SUPREME COURT OF QUEENSLAND

CITATION:	*Fox v Public Trustee of Queensland* [2022] QCA 278
PARTIES:	**SEAN NELSON FOX** (applicant) **v** **PUBLIC TRUSTEE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 15451 of 2022 QCATA No 344 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	Application for Stay of Execution
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – Unreported, 6 December 2022 (Acting Senior Member Fitzpatrick)
DELIVERED EX TEMPORE ON:	16 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	16 December 2022
JUDGE:	Flanagan JA
ORDERS:	**UPON the Applicant, by his counsel:**

(a) giving the usual undertaking as to damages; and

(b) further undertaking that, as soon as reasonably practicable after receipt by him of the funds referred to in paragraphs 3 and 4 of the Affidavit of Sean Nelson Fox filed 8 December 2022, he will:

(i) pay and discharge all outstanding rates in respect of the premises at Unit 2, 66 York Street, Nundah QLD 4012;

(ii) pay and discharge all outstanding secured debts over the Property; and

(iii) take all such steps as are available to him to pay and discharge the body corporate levies, if any, which have been raised in respect of the Property;

THE COURT ORDERS THAT:

1. **The decision made on 6 December 2022 by the Appeal Tribunal of the Queensland Civil and Administrative Tribunal in proceeding number APL 344-22, on appeal from proceeding number MCDT 402/22, be**

stayed until the hearing and determination of this appeal.

2. **The costs of and incidental to this application be each party's costs in the appeal.**

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO STAY OR DISMISS ORDERS OR PROCEEDINGS GENERALLY – where the applicant applied to stay a decision of the QCAT appeal tribunal pending determination of an appeal – where the competency of the appeal is challenged on the basis that it is not an appeal from a final decision of the QCAT appeal tribunal pursuant to s 150(2)(b) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) – where the decision of the QCAT appeal tribunal involved re-issuing a Warrant of Possession in circumstances where there was no evidence of a residential tenancy agreement – whether the decision of the QCAT appeal tribunal is a final decision –whether the applicant has a good arguable case – whether the disadvantage to the respondent caused by granting the stay outweighs the disadvantage which would be suffered by the applicant – whether the decision should be stayed until the determination of the appeal

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3(b), s 8, s 152(2), s 150(2)

Attorney-General for Trinidad and Tobago v Eriche [1893] AC 518; [1893] UKLawRpAC 46, cited
Cachia v Isaacs (1985) 3 NSWLR 366, cited
Day v Humphrey [2017] QCA 104, cited
Ex parte The Amalgamated Engineering Union (Australian Section); Re Jackson (1937) 38 SR (NSW) 13; [1937] NSWStRp 53, cited

COUNSEL: A J H Morris KC, with C M Thwaites, for the applicant (pro bono)
N Thirumoorthi (*sol*) for the respondent

SOLICITORS: No appearance for the applicant
Official solicitor to the Public Trustee of Queensland for the respondent

FLANAGAN JA: By application filed 8 December 2022 the applicant seeks a stay of the decision of the Queensland Civil and Administrative Tribunal (the Tribunal) in proceeding number MCDT 402/22. A stay application pending appeal may be made pursuant to s 152(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) which provides:

> "(2) However, the Court of Appeal or the tribunal as constituted when the decision was made, may make an order staying the operation of the decision until the appeal is finally decided."

A preliminary issue raised by the respondent is whether the present appeal to this Court is competent. Section 150(2) provides:

> "A party to an appeal under division 1 may appeal to the Court of Appeal against the following decisions of the appeal tribunal in the appeal—
>
> (a) a cost-amount decision;
>
> (b) the final decision."

The present appeal, dealing as it does with a residential tenancy dispute and being a minor dispute, is an appeal that falls under division 1. It is not an appeal against a cost-amount decision. Therefore, the competency of the appeal is challenged by the respondent on the basis that this is not an appeal from a final decision of the appeal tribunal pursuant to s 150(2)(b). It is first necessary to set out the history of the matter.

On 8 December 2022 the applicant filed a notice of appeal against the whole of the order of the appeal tribunal made on 6 December 2022. In 1995 the applicant's parents purchased Unit 2, 66 York Street, Nundah, Queensland (the Property). The applicant's father died in 1999. The applicant has resided at the Property from 1995 to the present.

By decision of the Tribunal dated 23 August 2021, the Public Trustee was appointed as the administrator for the applicant's mother for all financial matters. The applicant's mother is presently 88 years of age, resides at a nursing home and suffers from Alzheimer's.

