COURT:	Land Appeal Court at Brisbane
DELIVERED ON:	23 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	23 May 2013
JUDGES:	Muir and Gotterson JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is refused.** **2. The applicants pay the respondent's costs of the application.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – GENERALLY – where the applicants' land was taken by the respondent under the *Acquisition of Land Act* 1967 (Qld) – where the applicants served the respondent with a notice of appeal out of time – where the applicants apply for leave to appeal a decision of the Land Appeal Court – where the applicants contend that the Land Appeal Court made an error or mistake of law in construing the *Land Court Act* 2000 (Qld), s 64, s 65 and s 57(c) – whether an appeal to the Land Appeal Court is incompetent if the applicants fail to serve the notice of appeal on the respondent within 42 days after the order was made – whether serving the respondent with a notice of appeal out of time can be cured by an order of the court under the *Land Court Act* 2000 (Qld), s 57 *Acquisition of Land Act* 1967 (Qld), s 20(2) *Judicature Act* 1876 (Qld), s 9, s 10, O 56 r 6, O 57 r 2 *Land Court Act* 2000 (Qld), s 64, s 65, s 57(c), s 74(1)(a), s 74(2)

Land Court Rules 2000 (Qld), r 3, r 7
Rules of the Supreme Court 1900 (Qld), O 70 r 2, O 70 r 4
Supreme Court Act 1867 (Qld), s 38
Uniform Civil Procedure Rules 1999 (Qld), r 8(1)

Agtrack (NT) Pty Ltd v Hatfield (2005) 223 CLR 251; [2005] HCA 38, cited
Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1; [1932] HCA 9, cited
Austral Pacific Group Ltd (In liq) v Airservices Australia (2000) 203 CLR 136; [2000] HCA 39, cited
BP Australia Ltd v Brown (2003) 58 NSWLR 322; [2003] NSWCA 216, cited
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26, cited
David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265; [1995] HCA 43, cited
Gordon v Tolcher (2006) 231 CLR 334; [2006] HCA 62, cited
Hope v Brisbane City Council [2012] QLAC 9, related
Mills v Dawn Block Gold Mining Company Ltd (1882) 1 QLJ 61, cited
Newtronics Pty Ltd (Receivers and Managers Appointed) (in liq) v Gjergja (2008) 219 FLR 1; (2008) 67 ACSR 468; [2008] VSCA 117, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited

COUNSEL: A Skoien for the applicants
M Hinson QC, with M Williamson, for the respondent

SOLICITORS: McCarthy Durie Lawyers for the applicants
Brisbane City Legal Practice for the respondent

[1] **MUIR JA:** I agree that the application for leave to appeal should be refused with costs for the reasons given by Jackson J.

[2] **GOTTERSON JA:** I agree with the orders proposed by Jackson J and with the reasons given by his Honour.

[3] **JACKSON J:** The applicants apply for leave to appeal a decision of the Land Appeal Court to the Court of Appeal on the ground of error or mistake of law on the part of the Land Appeal Court.[1]

[4] The applicants contend that the Land Appeal Court made an error or mistake of law in construing ss 64, 65 and 57(c) of the *Land Court Act*. The question is whether an appeal to the Land Appeal Court is incompetent if a party intending to appeal to that

1 Sections 74(1)(a) and 74(2) of the *Land Court Act* 2000 (Qld) ("the *Land Court Act*").

court fails to serve the notice of appeal against the order of the Land Court on the other party to the proceeding within 42 days after the order was made. The Land Appeal Court held that the answer to that question was "yes".

[5] The critical sections are ss 64 and 65 of the *Land Court Act* as follows:

> "**64 Right of appeal to Land Appeal Court**
>
> A party to a proceeding in the Land Court may appeal to the Land Appeal Court against all or part of the decision of the Land Court.
>
> **65 Notice of appeal**
>
> (1) A party intending to appeal against a decision of the Land Court must, within 42 days after the order containing the decision is made by the court, 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."

[6] The factual context is straightforward. The applicants' land was taken by the respondent under the *Acquisition of Land Act* 1967 (Qld). The Land Court assessed the compensation to which the applicants were entitled under s 20(2) of that Act. On 28 August 2012, the Land Court made an order assessing the compensation at $230,000 and provided that interest was payable at a particular rate.

[7] 9 October 2012 was 42 days after the order. On that day, the applicants filed a notice of appeal to the Land Appeal Court, pursuant to s 64 of the *Land Court Act*. It is accepted for the purposes of the application that the filing of the notice of appeal constituted service on the registrar of the Land Appeal Court for the purposes of s 65(1)(b) of the *Land Court Act*.

[8] However, the notice of appeal was not served on the respondent, as the other party to the proceeding in which the decision was made, until 10 October 2012. Thus, service was one day late.

