SUPREME COURT OF QUEENSLAND

CITATION:	*Newton v Brisbane City Council* [2014] QCA 242
PARTIES:	**CHRISTOPHER GRAEME NEWTON** (applicant) **RUSSELL GORDON HAIG MATHEWS** (not a party to the application) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 8870 of 2014 QCAT No 152 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED EX TEMPORE ON:	26 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2014
JUDGE:	Morrison JA
ORDERS:	**1. Application for Mr Mathews to appear for Face 2 Face Foundation Pty Ltd is refused.** **2. The Application for Face 2 Face Foundation Pty Ltd to be joined as an applicant is refused.** **3. The Application to Stay is dismissed.** **4. Applicant to pay the Respondents costs of and incidental to the application to stay, to be assessed on the standard basis.** **5. Face 2 Face Foundation Pty Ltd to pay the Respondents cost of and incidental to the application to be joined, to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PARTIES – OTHER MATTERS – where there was an application for a stay of execution by the applicant from a decision of the Queensland Civil and Administrative Tribunal – where there was an application to have a party joined to the application – where the party seeking to be joined to the application was

a company – where the company did not have legal representation – where an individual sought leave from the Court to represent the company – where that individual was not a director of the company – where that individual was a vexatious litigant and prohibited from commencing proceedings against the respondent and its employees – whether leave for the joinder of the party to the stay application should be granted

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where the grounds relied upon at QCAT were relied upon in the proceedings seeking a stay of execution – where those grounds included that QCAT did not have the jurisdiction to make the decision as the premises are not residential premises and that the respondent had engaged in fraud – where there was further concern that the submissions and materials were not dealt with sufficiently in QCAT – where the Court considered the prospects on appeal and if there would be irreparable harm if the stay was not granted

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 150(3)
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 293

Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd [2008] 2 Qd R 453; [2008] QCA 322, followed
Face 2 Face Foundation Pty Ltd & Anor v Brisbane City Council [2014] QCATA 267, considered
Simto Resources Ltd v Normandy Capital Limited (1993) 10 ACSR 776; [1993] FCA 305, applied
Underwood v Queensland Department of Communities (Qld) [2013] 1 Qd R 252; [2012] QCA 158, followed

COUNSEL:	The applicant appeared on his own behalf G N Newton QC, with S Webster, for the respondent
SOLICITORS:	The applicant appeared on his own behalf Brisbane City Legal Practice for the respondent

Application for Mr Mathews to appear for Face 2 Face Foundation

MORRISON JA: This is an application brought by Mr Russell Matthews on behalf of Face 2 Face Foundation Pty Ltd (F2F) seeking leave of the Court to appear for that company on today's application for a stay. In support of that Mr Matthews has filed two affidavits, the first sworn on 22 September 2014. That affidavit deposes in paragraph 1 to the fact that he is a director of F2F. That fact is countersaid by an exhibit to the affidavit

of Ms Green which shows that in a search on the 17th of September that Mr Matthews was not director.

Since that time it seems F2F, at least its shareholder, has held a meeting and appointed Mr Matthews a director and the two documents which refer to that are a minute of an extraordinary general meeting of the shareholder of F2F together with a meeting of the directors, that's Ms Newton and Mr Matthews, authorising him to appear in this court on the hearing of the stay application and any appeal, if necessary.

In the second affidavit by Mr Matthews, which is sworn on the 25th of September 2014, not much in that affidavit deals with the position of F2F, except to say that it is a not for profit tax exempt body that provides accommodation for homeless people and people in danger of becoming homeless. It is a trustee of the F2F itself and does not have surplus funds to be able to provide for security for costs. Nothing in that affidavit deposes to the inability of F2F to retain what might be termed regular legal representation in the form of solicitors and or counsel for the purposes of today's application.

