QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Captain Nemo's Pool and Spa Supplies v Pike* [2021] QCAT 47
PARTIES:	**CAPTAIN NEMO'S POOL AND SPA SUPPLIES** (applicant) **v** **NIGEL PIKE** (respondent)
APPLICATION NO:	APL130-20
MATTER TYPE:	Other minor civil dispute matters
DELIVERED ON:	10 February 2021
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Dr J R Forbes
ORDER:	**The application for leave to appeal is dismissed**
CATCHWORDS:	APPEAL – APPLICATION FOR LEAVE TO APPEAL – consumer dispute – where the applicant firm did not appear at the time appointed for hearing – where the primary tribunal exercised its discretion to hear and determine the matter in the applicant's absence – where the applicant changed its address without notifying QCAT – where the applicant alleges that it was unaware of its duty to notify QCAT – where notice of trial sent to applicant's former address – where applicant alleges denial of due process and seeks a new trial – whether application for leave should be granted
	Acts Interpretation Act 1954 (Qld) s 39A *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 32, s 92, s 93, s 139, s 140, 3rd schedule *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 *Collier v Coast to Coast Earthmoving Pty Ltd* [2018] QCATA 129 *Fox v Percy* (2003) 214 CLR 118 *FV Rentals (t/a Forbes Realty Rentals) v Anderson* [2014] QCATA 181 *Harris v Foxworth Pty Ltd* [2013] QCATA 133 *House v The King* (1936) 55 CLR 499 *Keynes Capital Global Limited v Guo* [2020] NSWCA 178 *Lee v The Queen* [2020] NSWCCA 307

Minister for Immigration and Citizenship v SZMDS & Another (2010) 240 CLR 611
Pickering v McArthur [2005] QCA 294
The Pot Man Pty Ltd v Reaoch [2011] QCATA 318
W, In re, (an infant) [1971] AC 682

APPEARANCES & REPRESENTATION: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

[1] This application by Captain Nemo's Pool and Spa Supplies (`Nemo') seeks leave to appeal a decision of the Tribunal, given in its absence on 30 January 2020. The amount of $5,770.50 was then awarded to the Respondent Nigel Pike (`Pike').

[2] On or about 28 November 2017 Nemo sold Pike an outdoor spa bath and accessories. Pike claims that that the spa was irreparably faulty due to leaks and deterioration of the plastic base.

[3] The parties attended mediation[1], but no resolution resulted.[2]

[4] Pike began these proceedings on 6 March 2019, and they were listed for hearing on 30 January 2020. Pike then appeared. Nemo did not.

Ex parte hearing

[5] In exercising its lawful discretion to proceed *ex parte* the Tribunal observed:

> [Nemo's notice of hearing] was sent to Shop 26, 502 Hope Island Road, Helensvale.[3] That is where the notice of mediation[4] went, so I am going to accept that they received notice of mediation and therefore they should have received the notice of hearing, because the address for service is the same, so under section 93 of the QCAT Act[5], I can elect to proceed in the absence of the other party.[6]

[6] A business is duly served with a notice of hearing if that document is posted to the business address last known to the server.[7] Notices of hearing, unlike certain other documents, are issued by the Registrar, not by a party.[8] The Registrar relies, of course, on addresses for service supplied by the parties. It is common ground that Nemo's notice was sent to the firm's only address then known to QCAT, namely 26/502 Hope Island Road, Helensvale.

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1 T page 2 lines 11-13.
2 Certificate of mediation 11 June 2019.
3 As verified by registry officer's affidavit sworn on 3 January 2020.
4 And the initial application for substantive relief: see affidavit of Nigel Pike, filed 19 March 2019.
5 Materially s 93 of the QCAT Act (`the Act') provides that if a person has not attended a hearing and the Tribunal is satisfied that the person has been given notice of the hearing under s 92, the Tribunal may hear and decide the matter in the person's absence.
6 T pages 2-3, lines 46-47 and 1-4 respectively.
7 The server being the Registrar of the Tribunal. QCAT Practice Direction No 8 0f 2009 s 13(b). See also *Acts Interpretation Act 1954* (Qld) s 39A(1)(b),
8 Section 92 of the Act.

[7] The Tribunal heard Pike's evidence[9] on oath[10] and concluded:

> [T]he goods were not of acceptable quality under section 54 of the Australian Consumer laws and therefore there was a breach of the guarantee under [those] laws.[11]

[8] Applying section 93 of the QCAT Act, the Tribunal proceeded to enter judgment against Nemo in the sum of $5,770.59.

[9] On 17 March 2020 Nemo applied for a reopening. In support of that application it submitted:

> We were never notified of any hearing ... due to our change of address. ... [W]e rang QCAT [and] discovered ... the notice was mailed to 26/502 Hope Island Road Helensvale. We moved out on 13/9/19 ... to Siganto Drive Helensvale.

[10] On 21 April 2020 that application was dismissed. The Tribunal was not satisfied that Nemo gave a reasonable excuse for its absence, and found that no significant new evidence was presented.[12] The Act provides that:

> [T]he tribunal's decision on [an] application [to reopen] is final and cannot be challenged, appealed against, reviewed, set aside or called into question in another way, under the *Judicial Review Act* or otherwise.[13]

[11] A second reopening application – which is what the present application amounts to – is not allowed.[14]

Leave to appeal sought

[12] Nemo's application for leave, lodged on 21 May 2020, is the first QCAT document filed with Nemo's new address, namely 1/138 Siganto Drive Helensvale.