On 15 November 2021 the respondent served the applicant with a Form 12 Notice to Leave. The notice correctly identified the address of the Property as 2/66 York Street, Nundah, Queensland, 4012. The notice required the applicant to vacate the Property by midnight 7 February 2022.

The applicant failed to leave the Property by this date.

On 17 February 2022 the respondent filed in the Tribunal an application for minor civil

dispute – residential tenancy dispute. The application sought a termination order of a residential tenancy and a Warrant of Possession. The application, as well as the affidavit in support of Clinton Miles affirmed 15 February 2022, however, referred to the incorrect address for the Property, namely 4/64 – 66 York Street, instead of 2/66 York Street. Documents exhibited to Mr Miles' affidavit did however include utilities and rates notices which identified the correct address.

In the Tribunal the application was given number MCDT 402/22.

On 14 June 2022 the applicant filed an affidavit in that proceeding. The applicant has been a solicitor for 33 years but retired in 2011 as a result of ill health. He stated that he had always lived with his parents and has never owned a property. At paragraph 14 of his affidavit the applicant referred to an agreement between his parents and himself that each of them would reside in the Property for the rest of their lives, that the applicant would pay any property expenses his parents could not pay and that upon the death of both his parents he would receive a life interest in the Property with reversion being left 50 percent to him and 50 percent to his brother. In support of this alleged agreement the applicant annexed his mother's will which, upon her death, creates a life interest in the Property in favour of the applicant.

In paragraphs 15 through to 22 of this affidavit, for the purposes of establishing an equitable interest in the Property, the applicant detailed his financial contributions totalling between $358,500 to $411,000.

At paragraphs 31 to 33 of his affidavit, the applicant asserted the following equitable interest in the Property:

> "31. Given the agreements I reached with my parents, my years of service, my financial contributions and the sacrifices I have made with respect to my career and my relationships, I believe I have a 50% equitable interest in the Property.
>
> 32. In the alternative, I have a life interest in the Property, the terms of which are recorded in my Mother's Will.
>
> 33. In the alternative, my parents promised that I could live in the Property for as long as I wanted if I contributed to the

> outgoings for the Property. I paid at least $266,000 towards property expenses. I made those payments relying on the promise my parents had made to me."

The applicant at paragraph 34 of his affidavit stated that he has an equitable interest in the Property or a life tenancy and that the arrangement between himself and his mother is not a residential tenancy within the meaning of the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) (RTRA Act). The applicant further asserted that even if it was a residential tenancy it should not be terminated because that would cause him unnecessary hardship as he has no savings and nowhere else to live. He presently lives on a disability pension.

On 29 June 2022 a second affidavit of Mr Miles affirmed 29 June 2022 was filed in the proceeding. In paragraphs 3 to 5 of the second affidavit Mr Miles referred to the address set out in the application containing a typographical error and identified that the correct address of the Property was 2/66 York Street, Nundah.

On 4 July 2022 the parties, both legally represented, attended a hearing before the Tribunal. Certain orders were made that day in relation to the applicant's claimed equitable interest.

On 23 August 2022, the Tribunal made a decision in the following terms, referring to the incorrect address of 4/64 York Street:

> "1. The Residential Tenancy Agreement between the parties be terminated as from midnight on 24 October 2022 on the grounds of Failure to leave.
>
> 2. A Warrant of Possession to issue authorising a police officer to enter the premises at 4/64 YORK STREET NUNDAH QLD 4012.
>
> 3. The Warrant shall take effect on 25 October 2022 and remain in effect for 14 days, to expire at 6:00pm on 8 November 2022.
>
> 4. The Warrant to be executed as soon as reasonably practicable after taking effect.
>
> 5. Entry under the Warrant shall only be between the hours of 8:00am and 6:00pm."

On 21 October 2022 the respondent filed an application for miscellaneous matters with the Tribunal seeking that orders 1 to 3 of the decision of the Tribunal dated 23 August 2022 be amended so as to show the correct address of the Property. On 7 November 2022 the Tribunal made the orders substantially in the terms sought by the respondent.

On 21 November 2022 the applicant filed an application for leave to appeal or appeal the Tribunal's decision made 7 November 2022 and filed an application to stay the decision of 7 November 2022 with the appeal tribunal.

On 22 November 2022 the appeal tribunal granted an interim stay and made directions. One of those directions was that the appeal tribunal would issue further directions in relation to the application for leave to appeal or appeal following determination of the application to stay a decision.

