[2014] QCA 337

COURT OF APPEAL

HOLMES JA

Appeal No 8870 of 2014
QCAT No 152 of 2014

BRISBANE CITY COUNCIL	**Applicant**
v	
CHRISTOPHER GRAEME NEWTON	**Respondent**

BRISBANE

WEDNESDAY, 17 DECEMBER 2014

HER HONOUR: Mr Christopher Newton has sought leave to appeal a decision of the Appeal Division of the Queensland Civil and Administrative Tribunal. (I'll refer to Mr Newton from here on as the applicant, simply to distinguish him from Mr Newton of Queen's Counsel who appeared for the Brisbane City Council on its application.) The Appeal Division of the Queensland Civil and Administrative Tribunal had refused the applicant's application for leave to appeal from a first instance tribunal decision concerning his tenancy of a Council property.

The respondent to his application in the Tribunal, the Brisbane City Council, seeks an order striking out his application for leave. It says that, although sitting as a single Judge, I have jurisdiction to make such an order under rule 767(b) of the *Uniform Civil Procedure Rules*, which enables a single Judge of Appeal to exercise the Court's power in "an application in a civil proceeding for leave to appeal", and also pursuant to section 44(2)(a) of the *Supreme Court of Queensland Act*, which empowers a Judge of Appeal to exercise the Court's power to make an order concerning the institution of an appeal.

The Council has referred to *ASIC v Neolido Holdings Pty Ltd* [2006] QCA 266, in which reference was made to McPherson JA's having refused an application for leave to appeal, sitting alone, under rule 767, and to my decision in *McElligott v McElligott* [2014] QCA 54, striking out a notice of appeal under section 44(2).

The grounds on which the Council seeks to have the application for leave struck out are that it's improperly instituted, in that it's plain the applicant means the appeal itself to involve the re-agitation of factual questions, including unsubstantiated allegations of fraud, although under section 150(3)(a) of the *Queensland Civil and Administrative Tribunal Act* 2009, leave to appeal can only be given on questions of law; that the applicant has no prospects of success in the proposed appeal; and that there is no utility in the appeal, because the Council has already retaken possession of the property and substantially demolished the dwelling house on it.

I have some concerns, which I've explored with counsel, as to whether the reference in rule 767(b) to "an application in a civil proceeding for leave to appeal" extends to an application which arises out of proceedings in the Queensland Civil and Administrative Tribunal. Section 3(1) of the *Uniform Civil Procedure Rules* makes the rules applicable to civil proceedings in the Magistrates, District and Supreme Court, and the rules dealing with the commencement and carriage of proceedings refer to proceedings commenced in those courts.

On one view, the expression in rule 767(b) would seem to envisage an application which arises from an existing proceeding in the District or Supreme Court. There is also the question of whether, if rule 767(b) were as broadly construed as the Council contends, any work would be left to rule 766(3)(c), which permits the Court's jurisdiction and powers to be exercised by two or more Judges of Appeal in applications for leave to appeal in any other matter.

Mr Webster, for the Council, mounted a fairly compelling argument to the contrary. He pointed out that rule 745 of the *Uniform Civil Procedure Rules* applied part 1 of chapter 18 to appeals to the Court of Appeal from a variety of matters, in a broader range than civil proceedings in the Magistrates, District and Supreme Court.

This application, he argued, could be distinguished from the other matters referred to in rule 766(3)(c) because it is a minor civil dispute, and, thus, can be characterised as a civil

proceeding. There would still be work for rule 766(3)(b) in relation to other matters emanating from the Queensland Civil and Administrative Tribunal, for example.

Assuming I do have power to hear the application, insofar as it concerns the merits of the leave application, there is still a question as to whether I should depart from the existing practice of the Court of sitting a bench of three to hear applications for leave to appeal and, usually, where leave is granted, also resolving the appeal itself. If the application were, on its face, improperly instituted, I do consider I would have power under section 44(2) to strike it out. That would be so if leave was sought on questions of fact, not law.

I'll deal with that issue now. The applicant's draft notice of appeal has, as its ground, the Queensland Civil and Administrative Tribunal's lack of jurisdiction. The application for leave contains, as reasons justifying its grant, assertions that the Member of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal did not consider the evidence or the appellant's arguments, which are, arguably, capable of being questions of law as to the application of procedural fairness. There are then other matters raised as to whether the premises were residential premises and the lease, a residential tenancy, which are, in my view, capable on their face of amounting to questions of law; and the contention that the Tribunal did not have jurisdiction, obviously, would amount to an issue of law.

There's a further proposed ground suggesting that the Brisbane City Council has engaged in a tort of intentional interference with contractual relations, which seems to amount to an assertion of fact which would not fall within section 150.

The other matters, though, depending on the arguments ultimately advanced, at least on their face appear to amount of questions of law. So I do not consider that one can say that the application has then been improperly instituted.

That leaves, though, the question of whether I should be exercising a jurisdiction to dismiss the application for leave to appeal because of the absence of prospect of success.

Mr Newton of Queen's Counsel, for the Council, submitted that if I were satisfied that this was, essentially, an appeal seeking to re-agitate a question of fact as to whether there was

a residential tenancy, I should strike out the application now. He pointed to the original lease documents, the term of the lease having expired, which was a general tenancy agreement, to a submission of the applicant and to the affidavit of the applicant, referring to persons living at the premises, to argue that, plainly, this was a residential tenancy agreement.

He also pointed to the applicant's submissions about various forms of fraud alleged on the part of the Council and others, which, on any view, are purely factual arguments, which could not be advanced by the applicant on an appeal under section 150(3)(a) of the *Queensland Civil and Administrative Tribunal Act*.

I've set out the arguments which I presently can see for and against the existence of a jurisdiction in me, as a single Judge, to deal with the leave application on its merits. I do not propose to resolve them because I think there are practical reasons against my embarking as a single Judge, on the determination of this application, contrary to the Court's usual practice.

Mr Newton submitted that, assuming jurisdiction, if I was satisfied on the material he has pointed to that there is nothing here but a factual dispute, I should not be deterred by matters of practice from doing so. He may be right about that in principle. But I am not convinced that, in fact, the matter is so easily characterised.

The applicant says he wants to argue that, on the facts, his arrangement with the Council did not fall within the statutory definition of a residential tenancy. That is a question of law, which does require some further consideration to determine whether it is devoid of merit as the Council says, and I do not consider it appropriate for me to undertake that exploration here.

Mr Newton proposed that, if I were unconvinced I should deal with the matter summarily, I should adjourn both the Council's application and the application for leave. I will do so. Both applications are adjourned to a date to be fixed to be heard by a bench of three Judges of Appeal.

...

HER HONOUR: All right. It's a counsel of laziness, really, in some respects, but I'll reserve the costs of today's application.