[9] The applicants' primary contention is that non-compliance with s 65(1)(a) does not render the proceeding on appeal invalid, on the proper construction of ss 64 and 65.

[10] Alternatively, the applicants contend that the invalidity can be cured by an order made under s 57(c) of the *Land Court Act*. That section provides:

> "**57 Powers of Land Appeal Court**
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> The Land Appeal Court may do 1 or more of the following—
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> (a) suspend the operation of the decision and remit the matter, with or without directions, to the court or tribunal that made the decision to act according to law;
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> (b) affirm, amend, or revoke and substitute another order or decision for the order or decision appealed against;
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> (c) make an order the Land Appeal Court considers appropriate."

[11] The Land Appeal Court rejected both contentions. As to the operation of s 65(1), it said:

> "In our opinion, the requirements of service of s 65(1) of the Act cannot be considered to be procedural going only to the mode of enforcement of the right of appeal conferred by s 64. The effect of s 64 is that a new right is created, that is a right of appeal to the Land Appeal Court, but that right is immediately limited by s 65(1) which imposes a condition which is of the essence of the new right. There is nothing in the Act to indicate that the s 65(1) requirements are procedural only. The section is in mandatory terms and there is no provision for the Court to extend the time limit or for the condition to be waived by the parties. The section must be given a meaning and to hold that the time limit need not be observed would be contrary to the clear words of the section …
>
> The mandatory language used in s 65, together with its proximity to s 64 which creates the right of appeal, lead us to conclude that it is a condition of the institution of an appeal that there be compliance with s 65. A failure to do so means that there is no valid appeal."[2]

[12] As to the operation of s 57, the Land Appeal Court said:

> "A prerequisite to the exercise of the powers in s 57 is that the Land Appeal Court must have jurisdiction before it may exercise those powers. The Land Appeal Court only has jurisdiction if a valid appeal is instituted, that is one which is filed and served in accordance with ss 64 and 65 of the Act."[3]

[13] The reasons that the Land Appeal Court provide in support of those conclusions are detailed and include reference to the relevant sections, a consideration of the operation of those and other sections of the Act, as context, and a consideration of the legislative history of both ss 64 and 65 and other relevant provisions. As well, the reasons consider the relevant principles of statutory interpretation in the context of cases which provide a framework for the comparison of the operation of ss 64 and 65 according to the contentions of both the applicants and the respondent.

[14] I agree with the reasons of the Land Appeal Court in reaching the conclusions set out above. Therefore, it is largely unnecessary for me to expand upon that court's reasons. However, I would add some observations which confirm, in my view, the conclusions to which the Land Appeal Court came.

[15] First, *Project Blue Sky Inc v Australian Broadcasting Authority*[4] is not only relevant in this case because it is a leading case upon the principles of statutory interpretation, by which the legal meaning of the sections is to be ascertained, but also because it is authority for the proposition that:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends on whether there can be discerned a legislative purpose

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2 *Hope* v *Brisbane City Council* [2012] QLAC 9 at [30] and [32].

3 At [40].

4 (1998) 194 CLR 355; [1998] HCA 28.

> to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue."[5]

[16] Secondly, in my view, the Land Appeal Court rightly characterised the question as whether the requirement of service on the other party within time was a condition of the essence of the right of appeal or procedural, going only to the mode of enforcement of that right. That approach is one endorsed in many cases in analogous circumstances in the High Court.[6] As was said by Spigelman CJ in *BP Australia Ltd v Brown*,[7] the relevant principle of statutory interpretation is stated in the joint judgment of Gavan Duffy CJ and Dixon J in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*[8] as follows:

> "…When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."[9]

[17] Thirdly, in construing the "new right" given by the particular provisions in this case, it is as well to bear in mind that a right of appeal and a power on appeal to set aside the decision appealed from and to make other orders in lieu thereof are creatures of statute alone and it is in and from the statute that the scope of the relevant right and power must be ascertained.

[18] It serves no great purpose to draw broad analogies between the powers of one court to extend time and the powers of another court operating under different statutory provisions and powers. But as a matter of history, and in the Queensland context, the first creation of a general right of appeal from a judgment of a single Judge comprising the Supreme Court of Queensland to a Full Court was itself a creature of statute, in the form of s 38 of the *Supreme Court Act* of 1867 (Qld) and ss 9 and 10 of the *Judicature Act* 1876 (Qld), the latter Act having been modelled on an English progenitor. The time for bringing an appeal was contained in the rules of court.[10]

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5 At [91].

6 Recent examples are *David Grant & Co Pty Ltd v Westpac Banking Corporation & Ors* (1995) 184 CLR 265 at 276-277; [1995] HCA 43 at [28]-[29]; *Austral Pacific Group Ltd (In liq) v Airservices Australia* (2000) 203 CLR 136 at 148-149; [2000] HCA 39 at [32]; *Gordon v Tolcher & Anor* (2006) 231 CLR 334 at 347-348; [2006] HCA 62 at [37]–[40]; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251 at 268-269; [2005] HCA 38 at [51] and *Newtronics Pty Ltd (Receivers and Managers Appointed) (in liq) v Gjerjga* (2008) 67 ACSR 468 at [53]–[58]; [2008] VSCA 117.