On 6 December 2022 the appeal tribunal made the following orders:

> 1. The application to stay a decision filed on 21 November 2022 is refused.
> 2. The interim order dated 22 November 2022 is vacated.
> 3. The Warrant of Possession made on 7 November 2022 is re-issued to take effect on 9 December 2022.
> 4. The Warrant of Possession shall remain in effect for 14 days to expire at 6 pm on 23 December 2022.
> 5. The Warrant of Possession is to be executed as soon as reasonably practicable after taking effect.
> 6. Entry under the Warrant shall only be between the hours of 8 am and 6 pm.
> 7. Direct the appellant to advise if he intended to proceed with the application for leave to appeal or appeal by 4 pm on 20 December 2022.

Pursuant to the refusal of the stay decision, the decision in MCDT 402/22 was re-issued reflecting the orders made by the appeal tribunal on 6 December 2022. Also, on 6 December 2022 the applicant's legal representatives advised the appeal tribunal that the appellant intended to proceed with the application for leave to appeal or appeal subject to any orders which may be made by this Court in the appeal proceedings, which were expected to be filed and served the following day.

It is the appeal tribunal's decision of 6 December 2022 which the applicant seeks to stay. A request for written reasons for the decision was made on 8 December 2022, but as at the date of determining the stay application, no reasons have been provided. This observation is not to be interpreted as being at all critical of the acting senior member, rather the observation is made in the context of this Court not having the benefit of reasons in considering whether the applicant has a good arguable case.

The respondent, by reference to a number of decisions including *Turnbull v The State of Queensland through The Department of Housing and Public Works* [2014] QCA 240 and *Terera & Anor v Clifford* [2017] QCA 181 and *Peet & Anor v Rental Domain & Anor* [2014] QCA 272, submits that the appeal is incompetent because the decision of the appeal tribunal made on 6 December 2022 is not, for the purpose of s 150(2)(b), the final decision.

The final decision, as submitted by the respondent, will be the decision of the appeal tribunal in determining whether leave to appeal should be granted and the determination of the appeal itself. The difficulty with this submission is that the orders made by the appeal tribunal on 6 December 2022 did not simply involve the lifting of the interim stay order and the refusal of the stay application. It also involved the appeal tribunal itself re-issuing a Warrant of Possession. The very foundation of that Warrant of Possession that underlies its validity is the existence of a residential tenancy agreement and, of course, the failure of the applicant to comply with the Notice to Leave. The appeal tribunal also made orders relevant to the date that the warrant would be able to be issued. In those circumstances, the question arises whether that was a final decision for the purpose of s 150(2)(b). There is a definition in schedule 3 to the QCAT Act that defines "final decision" of the tribunal in a proceeding to mean:

> "the tribunal's decision that finally decides the matters the subject of the proceeding."

I note that that definition refers to "the tribunal", which itself is a defined term in schedule 3 and means:

> "the Queensland Civil and Administrative Tribunal established under section 161."

There is, however, a separate definition of "appeal tribunal", which defines that term to mean:

> "the tribunal constituted, or to be constituted, under section 165 for the purpose of hearing and deciding an appeal against a decision of the tribunal."

The issuing or re-issuing of the Warrant of Possession by the appeal tribunal is in the nature of final relief. By the orders made on 6 December 2022, there was really nothing left for the appeal tribunal to decide because the respondent would obtain possession of the Property. That encompasses a final determination of at least three things. First, that there existed, as between the respondent mother and the applicant son, a residential tenancy agreement. Two, that that agreement was terminated. Three, that the basis of that termination was the failure of the applicant to comply with the Notice to Leave.

One asks, therefore, what was left for the appeal tribunal to decide in terms of any application for leave to appeal or appeal.

If, however, the definition of final decision should be construed as applying only to the appeal tribunal and not to a tribunal, then it should be interpreted according to its ordinary meaning in light of the objects and purposes of the QCAT Act. Those objects are set out in s 3 of the QCAT Act and include the following in s 3(b):

> "to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick."

I also note that the Tribunal's functions relating to the objects are set out in s 4.

In my view, it is open to argue, as the applicant has, that the decision of the appeal tribunal and the orders made by it on 6 December 2022 have the necessary quality of a final decision in that those orders finally determined the rights of the respondent vis-à-vis the applicant. The effect of those orders if a stay is not granted is that the applicant will be removed from the Property by the execution by police of the Warrant of Possession. Even if I did not accept the submission of Mr Morris KC that the decision was a final decision for the purposes of s 150(2)(b), I would otherwise have accepted his submission that this Court in its inherent jurisdiction, and in its supervisory jurisdiction, could have enjoined

the respondent from enforcing the Warrant of Possession on the basis that underlying the Warrant of Possession are arguable jurisdictional errors.