Normally a corporation must appear by legal representatives who are qualified to appear on its behalf. The principle was most recently and conveniently stated by French J as he then was in *Simto Resources Ltd v Normandy Capital Limited* (1993) 10 ACSR 776 at page 781 in these terms:

> "The high threshold of exceptional or special circumstances which applies to the exercise of the discretion under the English rules and similarly formulated rules in Australia, no doubt derives from the characterisation of the discretion as a dispensing power. This will be coupled with the rationale for the restriction which in large part is related to the proposition that persons should not be represented in superior courts other than by legally qualified agents who not only possess the relevant skills to conduct the litigation but also are bound to observe certain duties to the court itself. Of course, any natural person may represent himself or herself. But a company being a fictitious legal person must always be represented by another. And

> that attracts the application of the principle that representation by an agent should be limited to legally qualified persons subject to the inherent and residual discretion of the court to waive the requirement in appropriate circumstances. The rationale to which I have referred emerges from such authorities as *Tritonia Ltd v Equity and Law Life Assurance Society* [1943] AC 584."

That principle has been cited with apparent approval, although on a slightly different point, by this court in *ASIC v Neolido Holdings Pty Ltd* [2006] QCA 266. Special circumstances may be accepted to apply where the company cannot afford legal representation or for some other reason the company is constrained in its ability to obtain legal representation. Nothing of that kind appears here. The assertion that the company does not have surplus funds to be able to provide security for costs does not assist. That does not answer the proposition that it could afford appropriate legal representation for today's purposes.

Added to that is the fact that the person who is now appointed as director and seeks to appear is in fact a vexatious litigant so declared by Fryberg J in this court, that is, the Supreme Court, on 9 February 2006. Under that order Mr Matthews is prohibited from instituting any proceedings in any court of the State of Queensland against the Brisbane City Council (The Council) and or any employee of the Council.

He seeks to appear, however, on behalf of F2F and thereby there might be an argument that he himself is not instituting a proceeding in a court against the Council. However, the fact that he is a vexatious litigant, and in respect of the respondent to this application, in my view makes him an inappropriate agent to appear for the company were it otherwise reasonable to do so. For those reasons the application for Mr Matthews to appear for F2F is refused.

Application for Face 2 Face Foundation Pty Ltd to be joined as an applicant

Now, that then leaves the question of whether F2F nonetheless should be a party to this proceeding.

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In the circumstances of the opposition of the council and the absence of any qualified person to make the application on behalf of F2F, I will not join F2F to this application.

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Application to Stay

This is an application to stay a decision made by the Appeal Tribunal of the Queensland Civil and Administrative Tribunal (QCAT) on 12 September 2014. The applicant has not yet filed an application for leave to appeal to this Court, but intends to do so and has annexed a copy of the proposed application to his affidavit.

The proceedings in QCAT concerned property at 953 Rochedale Road, Rochedale South. That property contains, amongst other things, the house where the applicant and his family reside. In the QCAT proceedings, the respondent to this application, the Council, sought to terminate any entitlement of the applicant to remain on the property.

Background

On 12 February 2010 the Council became the registered proprietor of the land at 953 Rochedale Road. The historic and title search reveals a transfer to the Council by the previous owner, Mr Di Carlo. No interest relating to the applicant, or the company he refers to, F2F, is noted on the title.

On about 15 February 2009 the Council, the applicant and F2F, entered into a General Tenancy Agreement. The initial term was two years, with three options, each of one year.

On about 15 February 2012, the Council entered into a General Tenancy Agreement (the agreement) with the applicant and F2F. The Agreement was for the first of the three option periods under the 15 February 2009 General Tenancy Agreement. Both the applicant and F2F were tenants. The term of the Agreement commenced on 15 February 2012, and ended on 14 February 2013. Notwithstanding that item 5.1 of the Agreement referred to it as a "periodic agreement", the setting of an expiry date for the term meant that the agreement was for a fixed term.

In October 2012 notices to leave were issued by the Council and served upon each of the applicant and F2F. Neither of the tenants vacated.

The QCAT Proceedings

The Council instituted proceedings in QCAT on 14 January 2014, pursuant to s 293 of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) (the RTA.) Council sought a termination order and a warrant of possession.

The grounds relied upon in the QCAT proceedings were as follows:

(a) that the rental property was occupied by the tenants under the Agreement, expiring on 14 February 2013;

(b) the Council gave a notice to leave to each of the tenants on 31 October 2013, requiring that the property be vacated by 10 January 2014; and

(c) an inspection on 13 January 2014 revealed that it was still occupied.

