SUPREME COURT OF QUEENSLAND

CITATION:	*Reihana v Davern & Anor*[2014] QSC 127
PARTIES:	**TONI COLIN REIHANA** (applicant) **v** **TREVOR DAVERN (ADJUDICATOR)** (first respondent) **BEENLEIGH SHOW SOCIETY** (second respondent)
FILE NO/S:	BS 9724/13
DIVISION:	Trial
PROCEEDING:	Originating Application
DELIVERED ON:	12 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2014
JUDGE:	Alan Wilson J
ORDER:	**Application dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the applicant seeks judicial review of a decision of an adjudicator of the Queensland Civil and Administrative Tribunal – where the applicant alleges that the adjudicator failed to consider one aspect of relief sought in his application by making the decision to adjourn the proceeding so that it could go to a compulsory conciliation conference – where s 156 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) precludes the application of the *Judicial Review Act* 1991 (Qld) to decisions of the Queensland Civil and Administrative Tribunal unless there is jurisdictional error – where there is an issue as to whether the adjudicator's decision demonstrates jurisdictional error – where the Queensland Civil and Administrative Tribunal has an internal appeals process which the applicant failed to use – where there are doubts as to whether an internal appeal would have been successful – where the application for judicial review was in any event made out of time – whether judicial review of the decision should be available *Judicial Review Act* 1991 (Qld), s 26 *Queensland Civil and Administrative Tribunal Act* 2009

(Qld), s 114, s 127, s 146, s 147, s 156, Part 8 Division 1, Schedule 3
Queensland Civil and Administrative Tribunal Rules 2009, r 88
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 291, s 416

Craig v South Australia (1995) 184 CLR 163, considered
Kirk v Industrial Relations Commission (NSW) (2010) 239 CLR 531, considered
Medical Board of Australia v Judge Horneman-Wren & Leggett [2013] QSC 339, considered

COUNSEL: Mr Reihana appeared on his own behalf

No appearance for the first respondent

Ms A Laylee, solicitor, for the second respondent

SOLICITORS: McCarthy Durie Lawyers for the second respondent

[1] **Wilson J**: Mr Reihana seeks judicial review of a decision of a QCAT[1] Adjudicator, Mr Davern, in a Tribunal matter which arose out of tenancy proceedings involving caravans on Beenleigh showgrounds.[2]

[2] His complaint is that, at a hearing in the Tribunal on 25 February 2013 before Mr Davern, the Adjudicator, wrongly failed to hear him about, and adjudicate upon, his claims to resist efforts by the Society and the local Council, which owns the showgrounds land, to evict him and his caravans.

[3] Affidavit evidence shows that Mr Reihana had, at that time, two caravans on Beenleigh Showgrounds; that they had been there for some considerable period; that he had no form of written tenancy agreement or licence for their presence, or his occupation of them; that part of the showgrounds land had been resumed by the Logan City Council for road construction in 2011; and, that these circumstances had been communicated to Mr Reihana in 2012 and, in early January 2013, the Society served him with a Notice to Leave under the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) (the RTRA).

[4] On the hearing date, 25 February last year, the Tribunal had a welter of applications before it. Prior to that hearing Mr Reihana had filed:

a) On 26 November 2012, an application for compensation for the costs of relocating his caravans against Ms Mundt, the secretary of the Show Society;

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1 Queensland Civil and Administrative Tribunal.

2 I had a recollection of some earlier involvement with the matter while QCAT President but could not recall the circumstances. Mr Reihana said that he wrote to me in that capacity with a complaint about the adjudicator's conduct, and the matter generally, and I replied saying his complaint could not be addressed until the proceedings had finished. Neither of the parties who appeared (Mr Reihana, and the Show Society) objected to my dealing with the matter and, in light of the paucity of my memory about what happened in it during my term as QCAT President and Mr Reihana's information about what had transpired in the Tribunal, in connection with my previous involvement, I was comfortable about doing so.

b) On the same day, an application for an interim order to restrain Logan City Council from proceeding with the road works which precipitated the need to move his caravans;

c) On the same day, an application in a minor civil dispute (residential tenancies) against Ms Mundt for 'relocation expenses' and similar claims;

d) On 4 January 2013, another application for compensation again relating to the relocation; and, other relief including relief in respect of a Notice to Leave the Society had served upon him the previous day;

e) On 16 January 2013, another application for an injunction; and

f) On the same day, an application to withdraw his proceedings commenced on 26 November for resolution of a minor civil dispute (residential tenancy) – item c, above).