The first jurisdictional error is the no evidence rule in that on the material before this Court there appears to be no evidence from which it may be implied that a residential tenancy agreement existed as between the respondent mother and the applicant son. Secondly, by the directions made by the Tribunal – which I will outline in more detail shortly – the applicant was, in effect, prevented from having his evidence, which was uncontradicted in relation to the existence of an equitable interest, taken into account by the Tribunal for the purpose of determining whether there was an implied residential tenancy agreement.

Both those errors, in my view, are arguable jurisdictional errors which would enliven this Court's inherent jurisdiction in its supervisory capacity.

As to the stay application itself, in *Day v Humphrey* [2017] QCA 104 at [5] – [6] Morrison JA stated:

> "An applicant for a stay must demonstrate some reason why a judgment should be given immediate effect. The test applicable on an application to stay a judgment pending an appeal is simply expressed as being whether the case is an appropriate one for a stay.
>
> The test reflects a wide discretion reposed in the Court and authority establishes that there are some traditional factors to be taken into account on the application, namely whether:
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> (a) there is a good arguable case;
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> (b) the applicant will be disadvantaged if the stay is not granted; and
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> (c) there is some compelling disadvantage to the respondent if a stay is granted, which outweighs the disadvantage suffered by the applicant."

The grounds of appeal seek to challenge the appeal tribunal's decision made on 6 December 2022 to re-issue the Warrant of Possession made on 7 November 2022. The grounds of appeal identify three challenges to the appeal tribunal's decision to re-issue the Warrant of Possession. First, that the warrant was re-issued without having regard to the applicant's claim to an equitable interest in the Property. This was in circumstances where

the applicant had deposed to his equitable interest and this evidence was neither challenged nor contradicted. Further, the evidence of the applicant's equitable interest contradicted the existence of any residential tenancy agreement as between the applicant and the respondent for the purposes of the RTRA Act.

The applicant also challenges the appeal tribunal's power to make the orders of 6 December 2022 as once the application for a Warrant of Possession had been determined by the Tribunal on 23 August 2022 (albeit by reference to the wrong address of the Property), the Tribunal had become *functus officio*. For the purpose of determining the present application it is not necessary to have any further reference to this secondary argument.

The respondent submits that as the applicant did not appeal the decision of the Tribunal made 23 August 2022, it has poor prospects on appeal of asserting that the appeal tribunal, in making the orders of 6 December 2022, was required to revisit any issues concerning the applicant's asserted equitable interest or his argument that there was no residential tenancy agreement.

There is in my view however, a good arguable case that the Tribunal has proceeded to issue a Warrant of Possession and the appeal tribunal has proceeded to re-issue a Warrant of Possession based on an asserted residential tenancy agreement and the applicant's failure to comply with a Notice to Leave, in circumstances where prima facie there does not appear to be any evidence of such a residential tenancy agreement. In this respect, Mr Morris KC correctly submits:

> "…there was no actual evidence of the applicant's residential tenancy agreement. None whatsoever. No rent was ever asked for nor paid. No dealings are deposed to, either between the [applicant] and his mother or between the [applicant] and the Public Trustee, from which a contractual consensus could be inferred."

Mr Morris further submits:

> "Moreover, the original decision-maker accepted that the [applicant] may have been a 'boarder' or a 'lodger' up to the time of Mrs Fox's departure, which necessarily precludes the finding of any residential

> tenancy agreement with his mother before the Public Trustee became administrator of her affairs."

Mr Morris identifies that the central issue in the appeal is whether QCAT is correct in the view that it is unable to take cognisance of equitable interests in real property, specifically in proceedings under the RTRA Act, in order to determine whether a person in occupation of residential premises is subject to a residential tenancy agreement, or whether, contrary to that, the premises are occupied on another basis.

The respondent has contended below, that:

> "The Tribunal has held on many occasions that being a creature of statute, its jurisdiction is limited by the QCAT Act and it does not have equitable jurisdiction and therefore no power to consider whether a party has acquired an equitable interest in property."

That, as a statement of law, is correct. However, that, as a statement of law, does not preclude the Tribunal under the QCAT Act taking into account the relevant matters as to whether or not a residential tenancy agreement existed or could be otherwise implied.