On the 18th of March 2014 the Council succeeded in the proceedings brought in QCAT, and orders for termination and a warrant of enforcement were made. The applicant and F2F then applied for leave to appeal to the Appeal Tribunal of QCAT. That application was dismissed on 12 September 2014. In lieu of the orders made by the adjudicator on 18 March 2014, the QCAT orders made on 12 September 2014 stipulated that the Agreement would be terminated on 20 September 2014 on the ground of failure to leave.

The reasons given by the Appeal Division of QCAT, constituted by Dr Forbes, are in the applicant's material. Dr Forbes held that following the expiry of the fixed term, the tenants (referring to the applicant and F2F) became monthly tenants, subject to two calendar months notice to vacate the property.[1] Dr Forbes referred to the fact that the adjudicator gave his decision on 18 March 2014 and that the application for leave to appeal was brought on two grounds, namely:

(a) QCAT did not have jurisdiction; and

(b) the Council had engaged in "the fraudulent Tort of international interference with contractual relations".[2]

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1 *Face 2 Face Foundation Pty Ltd & Anor v Brisbane City Council* [2014] QCATA, at [5]. This reflected clause 3 in Part 3 of the General Tenancy Agreement made on 15 February 2009, and repeated in the Agreement.

2 [2014] QCATA 267, at [10].

Dr Forbes recorded that the only real ground of opposition to the Council's application was that: "[T]he RTA does not apply to the situation and consequently QCAT does not have any jurisdiction."[3] As to the other ground, alleging fraud, Dr Forbes stated:

> "There are a few brief and vague references to fraud in the transcript, but the decision makes no such finding. That is not surprising, considering the dearth of particulars and evidence, and the cogency of proof needed to support such a charge. An application for leave may not be used as a device to enlarge and re-run the issues for trial, even if the new material is within the jurisdiction of the Tribunal."[4]

The reasons of Dr Forbes reveal that the tenants could not provide a coherent alternative description of their Agreement if it was not caught by the RTA. The tenants "variously and inconsistently assert that it is '*void*', a '*simple lease*' or '*commercial/industrial*' lease."[5]

Dr Forbes dealt with the challenge to jurisdiction based upon the fact that the RTA did not apply in these terms:

> "A residential tenancy is the right to occupy residential premises under a residential tenancy agreement.[6] A residential tenancy may exist in '*a part of premises and land occupied [by] premises*.[7] Section 10 of the RTA provides: '*Residential premises are premises used, or intended to be used, as a place of residence or mainly as a place of residence*.' Even if (as is submitted) '*place of residence*' and '*mainly as a residence*' were read conjunctively,[8] it could not be seriously suggested that land not built upon should be taken into account in deciding whether the premises are '*mainly*' residential."[9]

Dr Forbes concluded that the adjudicator's decision was correct. There was, in effect, no information or issues identified that could raise a challenge to the termination application. Having referred to the principles applicable when an application is brought for leave to

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3 [2014] QCATA 267, at [11].
4 [2014] QCATA 267, at [11]. Internal footnotes omitted.
5 [2014] QCATA 267, at [13].
6 The Act, s 11.
7 The Act, s 9(1).
8 Despite the disjunctive "or".
9 [2014] QCATA 267, at [15].

appeal[10] and, noting the limits upon an appeal by leave, Dr Forbes concluded that the adjudicator's findings of fact were not unreasonable and no appellable error appeared in the adjudicator's application of the law.

Grounds for the application for stay

The applicant relies on a number of grounds which can be summarised as follows:

(a) QCAT did not have jurisdiction, as the subject premises are not "residential premises";

(b) the Appeal Tribunal did not consider the evidence or arguments in an affidavit and two submissions put forward by the applicant;[11]

(c) the premises are not residential premises and the lease is not a Residential Tenancy Agreement;

(d) the Council has not advised the reasons why it needs the land and it has other vacant blocks available to it;

(e) F2F still has a valid, annually renewing, lease of the premises; and

(f) the Council engaged, in 2009, "in the fraud of Intentional Interference with Contractual Relations in relation to the lease in existence prior to BCC['s] purchase of the premises of 953 Rochedale Road, Rochedale."

In addition the applicant points to the fact that the occupants of the premises[12] would suffer irreparable harm if no stay was granted, because they would be forced to vacate and remove all their possessions, in circumstances where the Council had advised that it intended to demolish the buildings and structures. In that respect, the only evidence relied upon to support that allegation is an internal email attributing support to a Councillor.

