

# SUPREME COURT OF QUEENSLAND

CITATION: *Di Iorio v Wagener* [2016] QCA 97

PARTIES: **PETER DI IORIO**  
(applicant)  
v  
**GARY SEAN WAGENER**  
(respondent)

FILE NO/S: Appeal No 3622 of 2016  
DC No 46 of 2016

DIVISION: Court of Appeal

PROCEEDING: Application for Extension of Time *Queensland Civil and Administrative Tribunal Act*

ORIGINATING COURT: District Court at Southport – Unreported, 29 March 2016

DELIVERED ON: 15 April 2016

DELIVERED AT: Brisbane

HEARING DATE: 14 April 2016

JUDGES: Morrison JA

ORDER: **The application is refused.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TIME, EXTENSION, AND ABRIDGMENT – where the applicant brought proceedings in QCAT against the respondents and was ordered to pay \$8,240 – where that judgment was registered in the Magistrates Court in 2010 – where the applicant sought leave to appeal this decision in the appeal division of QCAT with that application was dismissed – where a sequestration order was made against the applicant in 2014 and challenges to that order were made in the Federal Circuit Court and Federal Court of Australia – where the applicant remains an undischarged bankrupt – where the applicant sought an extension of time within which to seek leave to appeal to QCAT in 2014, four years out of time – where that application was refused by QCAT – where the applicant filed an application for leave to appeal to the District Court in February 2016, three months out of time – where the applicant did not have consent of his Trustee in bankruptcy to do so – where that application was dismissed in March 2016 on the basis that the District Court did not have jurisdiction to hear the appeal – where an application was filed in the Court of Appeal in April 2016 seeking an extension of time – where the application identifies the judgments as being appealed against as the District Court decision of 29 March 2016 and

the Magistrates Court in 2010 – whether there is an adequate explanation of the delay – whether the interests of justice favour the grant of an extension of time

*Bankruptcy Act* 1966 (Cth), s 60, s 116

*Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 150

*Pickering v McArthur* [2005] QCA 294, cited

*R v Tait* [1999] 2 Qd R 667; [1998] QCA 304, cited

COUNSEL: The applicant appeared on his own behalf  
No appearance for the respondent

SOLICITORS: The applicant appeared on his own behalf  
No appearance for the respondent

- [1] **MORRISON JA:** Proceedings between Mr Di Iorio and the respondents commenced in Queensland Civil Administrative Tribunal (QCAT). Some time prior to 27 September 2010 judgment was given against Mr Di Iorio for \$8,240. There have evidently been a number of subsequent proceedings or applications. Some of the detail to which I will refer comes from the decision of Wall DCJ in *Di Iorio v Wagener & Anor*, given on 29 March 2016, and the transcript of the hearing of that matter.
- [2] On 27 September 2010 that judgment was registered in the Magistrates Court. An enforcement warrant based on that unsatisfied judgment was issued on 19 November 2010.
- [3] Mr Di Iorio sought leave to appeal the QCAT decision to the appeal division of QCAT. An application to the Presidential Member was dismissed on 22 November 2010 because of non-compliance with directions.
- [4] A sequestration order was made against Mr Di Iorio on 23 October 2014. Challenges to that order in the Federal Circuit Court and the Federal Court were exhausted by 28 May 2015. He remains an undischarged bankrupt.
- [5] On 5 November 2014, some four years out of time, Mr Di Iorio sought an extension of time within which to seek leave to appeal to QCAT. That application was refused by QCAT on 28 November 2014, and the application for leave to appeal was dismissed.
- [6] On 25 February 2016, three months beyond the normal time to appeal (if there is an avenue of appeal to the District Court), Mr Di Iorio filed an application for leave to appeal to the District Court. He did not have the consent of his Trustee in bankruptcy to do so.
- [7] That application was dismissed on 29 March 2016, on the basis that the District Court did not have jurisdiction to entertain the proposed appeal. I note also that Mr Di Iorio also told the District Court judge that “the various matters of complaint which he had in relation to the original QCAT decision, and the work of the respondent the subject of that decision, were all matters which had been previously raised in other courts by him unsuccessfully”.
- [8] Finally, on 8 April 2016 Mr Di Iorio filed an application in this Court, seeking:
  - (a) an ex parte interlocutory injunction in the form of a freezing order;