Mr Morris KC, in his submissions, has dealt extensively with the authorities relied on by the respondent for this purpose, but it is sufficient to have regard the decision of *Attorney-General for Trinidad and Tobago v Eriche* [1893] AC 518 and the New South Wales decisions in *Ex parte The Amalgamated Engineering Union (Australian Section); Re Jackson* (1937) 38 SR (NSW) 13 and *Cachia v Isaacs* (1985) 3 NSWLR 366 in which it has been held that a tribunal of limited statutory jurisdiction, with no power to grant equitable relief, must nonetheless have regard to a party's equitable interests where appropriate "to decide not only [the] matter [which it is empowered to determine] but all other matters necessary for the exercise of its jurisdiction" (*Cachia v Isaacs* (1985) 3 NSWLR 366 at 387 per McHugh JA).

Quite apart from the lack of evidence of such a residential tenancy agreement, the applicant's asserted equitable interest runs directly contrary to the existence of such an agreement. On 4 July 2022, prior to the making of the orders of 23 August 2022, the Tribunal ordered that the applicant:

> “file in the tribunal registry and serve on [the Public Trustee] an affidavit which exhibits a claim brought in a Court of common jurisdiction for orders to give effect to [the applicant’s] claimed interest in the property.”

According to the applicant, this decision effectively precluded him from defending the issues before the Tribunal (at first instance), unless he had the capacity and resources to commence proceedings in a superior court, by providing that:

> “if the [applicant] fails to comply with order 3 above, the Tribunal will proceed to make a decision on the evidence before it as at 4 July 2022, to be handed down not before 29 July 2022.”

The argument on appeal also appears to be that for the purposes of re-issuing the Warrant of Possession the appeal tribunal should have satisfied itself that a residential tenancy agreement existed in light of the asserted equitable interest.

Although the applicant did not appeal the Tribunal’s orders made on 23 August 2022, the foundation of any order re-issuing the Warrant for Possession must be the existence of the residential tenancy agreement and the applicant’s failure to comply with the Notice to Leave.

The next issue to consider in relation to the stay is whether there is some compelling disadvantage to the respondent if a stay is granted which outweighs the disadvantage which will be suffered by the applicant.

In his affidavit filed 8 December 2022 in support of a stay application, the applicant states that if he is ejected from the Property he currently has nowhere else to reside. Depending on his alternative accommodation, he may be unable to look after his mother’s cat. The respondent has previously conceded that the applicant will face some disadvantage if a stay is not granted, as he will have to at least find alternative accommodation.

The disadvantage to the mother is that there are substantial arrears incurred in the outgoings for the Property for many years due to the non-payment of council rates, water rates, and body corporate levies. The Property is continuing to incur costs and expenses which the respondent cannot meet. The applicant is not paying rent towards the Property

despite living in it and he refuses to pay the body corporate levies believing that they are invalid. There is an outstanding mortgage on the Property which has increased. The mother is also incurring other liabilities for residential aged care fees. The respondent also points to the real risk of the council commencing sale of land proceedings to recover unpaid rates and charges in circumstances where the council is not obliged to sell the Property at market value and may sell the land at its unimproved value. There is also a risk of the bank foreclosing on the Property.

Those disadvantages to the respondent are clearly outlined at paragraphs 52 and 54 of the respondent's recently filed submissions. As at the date of the submissions which was 15 December 2022, the respondent's debts relating to the Property have significantly increased and are currently in the sum of $51,051.08. There are further liabilities for residential care fees in the sum of $59,606.53 which the mother is unable to meet. She also has outstanding liabilities currently in the sum of $111,132.45. This, of course, is a relevant factor for the Court to take into account. The respondent requires access to the mother's property in order to sell the Property and meet her liabilities prior to any other person taking action against the mother.

The applicant however states in his affidavit that on 17 November 2022 BT Funds Management Limited advised him that a decision had been made by one of his insurers to accept his claim and pay a total and permanent disability insurance benefit of $257,375. Further, on 6 December 2022 Brighter Super advised the applicant that it had accepted a separate claim to pay a total and permanent disability insurance benefit of $56,351.69. The applicant is yet to receive these funds and is living day to day on his disability pension. There is no evidence presently before the Court that there is an imminent likelihood of either the bank or the council seeking to enforce any of their rights in relation to the Property. In circumstances where there is fair likelihood that the applicant would be paid a substantial amount and in circumstances where he is asserting an equitable interest in the Property, any disadvantage to the respondent if a stay is granted does not appear to outweigh the disadvantage which would be suffered by the applicant. This is further supported by the applicant offering the usual undertaking as to damages.

He submits that he is imminently to receive funds of over $300,000. That amount would more than suffice to meet any foreseeable exposure pursuant to the undertaking as to damages.