SUPREME COURT OF QUEENSLAND

CITATION:	*Warren v Legal Services Commissioner* [2014] QCA 150
PARTIES:	**ALEXIA MARGARET WARREN** (appellant/applicant) **v** **LEGAL SERVICES COMMISSIONER** (respondent)
FILE NO/S:	Appeal No 8960 of 2013 QCAT No 47 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application for Stay of Execution
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED EX TEMPORE ON:	20 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	20 June 2014
JUDGES:	Fraser and Morrison JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application is refused.** **2. The appeal is dismissed.** **3. The appellant is to pay the respondent's costs of the application and the appeal.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where the respondent started a discipline application against the appellant and subsequently sought an order for substituted service – where at the directions hearing the appellant opposed the making of that order but admitted she had a copy of the discipline application – where the tribunal avoided debating questions of service and made directions to progress the discipline application – where the appellant argues she has not been duly served – whether the tribunal erred in making directions to advance the discipline application instead of making directions to advance the respondent's application for substituted service *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 28(3)(d), s 37(2)

Queensland Civil and Administrative Tribunal Rules 2009 (Qld), r 39, r 41

Hope v Hope (1854) 4 De G M & G 328; 43 ER 534; [1854] EngR 805, cited
Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2011] 2 Qd R 114; [2010] QCA 119, cited
Pino v Prosser and Hassan [1967] VR 835; [1967] VicRp 107, cited
Place Design Group Pty Ltd v Hassard [2013] QCAT 742, cited
United Group Resources Pty Ltd v Calabro (No 4) [2010] FCA 791, cited

COUNSEL: A M Warren (*sol*) for the appellant
M D Nicolson, with S L Lane, for the respondent

SOLICITORS: Lexie Warren Solicitor for the appellant
Legal Services Commissioner for the respondent

FRASER JA: The appellant solicitor is an Australian legal practitioner. On 12 February 2013 the respondent commissioner started a discipline application against the appellant under s 452 of the *Legal Profession Act* 2007 (Qld) by filing the application in the Queensland Civil and Administrative Tribunal. On 4 July 2013 the respondent filed an application in that tribunal seeking an order for substituted service. The tribunal subsequently convened a directions hearing for 27 August 2013. The respondent notified the appellant that the respondent would pursue the application for substituted service at the directions hearing. The appellant appeared at the directions hearing. She informed the tribunal that she had received a copy of the discipline application from the respondent but she argued that she had not been duly served in accordance with the applicable rules. She argued that directions should be made to progress the respondent's application for an order for substituted service.

The tribunal considered that in circumstances in which the appellant had received a copy of the discipline application, the appropriate course was to make directions to advance that application rather than to embark upon a lengthy debate about questions of service. The tribunal made directions that the appellant file and give to the respondent a copy of her response to the disciplinary application and that the matter be listed for a compulsory conference.

The appellant has appealed against those directions and she also filed an application seeking a stay of the directions until further order and leave to adduce further evidence in the form of her 25-page affidavit. Most of that affidavit concerns criticisms of aspects of the respondent's conduct and application for an order for substituted service, but the affidavit also confirms that the appellant received a copy of the discipline application from the respondent in July 2013.

The respondent raised a preliminary contention that the appeal is incompetent because the procedural directions made in the tribunal did not amount to a decision of the tribunal within the meaning of s 468(1) of the *Legal Profession Act*. The respondent argued that this expression connotes a decision under s 456 of that Act which substantively disposes of the discipline application. It is not necessary to decide that question. The appeal is bound to fail in any event.

The appellant did not contest the territorial or substantive jurisdiction of the tribunal to hear the discipline application against her. The premise of her appeal is that she has not been duly served with the discipline application. Upon that premise, the appellant argued that the tribunal should not have made procedural directions to advance the discipline application, but should instead have made directions to advance the respondent's application for an order for substituted service. The appellant also argued that she was denied procedural fairness and that the tribunal's reasons were inadequate.

None of these arguments has merit.

More than 150 years ago, Lord Cranworth LC, speaking in the context of orders for substituted service, said in *Hope v Hope* (1854) 4 De G M & G 328 at 342 that:

> "The object of all service is of course only to give notice to the party on whom it is made so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required."