- (b) that a “freezing order [be] issued and a De novo and further hearing granted to provide additional evidences to support my claims pending further Court orders”;
  - (c) an “urgent interlocutory injunction, a mareva and freezing order”;
  - (d) a permanent stay of the orders of the Magistrate’s Court in 2010;
  - (e) leave to appeal from the judgment of the judicial registrar in the Magistrate’s Court on 27 September 2010;
  - (f) the QCAT orders of 27 September 2010 be dismissed or quashed; and
  - (g) a permanent stay or dismissal of the sequestration orders.
- [9] What follows in the application is a series of statements about self-represented litigants and judicial review, and the case against the respondents in 2010, then statutory provisions and statements concerning defective building work and warranties for building work, as well as a number of references to authorities in relation to disparate areas of the law, including “judicial accountability”. The application identifies the judgments against which the appeal is proposed as: the District Court decision on 29 March 2016 and the Magistrates Court in 2010. No reason is included for granting leave.
- [10] The application itself therefore does not articulate an understandable basis for the grant of leave. Neither does the affidavit of Mr Di Iorio, which seems directed mainly at the factual contentions that were the subject of the hearing in QCAT in 2010.

#### **Listing of the application**

- [11] Because the application did not identify any rational basis for relief, the Court was not prepared to entertain the application on an ex parte basis. The parties were notified that it would be listed on 14 April 2016.
- [12] Mr Di Iorio appeared for himself. The respondents sent an email explaining that due to the shortness of notice they could not attend, and could not afford representation. That email became Exhibit 1. It also put forward some arguments opposing the application.

#### **Mr Di Iorio’s contentions at the hearing**

- [13] Mr Di Iorio handed up a document which was said to be an outline. It clarified the orders sought in these terms:
- (a) an injunction or freezing order or mareva order;
  - (b) that the “bankruptcy orders be dismissed and a DE novo [trial] allowed”;
  - (c) the QCAT orders be “dismissed permanently stayed and a de novo [trial] allowed and to adduce new evidences”;
  - (d) the “UNLAWFULL (sic) bankruptcy and sequestration order and UNLAWFULL (sic) sale of assets by Paul Andrew Leroy, Hall Chadwick Trustee of the estate be permanently stayed, dismissed”; and
  - (e) a “de novo [trial] be allowed to review QCAT orders/judgments on questions of law error of law; mis-exercise of discretion; or... the judges findings of fact were wrong”.
- [14] The document then sets out reasons for the orders. They include matters under the “Building Work Contractors Act 1995” and the *Queensland Building and Construction Commission Act 1991* (Qld); that Mr Di Iorio’s bankruptcy trustee had “denied [his]

appeal to QCAT” and “diverted and perverted the course of Justice”; and that QCAT had “perverted the course of justice, denied natural justice, a breach of the rule of natural justice occurred, that procedures that were required by law to be observed were not observed, did not have jurisdiction, improper exercise of power conferred, the decision involved an error of law, there was no evidence or other material justifying the decision”.

- [15] The outline goes on to advance “reasons for the dismissal of bankruptcy”, and details of a property at Sarawak Avenue, Palm Beach. It is apparent that the property is in the possession of the trustee in bankruptcy. Mr Di Iorio was removed from the property under an enforcement warrant. He apprehends that the trustee wishes to sell the property, and fears a firesale at an undervalue.
- [16] None of the matters in the preceding two paragraphs has been attested in affidavit form, but remain assertions in the outline.
- [17] Mr Di Iorio made oral submissions that, after some debate, made clear that he sought three things in the application: first, that the QCAT orders in 2010 and 2014 be reversed; secondly, that his bankruptcy be annulled, so that the property will not be sold; and thirdly, an urgent injunction to restrain the trustee in bankruptcy from selling the property.

### **Discussion**

- [18] As for the injunction which Mr Di Iorio seeks, there are many hurdles preventing relief.
- [19] First, the application has not been served on the trustee. It only became clear at the hearing that the injunction was, in fact, directed at restraining the sale of property by the trustee. Mr Di Iorio does not know what stage any selling campaign has reached, nor even if the property is listed for sale. It is inappropriate to proceed ex parte in those circumstances.
- [20] Secondly, any application to challenge the basis of the trustee’s authority, by seeking to have the bankruptcy annulled, would be a proceeding brought in the Federal Court, or Federal Circuit Court, where bankruptcy jurisdiction resides.
- [21] Thirdly, any injunction to restrain a trustee from selling the property faces the problem that upon the sequestration, the property vested in the trustee. The trustee has statutory obligations to proceed with the bankruptcy, and realise the assets to pay the creditors.
- [22] Fourthly, possession of the property was compelled under an enforcement warrant. The enforcement warrant was issued on 6 February 2016, and recites that “an order has been obtained against Peter Di Iorio for the recovery of possession” of premises at Palm Beach. I cannot discern any suggested basis on which that order can be challenged.
- [23] Fifthly, any injunction restraining such a sale would inevitably be conditioned on Mr Di Iorio giving a worthwhile undertaking as to damages, or security. In oral submissions, Mr Di Iorio said that the property had a mortgage over it to a bank, which was owed about \$90,000. There are other creditors. Holding out the trustee may mean that the property is eventually sold on a less advantageous market. Given that he is an undischarged bankrupt, it is difficult to see a court being persuaded that he can offer a worthwhile undertaking or security.