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10 [2014 QCATA 267 at [17]; that an appellant must demonstrate an arguable case of error, which, if left uncorrected, will result in a substantial injustice. Further, that a relevant "error" means an error of law, or a finding of fact, that is not merely debateable, but rationally indefensible.

11 Identified as CGN05, CGN01 and CGN02.

12 The applicant, his family, and other tenants.

Applicable legal principles

The application for leave to appeal is brought under s 150(3) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld). That section permits an appeal to this Court against a final decision of the Appeal Tribunal, only on a question of law and only if the party who wishes to appeal has obtained leave to appeal from this Court. As was said in *Queensland Building and Construction Commission v Meredith*[13]

> "Section 150(3) of the QCAT Act permits an appeal to this Court against a final decision of the Appeal Tribunal only on a question of law and only if the party who wishes to appeal has obtained leave to appeal from this Court. The very structure of this provision forcefully implies, first, that leave to appeal may be given only with respect to a question or questions of law and, secondly, that in considering the exercise of the discretion to grant leave to appeal, this Court will have high regard for the prospects of success that the applicant for leave has of demonstrating error on the part of the Appeal Tribunal with respect to the question or questions of law concerned. There must be reasonable prospects of success to warrant a grant of leave."[14]

Underwood v Queensland Department of Communities (Qld) concerned an application for leave to appeal in respect of a tenancy agreement which had been dealt with both at first instance and in the Appeal Tribunal in QCAT. The Appeal Tribunal refused leave to appeal, as is the case here. Muir JA[15] stated:

> "[53] The applicant's claim was considered on its merits by the Tribunal. An application for leave to appeal from the Tribunal's decision was considered and rejected. These are considerations

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13 *Queensland Building & Construction Commission v Meredith* [2014] QCA 62, at [23].

14 Citing *Underwood v Queensland Department of Communities (Qld)* [2012] QCA 158, at [18] and [68]. (***Underwood***).

15 With whom Dalton J agreed.

> which are traditionally regarded as weighing against a grant of leave to appeal.[16]
>
> [54] This is not a case in which it is arguable that leave is necessary to correct 'a substantial injustice to the applicant.'[17] The proceedings, however, do provide a good illustration of the reason why courts exercise vigilance in managing proceedings carefully to prevent litigants, however well intentioned, from converting them into instruments of oppression of the other party and obstacles to the court's ability to provide expeditious service to other litigants."[18]

An applicant for a stay must demonstrate some reason why a judgment should not be given immediate effect. In *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd*[19] the court said:

> "[I]t will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional, and that a successful party in litigation is entitled to the fruits of its judgment. Generally speaking, courts should not be disposed to delay the enforcement of court orders."

The court went onto state, in relation to the assessment of the prospects, and a conclusion that prospects may be poor:

> "In cases where this Court is able to come to a preliminary assessment of the strength of the appellant's case, the prospects of success on appeal may weigh significantly in the balance of relevant considerations. The prospects of success will obviously tend to favour the refusal of a stay if the prospects of the appeal can be seen to be very poor."[20]

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16 *ACI Operations Pty Ltd v Bawden* [2002] QCA 286, [14]; and *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100.

17 *Arnold Electrical & Data Installations P/L v Logan Area Group Apprenticeship/Traineeship Scheme Ltd* [2008] QCA 100, [5]; and *Smith v Ash* [2011] 2 Qd R 175, [50].

18 *Underwood* at [53] and [54].

19 *Cook's Construction Pty Ltd v Stork Food Systems Australasia Pty Ltd* [2008] QCA 322, per Keane JA (with whom McMurdo P and White AJA agreed), at [12]. (***Cook's Construction***).

20 *Cook's Construction*, at [13].

The court in *Cook's Constructions* also referred to the relevant considerations, that are applicable on a stay in application, in these terms:

> "The decision of this court in *Berry v Green* suggests that it is not necessary for an applicant for a stay pending appeal to show 'special or exceptional circumstances' which warrant the grant of the stay. Nevertheless, it will not be appropriate to grant a stay unless a sufficient basis is shown to outweigh the considerations that judgments of the Trial Division should not be treated as merely provisional and that a successful party in litigation is entitled to the fruits of its judgment."[21]

In looking at the relevant factors, the court identified the prospects of success, to which I have referred, and the question of whether the appeal would be rendered nugatory and, then, irremediable harm, if that should occur.