7 (2003) 58 NSWLR 322 at 331; [2003] NSWCA 216 at [42].

8 (1932) 47 CLR 1 at 7; [1932] HCA 9.

9 See also *David Grant & Co Pty Ltd* at 276.

10 Order 57 r 2 of the rules of court, in the schedule to the *Judicature Act*, required that an appeal be brought within a period after pronouncing a judgment or order. Order 56 r 6 provided that the court or a Judge had power to enlarge the time for doing any act or taking any proceeding.

[19] As early as 1882, in *Mills v Dawn Block Gold Mining Company Ltd*,[11] an application was made to extend the time for appealing against a judgment provided for under those rules. The court took the view that the power under those rules to enlarge or abridge the time, for doing any act or taking any proceeding, conferred the power to extend the time for bringing an appeal. In other words, the power to extend time was contained in the rules which themselves limited the time by which the appeal had to be brought. The point for present purposes is that the particular rules contained an express power to extend the time in question, on their proper construction.

[20] Fourthly, the applicants' submissions make something of the structure of ss 64 and 65, because s 64 confers the right of appeal whereas s 65 provides a time for service of the notice of appeal. The applicants further seek to drive a wedge between ss 64 and 65 by their contention that under rr 3 and 7 of the *Land Court Rules* 2000 a proceeding is started in the Land Appeal Court by filing a notice of appeal. The point made is that the appeal is "started" before the notice of appeal is served in compliance with s 65.

[21] There is some untidiness in the application of r 7 in starting an appeal and the operation of s 65. That is reflected in the fact that s 65(1)(b) requires that the notice of appeal be served on the registrar of the Land Appeal Court in circumstances where the filing of the notice of appeal in the registry itself is treated as constituting that service.

[22] The explanation for the disconformity lies in the differences between the procedural model that obtains under the *Land Court Rules* and earlier forms of rules of court. The *Land Court Rules* owe their origin to the *Uniform Civil Procedure Rules* 1999, which is where the language that "a proceeding starts when the originating process is issued by the court" first appeared.[12] In earlier times, under earlier rules of court, a proceeding by way of appeal was brought by a notice of motion which was served and filed[13] and a time was provided for service.[14] Section 65 perhaps owes its form to that kind of procedural model.

[23] However that may be, the important point is that, as the Land Appeal Court concluded, service of the notice of appeal in accordance with s 65 is part of the institution of an appeal under the right conferred by s 64. It is important that the requirement of service on the other party to the proceeding within 42 days is one that appears in the *Land Court Act* itself and not in the rules of court which were made as subordinate legislation under s 214 of that Act.

[24] Lastly, the Land Appeal Court found it "noteworthy" that the legislative predecessor of s 65, s 44(11) of the *Land Act* 1962 (Qld), contained an express power to proceed where the notice of appeal had not been served within 42 days after the pronouncement of the decision but had been served not later than 20 days after that, provided that the appellant satisfied the Land Appeal Court of certain matters. That was an indication that "the absence of a similar power to extend time in the *Land Court Act* 2000 reflects an intention on the part of the legislature that the time limit

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11 (1882) 1 QLJ 61.

12 *UCPR* 8(1).

13 For example, order 70 r 2 of the *Rules of the Supreme Court* 1900, which was modelled on the form of the English rules of court of the time and the predecessor rules in Queensland from 1876 and as amended in 1894.

14 For example, order 70 r 4 of the *Rules of the Supreme Court* 1900.

prescribed by s 65(1) was to be mandatory for the commencement of a valid appeal."

[25] Two observations may be made about that point. First, it is permissible as a matter of statutory interpretation to have regard to the legislative history in the form of prior legislation in that way.[15] Secondly, the Land Appeal Court rightly treated that matter as a salient point – they said it was "noteworthy" and that the absence of a similar power in s 65 "reflects an intention" that the time limit was to be mandatory. But that did not deflect the Land Appeal Court from the primary task of construing the text of ss 64 and 65, in the context of the other provisions of the *Land Court Act*.[16]

[26] For those reasons, in my view, the decision of the Land Appeal Court was right for the reasons which they gave. It follows that the application for leave to appeal should be refused with costs.

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15 For example, *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 306, 311-312 and 330-331; [1981] HCA 26, which is often seen as one of the cases which established the modern approach to statutory interpretation in Australia. And see Pearce & Geddes, *Statutory Interpretation in Australia*, 7 ed at [3.31].

16 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47; [2009] HCA 41at [47].