### ***Reliance on the application for leave to appeal***

- [24] In so far as the application seeks an injunction based on the proposed challenge to the decisions in QCAT in 2010 and 2014, there are even greater hurdles.

- [25] First, where leave to appeal to the QCAT appeal tribunal is refused by the appeal tribunal, there is an avenue of appeal to this Court under s 150(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). Such an appeal is permitted only on a question of law, and only if leave is granted: s 150(2).
- [26] Mr Di Iorio has not identified any error of law on the part of the QCAT appeal division, in its decision on 28 November 2014.
- [27] Secondly, Mr Di Iorio's application for leave to appeal against the QCAT decision requires an extension of time. The appeal tribunal's refusal of leave was given on 28 November 2014. The time limited to apply for leave to appeal to this Court was 28 days. Mr Di Iorio's application to this Court, filed on 8 April 2016, is therefore more than 16 months out of time.
- [28] On an application for an extension of time the issues are whether:<sup>1</sup>
- (a) good reason for the delay has been shown; and
  - (b) it is in the interests of justice to grant the extension;
  - (c) that may necessitate a provisional assessment of the strength of the proposed appeal, the prejudice to the respondent, and the length of the delay.
- [29] The issues raised on the question of leave to appeal are whether:<sup>2</sup>
- (a) an appeal is necessary to correct a substantial injustice; and
  - (b) there is a reasonable argument that there is an error to be corrected.

***Explanation for the delay***

- [30] There is no adequate explanation for the delay in applying for leave to appeal. Mr Di Iorio explained that in the time since the QCAT decisions 2010 and 2014 he has been pursuing numerous other cases, in QCAT and elsewhere, as well as pursuing lines of challenge from the decision relevant to this application, in the District Court and elsewhere. In still further proceedings he has unsuccessfully challenged the sequestration orders.
- [31] That does not explain the delay in failing to apply for leave to appeal from the decision of the QCAT appeal division, given on 28 November 2014.

***Interests of justice***

- [32] The interests of justice do not favour the grant of an extension of time.
- [33] First, when Mr Di Iorio was made bankrupt on 23 October 2014 his "property" vested in his trustee: s 58 of the *Bankruptcy Act 1966* (Cth). Unless caught by s 116(2)(g) of the *Bankruptcy Act*, that property would have included any rights in respect of the QCAT proceedings, a chose in action being part of the bankrupt's property: s 116(1) of the *Bankruptcy Act*. The exception in s 116(2)(g) relates to: any right of the bankrupt to recover damages or compensation for personal injury or wrong done to the bankrupt. It seems that the right was caught as one of Mr Di Iorio's complaints is that the trustee would not give consent to the appeal to the QCAT appeal division.
- [34] An action (meaning a civil proceeding) commenced by a person who subsequently becomes bankrupt is stayed until the trustee makes a decision to prosecute or

<sup>1</sup> *R v Tait* [1999] 2 Qd R 667 at [5]; *Perhouse v Queensland Police Service* [2013] QCA 296 at [13].

<sup>2</sup> *Pickering v McArthur* [2005] QCA 294 at [3]; *Berry v Commissioner of Police* [2014] QCA 238 at [4]; *White v Commissioner of Police* [2014] QCA 121 at [5].

discontinue it: s 60(2) of the *Bankruptcy Act*. In so far as the proceedings in QCAT (for leave to appeal to the appeal division) were on foot, unless they were classified as proceedings for “any personal injury or wrong done to the bankrupt” under s 60(4), they were stayed under s 60(2), and abandoned under s 60(3) if no election was made by the trustee. No election was made by the trustee, it seems, and consent to Mr Di Iorio appealing was withheld.

- [35] Secondly, Mr Di Iorio has not identified any error of law on the part of the QCAT appeal division, in its decision on 28 November 2014.
- [36] Thirdly, the application identifies the judgments against which the appeal is proposed as: the District Court decision on 29 March 2016 and the Magistrates Court in 2010. No reason is included for granting leave.
- [37] The application itself therefore does not articulate an understandable basis for the grant of leave. Neither does the affidavit of Mr Di Iorio, which seems directed mainly at the factual contentions that were the subject of the hearing in QCAT in 2010.
- [38] Those matters cause me to reach the preliminary view that there is no adequate explanation of the delay and the interests of justice do not require that an extension of time be granted for the application for leave to appeal. I pause to emphasise that this is not a concluded view, but sufficient to make a preliminary assessment of the strength of the serious question to be tried, that is said to underpin the application for an injunction.

### **Conclusion**

- [39] For the reasons given above the application is refused.