Following matters

The principle that poor prospects would favour the refusal of stays is because "if there is obviously little prospect of ultimate reversal of existing orders, the concern to ensure that the existing orders can be overturned without residual injustice will have less claim on the discretion that might otherwise be the case."[22] In *Cook's Constructions*, the parties accepted that the appeal was arguable, which is why the court then turned its attention to whether the appeal might be rendered nugatory.

Discussion of the applicant's contentions

As in QCAT, two main points are advanced in the affidavit material on behalf of the applicant. The first is that QCAT's decision "has been affected by serious fraud." The second is that QCAT does have jurisdiction as the premises are "not residential premises."

The fraud allegations

As to the fraud allegations, these are based on the assertion that the Council conspired with the previous owner to defraud F2F of its long-term lease. As I understand the

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21 *Cook's Construction*, at [12]. Internal footnotes omitted.
22 *Cook's Construction*, at [13].

applicant's affidavit[23], it is suggested that the previous owner told the applicant, in 2009 that the council wished to purchase the property and wanted a different lease from the one then in place. The one then in place was not in favour of the applicant, but only F2F. It was a five-year lease commencing on 14 February 2009. The assertion is that the previous owner presented a General Tenancy Agreement, but allegedly made statements that under that General Tenancy Agreement F2F would be the tenant for over a decade as the Council would not be developing the site until well after 2020. It is also alleged that the previous owner told F2F that a General Tenancy Agreement form had to be used as the council wanted real estate agents to manage the lease.

The applicant's affidavit exhibits a facsimile from the previous owner to the Council on 2 November 2009 referring to the amended agreement, and stating that:

> "Due to arrangements between the tenant, Brisbane City Council and myself getting complicated, we have decided that the tenant will lease the whole of the property at 953 Rochedale Road, Rochedale in its entirety."

It seems that a draft replacement lease was prepared, giving a more restricted term of two years commencing from 15 February 2009, with three, one-year, options. The applicant has exhibited an internal memorandum from the Council (dated 10 November 2009) where that draft is referred to and approved by the Council. The applicant has also exhibited a letter from the council to the previous owner on 23 October 2009 commenting upon the Draft Tenancy Agreement.

The drafts in November 2009 concerned F2F being a tenant. They did not mention the applicant. The applicant asserts that the previous owner attempted to change the lease so that it was restricted to the house, saying the owner would lease the remainder of the five acres for his horse. However, the assertion continues, the previous owner said that F2F would still be able to use all of the land.

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[23] The one identified as CGN05.

Eventually, F2F executed a General Tenancy Agreement in Form 18A under the RTA. That form also shows the applicant as a tenant. The term was for two years from 15 February 2009 with three options, each of one year.

The applicant complains about the process by which the tenancy agreement was reached, including assertions that some figures were changed without his consent and it was backdated. However, it seems to be accepted that F2F (by the applicant who was then, though not now, a director) signed that tenancy agreement.

Apart from the facts and internal memorandum and letter referred to above, there is nothing to show the Council's involvement in the process. Those documents do not reveal anything that could be called a conspiracy, let alone fraudulent conduct. They are consistent with the council requesting that the owner attempt to arrange a more flexible regime and leaving him to try and achieve that.

What seems plain is that the Council requested, rather than required, the previous owner to renegotiate the lease so that there was greater flexibility from the Council's point of view. The previous owner did so and F2F signed a Residential Tenancy Agreement. If the previous owner made any misleading statements to F2F or the applicant, there is no basis to consider that the Council was party to it.

There is, in truth, no acceptable, cogent evidence of any conspiracy between the council and the previous owner, or any fraud perpetrated on the applicant or F2F. None of the exhibited documents suggest so, let alone prove it in a cogent way.