[5] The applications for injunctions were refused on 11 February 2013.

[6] The transcript of the proceedings of 25 February[3] shows that the Adjudicator dealt with Mr Reihana's application for compensation relating to his forced relocation, but adjourned it on the ground that QCAT could not determine the matter unless and until the parties had undertaken a conciliation conference, as required by s 416 of the RTRA.

[7] Mr Reihana contends that his application in QCAT filed 4 January 2013 sought relief in the nature of a '*…ruling, stay or substantive decision over the Notice to Leave Without Ground component of an "urgent General Tenancy Dispute application"...*'.[4] The QCAT application he filed on that date does show a claim, tersely expressed, for relief under s 291 of the RTRA: '*Find lessor breached under (s.291(2)(3))'*. Those provisions prevent a lessor from giving a tenant a Notice to Leave because the tenant has brought proceedings under the RTRA which are '*retaliatory*'. They are plainly intended to deter landlords from acting in a bullying or overbearing manner, *in terrorem*, against tenants who attempt to assert rights in the Tribunal.

[8] Both parties have filed affidavits exhibiting a number of QCAT documents. It appears to be common ground that the hearing on 25 February was for direction in a proceeding numbered T27-13, which was the number allotted to Mr Reihana's application filed 4 January – i.e., the application which sought compensation but, also, relief under RTRA s 291 in respect of the Notice to Leave.

[9] It is true the learned Adjudicator did not make any decision about those matters at the hearing on 25 February. The fact a Notice to Leave had been served upon Mr Reihana was, however, mentioned several times,[5] and, indeed, it was shown to the Adjudicator.[6] The Adjudicator said on several occasions that Mr Reihana's

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3 Exhibit D2 to Mr Reihana's affidavit filed 28 February 2014, continuing in Exhibit D to Mr Reihana's affidavit filed 11 February 2014.

4 Origininating Application BS9724/13 filed by Mr Reihana on 15 October 2013, first paragraph.

5 Transcript ((Exhibit D2 to Mr Reihana's affidavit) at 1-2.5; 1-2.27.

6 T 1-3.23.

compensation claim must go through a conciliation process under the auspices of the Residential Tenancy Authority before QCAT could adjudicate upon it and, according to the order which issued from the Tribunal after the hearing, that was what was directed.[7]

[10] The failure at the hearing to address Mr Reihana's complaints about the Notice to Leave would be troubling but for three things. First, the caravans had by that time been moved and, as he himself said, the question of compensation was likely to be agreed. Secondly, his own application focussed primarily upon that question and only shortly and obliquely raised the question of a 'retaliatory' Notice to Leave.

[11] Thirdly, the Society brought a new proceeding in QCAT on 18 March 2013 seeking to terminate Mr Reihana's tenancy which was heard and determined in the Tribunal on 16 April 2013, and a termination order was made. On its face, that application relied upon Mr Reihana's purported non-compliance with the Society's Notice to Leave of 3 January. Mr Reihana did not appear at that hearing, nor did he resist the application in any other way, including by asserting the Notice offended s 291.

[12] He has never attempted to upset any QCAT decision by using the Tribunal's internal appeal procedures.[8] If he was dissatisfied with the Adjudicator's decision on 25 February, he had that course open to him.

[13] The first question is whether judicial review under the *Judicial Review Act* 1991 (Qld) (the JR Act) is actually available as a remedy for Mr Reihana in those circumstances. Unsurprisingly, in light of the Tribunal's internal appeal process, the QCAT Act provides in s 156 that the JR Act does not apply to '… *a decision or to the conduct of the tribunal in a proceeding other than to the extent the decision or conduct is affected by jurisdictional error'.*

[14] The learned Adjudicator who comprised the tribunal[9] was dealing with a proceeding[10] and made a decision – that the proceeding was imperfect, and should be adjourned for a necessary step to be taken. Unless jurisdictional error can be shown, Mr Reihana has no valid claim for relief under the JR Act.[11]

[15] The term *jurisdictional error* necessarily connotes some mistake around a court's or tribunal's power affecting its proper functioning, either by it misapprehending or disregarding the nature or limits of its functions or powers or acting wholly outside that jurisdiction.[12] Errors may extend to include instances where a tribunal acts in the absence of a jurisdictional fact; disregards a matter the legislation requires to be taken into account (but only as a condition of jurisdiction); or, misconstrues the statute which gives it power so that it misconceives the nature of the function it is performing.