In *Pino v Prosser and Hassan* [1967] VR 835 at 837, McInerney J referred to that passage and other authority and observed that it would be "… remarkable to the point of seeming absurdity… that the defendant who, on his own affidavit admits that he received the writ… should be held not to have been served." That general principle has been applied in many different statutory contexts, including in the case cited by the respondent, *United Group Resources Pty Ltd v Calabro (No 4)* [2010] FCA 791 at [29] to [31]. I note that it has also been applied in a recent decision of this Court, *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd* [2011] 2 Qd R 114 at 123 [31].

Section 37(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 required the respondent to "give a copy of the application" to the appellant. A note to that provision directs attention to the rules about how the copy "must, or may" be given. With qualifications that are not presently relevant, rule 39 of the *Queensland Civil and Administrative Tribunal Rules* 2009 provides that: "a document required to be given to an entity in a proceeding may be given to the entity in 1 of the following ways…". The first of the eight specified ways is: "… by delivering it personally to the entity in the way provided in the service practice direction…". The last specified way is "… in any other way directed by the tribunal". The appellant referred also to rule 41. In circumstances of the present kind, rule 41 empowers the tribunal to decide, by order, that an entity is taken to have been given a document on the day it came into the entity's possession or on a later day stated in the order.

It was not necessary for the tribunal to make any order under rule 41 or any direction under rule 39. Section 28(3)(d) of the *Queensland Civil and Administrative Tribunal Act* 2009 obliged the tribunal to act "with as little formality and technicality and with as much speed as the requirements of this Act, an enabling Act or the rules and a proper consideration of the matters before the tribunal permit…". That statutory context tends to confirm that the permissive and flexible procedural provisions in rules 39 and 41 are consistent with the application by the tribunal of the general principle that receipt by a defendant of an originating process constitutes good personal service. The tribunal's directions, which implicitly sanctioned the manner in which the respondent gave a copy of the application to the appellant, were valid and appropriate.

The applicant contended for a different approach by reference to a decision in the tribunal and one of the tribunal's rules. The relevant rule is rule 19. In the submission by the appellant, the effect of rule 19(2)(a) was to make it mandatory for a copy of a discipline application to be served personally. That is a misconstruction of the rule. The effect of the cited provision is merely to prescribe a period of 28 days for the giving of a copy of an application, relevantly, if under an enabling Act or the rules, the copy must be given by delivering it personally.

The decision which the appellant cited is *Place Design Group Pty Ltd v Hassard* [2013] QCAT 742. It is a decision of an adjudicator. On my reading of it, it does not deal with the point which is relevant here. If, contrary to my own view, it were inconsistent with the application of the principle I have mentioned, then the decision in *Place Design Group Pty Ltd* ought not to be followed.

At the directions hearing in the tribunal, the appellant also submitted that the respondent had not served the discipline application within the time required by the rules. However, the appellant did not in the tribunal identify any substantive disadvantage flowing to her as a result of the delay or any substantive advantage she would gain by an order striking out the application on that ground in circumstances in which the respondent would presumably issue a fresh application in identical terms. In this Court, the appellant contended that the disadvantage lay in having to respond to an application in circumstances in which the applicant for the disciplinary orders had not himself complied with the rules. That is plainly not a disadvantage resulting from the delay. The tribunal was correct in refusing to allow the proceedings in the tribunal to be sidetracked by issues of that kind.

As to procedural fairness, the tribunal afforded the appellant an opportunity to make submissions about the effect of the receipt by her of a copy of the discipline application. She was unable to advance a persuasive argument on the point. The tribunal's reasons conveyed rejection of the appellant's contention that she had not been duly served. No more elaborate reasons were required in relation to this simple procedural point, nor was

the appellant denied procedural fairness merely because of the non-fulfilment of her unreasonable expectation that the tribunal would deal with a substituted service application which had become unnecessary to consider when the appellant appeared and admitted that the respondent had given her a copy of the discipline application.

The new evidence which the appellant sought leave to file should not be received, because it is irrelevant to the disposition of this appeal. Because this appeal should be dismissed, the appellant's application for a stay until further order should be refused. I would make the following orders:

1. The application is refused.

2. The appeal is dismissed.

MORRISON JA: I agree.

PHILIPPIDES J: I also agree.

FRASER JA: The successful respondent applies for an order for costs. The appellant opposes an order for costs on the ground that the whole matter would not have arisen if the respondent had complied with the rules and if the tribunal had made the position it adopted clear. As my reasons sought to demonstrate, the appeal was misconceived. I would order that the appellant pay the respondent's costs of the appeal, including the costs of the application.

MORRISON JA: I agree.

PHILIPPIDES J: I also agree.