In any event, the 2009 Tenancy Agreement, which was the first signed following the long lease, is now a matter of history. The current General Tenancy Agreement with the applicant and F2F is that which commenced on 15 February 2012 and then expired on 14 February 2013. The document reveals that F2F executed the Tenancy Agreement on 30 March 2012.[24] There is no credible suggestion that the applicant has any entitlement to reside on the premises apart from that General Tenancy Agreement. There is no

[24] Signing by one of its directors, Mrs Newton (the applicant's wife).

suggestion now, nor was there before QCAT, that the option to extend beyond 14 February 2013 was exercised. In my view there was no substance at all to the allegations of fraud or interference with contractual relations dependant upon that fraud.

Failure to deal with submissions and material

It is evident from the reasons given by Dr Forbes that he did, in fact, consider the allegations and fraud but found them insufficient.[25] It is also evident from Dr Forbes' reasons that he considered the content of CGN01 and CGN02, which were the submissions advanced on the application for leave to appeal in QCAT. Those submissions deal with the questions of whether the premises are residential premises for the purposes of the RTA, criticisms of the adjudicator's decision and the allegations of fraud.

QCAT did not have jurisdiction?

In relation to the contention that QCAT did not have jurisdiction because the premises were not residential premises, it seems to be based on the fact that the land includes uses that might be described as industrial or commercial, or even agricultural or rural. Thus, the applicant points to the fact that 953 Rochedale Road includes structures of an industrial or commercial kind "such as Shipping Container Storage, animal husbandry and agriculture" and is "used for pursuits of agriculture, animal husbandry, poultry raising, commerce, industrial storage [and] machinery workshop". The applicant's material also includes a Google satellite view of the property and a mud map plan showing that the land contains paddocks, a round yard, other yards and some sheds.

In my view the applicant's contentions are misconceived. The fact that the land which constitutes 953 Rochedale Road might be able to be used for a variety of uses does not mean that the Tenancy Agreement ceased to be a "Residential Tenancy Agreement" for the purposes of the RTA. Section 12(1) of the RTA defines a "residential tenancy agreement" as an "agreement under which a person gives to someone else a right to occupy residential premises as a residence". The applicant deposes that the house in which he (and his family)

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25 [2014] QCATA 267, at [11].

currently reside is on the land. In that way the Tenancy Agreement was an agreement under which the applicant or F2F was given the right to occupy residential premises. The fact that the agreement comprehended other parts of the land which might be put to other uses, does not change the essential nature of the agreement.

Further, the term "residential premises" is defined as "premises used or intended to be used as a place of residence or mainly as a place of residence": s 10 of the RTA. For that purpose it is sufficient if the premises are used "mainly as a place of residence". Thus, if a tenant, as in the case of the applicant, lived with their family in the house, but at the same time used part of the land to have some horses, dogs or chickens; that would hardly prevent the premises from being properly construed as "residential premises". Use of the premises "mainly as a place of residence" is a phrase that does not turn on the respective percentages or areas of the premises devoted to residential use and otherwise. One could more readily accept that the intensity of use may be a more apt determinant. Consider, for example, a property comprised of a house and 10 acres of land, and where 12 people reside in the house, and not at all on the balance of the 10 acres. In such a case it is difficult to conclude that the use, or intensity of use is other than residential.

Further, the term "premises" is defined in s 9(1) of the RTA as including "a part of premises and land occupied with premises". The latter phrase comprehends forms of residence which are less than a house as traditionally understood, such as a caravan, a moveable dwelling or a houseboat. None of those are applicable here, but the definition serves to indicate the breadth of the application of the RTA.

The applicant seeks to attack the reasons of the Appeal Division of QCAT insofar as they said "it could not be seriously suggested that **land not built upon** should be taken into account in deciding whether the premises are "mainly residential"[26]. No argument is advanced against that reasoning except that it is contrary to the evidence, and then the appellant adds the abusive assertion that "I am sure that Dr Forbes is not so dumb".

The RTA is directed towards tenancies over "residential premises", which are premises intended to be used as a place of residence or mainly as a place of residence. The

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[26] Emphasis added.

extension in s 9 to "land occupied with premises" is a reference to forms of residential premises that might be less than a conventional house. Thus it is, in my respectful view, plain that if the tenancy included land that was not built upon, that is irrelevant to the question of whether the premises are "mainly" residential. That is not altered just because the land has other structures on it. For example it could not be said that a residential tenancy over a house and land ceased to be so just because the land included a shed in which one could house tractors, farm equipment and a workshop.