[16] None of those things can be argued here. If the learned Adjudicator made an error, it was to simply fail to rule on one aspect of the relief Mr Reihana says he claimed

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7 QCAT order 25 February 2013, Exhibit B to Mr Reihana's affidavit filed 11 February 2014.

8 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (the *QCAT Act*), Part 8 Division 1.

9 Ibid, Sch 3 definition of 'tribunal'.

10 Ibid.

11 *Medical Board of Australia v Judge Horneman-Wren & Leggett* [2013] QSC 339 per Dalton J at [10].

12 *Craig v South Australia* (1995) 184 CLR 163 at 176ff; *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531 at 573-4.

in his tribunal application. Nothing in the transcript suggests that, if that mistake occurred, it involved a misunderstanding or misapprehension on the part the Adjudicator about his powers or the Tribunal's jurisdiction. He made orders and gave directions about what he apparently perceived was the primary issue between the parties – the compensation claim – and said nothing about Mr Reihana's application under s 291. Again, nothing in the transcript suggests that occurred because he wrongly doubted his power to do so or otherwise misapprehended his jurisdiction. If he made a mistake, it was one of oversight, not jurisdiction.

[17] (It should also be observed, in fairness to the Adjudicator, that if an error of that kind occurred it is unsurprising, in light of the numerous applications Mr Reihana had lodged by that time and the different kinds of relief they sought.)

[18] This is not a case in which Mr Reihana can point to any circumstance which would enable him to avoid the effect of s 156, and it operates to prevent him pursuing the relief he seeks here. For that reason alone his application must fail.

[19] In any event, his application faces other problems. His application for judicial review is out of time. It was brought on 15 October 2013, almost eight months after the hearing giving rise to his complaint. The JR Act generally provides that applications must be brought within 28 days of the decision being made: s 26. In the ordinary case that period begins to run when the decision has been recorded in writing and given to the applicant: s 26(1). Under s 26(2) the period starts on the '*relevant day*' and that term is defined, for present purposes, to mean the day when a document setting out the terms of the decision is given to the applicant: s 26(5)(d).

[20] If there is no prescribed period (and the QCAT Act does not contain one) the Court may consider an application if it was made within a 'reasonable' time: s 26(3), and in deciding what is reasonable the Court must have regard to the time when the applicant became aware of the decision: s 26(4).

[21] Mr Reihana exhibits, to his affidavit filed on 11 February 2014, a copy of a QCAT document headed 'Decision' obviously, on its face, relating to the proceedings on 25 February 2013. He does not say when or how he got it. The Adjudicator had power to make a decision directing an adjournment until the provisions of the RTRA had been met: QCAT Act, s 114. The 'Decision' document properly recorded that in terms of the QCAT Rules[13] (r 88) and took effect from the date it was made: QCAT Act, s 127. It is compelling that he must have received it shortly after the hearing date.

[22] Although he struck, it appears, some delay in obtaining the transcript of the proceedings on 25 February the 'Decision' document was all he needed to see that no order had been made about the Notice to Leave – the gist of his complaint.

[23] Assuming, say, a week in the ordinary course to receive the Decision document, time under s 26 is likely to have expired by, at the latest, the end of March 2013. No explanation is offered for the delay until October. In the absence of anything of that kind there is no ground for exercising, in his favour, the discretion s 26 leaves open. His application was many months late, and that fact alone would be an insurmountable barrier for him.

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13 *Queensland Civil and Administrative Tribunal Rules* 2009.

[24] There will often be, of course, a natural concern that a self-represented party is not unfairly or inadvertently shut out of a remedy by confusion or misunderstanding about legislation.

[25] Mr Reihana had sufficient gumption to file various applications in the Tribunal and must, at some point, have noticed that QCAT has its own internal appeal process and that the QCAT Appeal Tribunal has power, under both ss 146 and 147 of the QCAT Act, to make appropriate remedial orders where, for example, an appellant can establish some mistake of the kind he complains of. .

[26] It is also appropriate, despite these conclusions, to reflect upon the merits of Mr Reihana's application. If a remedy is available it must be one which contains a *jurisdictional error*. Although his submissions do not address the matter at all, for the reasons set out earlier nothing of that kind is apparent here. Moreover, it is clear that an appeal by Mr Reihana within QCAT would have had little prospect of success. He did not press, before the Adjudicator, for a determination of the s 291 question. He did not dispute the termination proceedings heard two months later. In denying him the remedy he has wrongly pursued here he is not, in any sense, being denied redress in the form of a legal remedy which he might have successfully pursued in some other way.