Further, this area of contention ignores the fact that the only tenancy agreement which the applicant or F2F can claim to give them a right to reside at 953 Rochedale Road is a General Tenancy Agreement applicable to residential premises under the RTA.

In my view there is no substance in the contention that QCAT lacked jurisdiction.

Other contentions

The applicant's material raises an additional matter which can be dealt with in short order. It is that the actions of the Council when dealing with the previous owner to obtain a change of lease, were all part of what is termed a "Catholic conspiracy" said to involve St Peter's Catholic Parish School and the then Lord Mayor Campbell Newman.[27]

It is asserted that that conspiracy perpetrated a fraud on the population of Brisbane. As no support, let alone credible support, was provided for this wild allegation, it should be ignored.

Conclusion as to the prospects on appeal

In my respectful view the applicant (and F2F if that matters) does not have any reasonable prospects of success in the proposed appeal. Indeed, I think the prospects are poor. That conclusion renders it unnecessary to consider whether the appeal should be rendered nugatory if a stay was refused. In *Cook's Constructions*, that question was approached because the prospects of success were agreed at being reasonable in the sense that the appeal was arguable.

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[27] Described as a "turncoat Catholic".

That is not the case here. However, I do not accept that the appeal would be rendered nugatory if a stay was refused. The applicant and F2F failed before the adjudicator and before the appeal tribunal to QCAT. Their prospects of success are poor, and the only lease or residential tenancy agreement that they can point to which would justify them resuming or retaining their residence on 953 Rochedale Road, is a form of agreement which expired some 19 months ago. There is no suggestion that the option was exercised, and the evidence points fairly clearly to the fact that the tenants have remained residing there since that time. For that reason they have no entitlement to stay on the land, and for that reason again, the appeal will not be rendered nugatory if a stay is refused.

Irreparable harm if no stay is granted

For the reasons above I do not consider that a stay should be granted, as there are insufficient prospects of success in the appeal.[28] However, I do not consider that irreparable harm would be caused if the stay was not granted in any event. True it is that the applicant, his family, and others would have to vacate the property. True it is also, that that would cause some difficulty. However, there was no evidence to suggest that alternative accommodation cannot be found. There is no evidence to suggest that any search has been made for alternative accommodation. Indeed, the proceedings in QCAT have been on for such a time that the applicant and F2F have had more than ample time to make investigations as to alternatives, should the proceedings not go their way. In the event that the applicant succeeded in the appeal, any costs or expense incurred by reason of the disruption in having to move premises could be the subject of a compensation claim against the Council, which it is undoubtedly able to pay.

Further, a review of the rent due but unpaid under the Agreement, by which each of the applicant and F2F were tenants, reveals that rental arrears for the period from 15 March 2013 until 14 September 2014 amount to $42,307.20. Any consideration of a stay would include the prospect that it would be granted on condition that the arrears were paid in full. However, the applicant is an undischarged bankrupt, and therefore there seems little prospect that the outstanding arrears will be paid. Indeed, there is no offer to do so.

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[28] See *Underwood* at [53]; *Cook's Construction* at [12].

The applicant asserted from the bar table, that F2F would observe its obligations if a stay were granted. However, there is reason to doubt that since it has not paid so far. Further, some material that was filed today in support of an application for F2F to be represented by Mr Matthews, suggested that F2F did not have the surplus funds to pay security for costs. That leads one to doubt that F2F could make up the arrears of rent. In considering this question, one has to bear in mind that, on the face of it, the applicant and F2F have no entitlement whatever to remain on the land at 953 Rochedale Road, or in any of the premises on that land. The only agreement that can be pointed to is one which has expired, and the applicant and F2F are holding over. Indeed, they have been holding over since 14 February 2013, during which time rental arrears in excess of $42,307.20 have accrued. It seems unlikely that the possible costs and expense involved in having to vacate the premises would approach anything like that sum.

Conclusion

In my view the application should be dismissed, and I dismiss the application.

There is no reason why costs should not follow the event. I order that the applicants pay the respondent's costs of and incidental to the application, to be assessed on the standard basis.

On the application by F2F, to be represented by Mr Matthews, the respondent's costs of the application, such as they are, should be paid by F2F.