Purpose of this hearing

[13] For present purposes it is unnecessary to detail the pros and cons of the parties' evidence on the merits – or, in Nemo's case, its proposed evidence. That is so because the present question in whether the primary decision should be set aside, and the matter remitted for retrial. If that request were granted the merits would then be considered..

[14] The applicant Nemo alleges denial of natural justice, asserting a right to be heard.

[15] The right to a hearing, as part of natural justice, is really a right to an opportunity to be heard. At common law that right can be forfeited, and that common law rule is underpinned by section 93 of the Act. Here it was forfeited by Nemo's neglect of its duty to notify QCAT of its change of address. That duty is not only a counsel of common sense; it is required by law. QCAT Rule 36 directs every litigant to provide

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9 Photographs included: T page 5 line 36, page 9 line 32.
10 T page 17 line 34.
11 Transcript of hearing 30 January 2020 (`T') page 21 lines 4-7.
12 QCAT Act Schedule 3, definition of `reopening ground".
13 Section 139(5); *Collier v Coast to Coast Earthmoving Pty Ltd* [2018] QCATA 129 at [18].
14 QCAT Act s 140(5).

an address for service, and Rule 37 states that any change in that address must be notified to the Registrar and to every other party.[15]

[16] In support of its application for leave Nemo submits[16]:

> We were not aware that our address for service for QCAT documents was required to be updated, as we were not familiar with the QCAT process ... Mr Pike should have told the tribunal at the hearing on 30 January 2020 that we had changed address.

[17] To which Mr Pike reasonably replies: `It is not my responsibility to notify QCAT that Captain Nemo's ... have moved ... [They are] blaming me for their neglect'.[17]

[18] The weakness of Nemo's bold submission is not alleviated by assertions that its new address was advertised generally (but not to QCAT in particular), or that Pike, being `a local to the area' was `well aware' of the change. Most if not all of the Nemo-Pike communications were by email. Incidentally, while Nemo's location changed, its email address remained the same.

[19] In the light of correspondence, followed by service of Pike's initiating application, and attendance at mediation Nemo was well aware that it was facing a substantial claim. When mediation failed, it well knew, or should have known that a hearing and judgment would follow.

Policies of expedition and finality

[20] *Harris v Foxworth Pty Ltd*[18], a decision of Wilson J, a former President of the Tribunal, deals with precisely a similar situation – a judgment in default of appearance, following a failure to notify QCAT of a change of address. Dismissing Harris' application for leave to appeal his Honour observed:

> Mr Harris has been, with respect, the author of his own misfortune. His conduct of these proceedings exemplifies the need for parties in disputes of this kind to take ... sensible and logical steps required under the Rules of the Tribunal to ensure that they are kept informed about developments in the proceedings in which they are involved. Once that it is understood that Mr Harris failed to do that – to take steps required under the QCAT rules to keep the Tribunal informed of his address for service of documents - his application for leave to appeal must fail.[19]

[21] Rejecting such excuses as `we are not familiar with the QCAT process' his Honour pointed out that updating an address for service was simply a matter of reasonable care and common sense:

> Greater sympathy might be extended to him if it were not that the QCAT Rules incorporate practical requirements which, even to a non-lawyer, are plainly sensible and logical.[20]

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15 A form entitled `Change Your Contact Detail' is provided for that purpose.
16 Email Nemo to QCAT 5 November 2020, items (b) and (d).
17 Email Pike to QCAT 11 November 2020.
18 [2013] QCATA 133.
19 [2013] QCATA 133 at [18]-[19].
20 [2013] QCATA 133 at [20].

[22] The need for expedition and economy of court resources has recently been emphasised at the highest judicial level[21], as Wilson J pointed out in another decision:

> QCAT has a statutory obligation to deal with matters in ways that are accessible, economical and quick ... The Minor Civil Disputes jurisdiction, in particular, is one in which the Tribunal has a broad jurisdiction to make orders that it considers fair and equitable ... It is common knowledge that the jurisdiction is a busy and demanding one, in which parties are expected to present their own cases, and act in their own interests ... The legislation, and the demands upon public resources which fund QCAT necessarily impose an expectation and an obligation upon a party that it will ensure that it acts in its own best interests, *or accept the consequences.* [22]

[23] In the same case Wilson J reminded parties that their own cases are not the centre of the legal universe; the Tribunal's time and resources are limited, and there are other litigants in the queue.

[24] An application of the present kind is clearly something that the Act is designed to discourage. If any party who fails to register a change address were allowed to appeal and secure a new trial, then one trial would become two, and the second trial, could generate another appeal about a disproportionately modest amount of money or property. Justice to the party who duly did appear is not to be disregarded.

Appealing discretionary decisions

[25] A section 93 decision is discretionary. Appeals against discretionary decisions are particularly restricted:

> The manner in which an appeal against an exercise of discretion is governed by established principles. It is not enough that the judges of the appellate court consider that, if they had been in the position of the appellate court, they would have taken a different course.[23]

[26] Provided that the decision is not plainly unjust or unreasonable, or clearly contrary to principle, the decision will not usually be disturbed.[24] The present decision cannot fairly be described in those terms. Where reasonable minds may differ, a decision cannot properly be called erroneous simply because one conclusion has been preferred to another possible view.[25]

Not a retrial

[27] An application for leave to appeal is not an opportunity to `second guess' the primary decision. It is not nearly enough to feel a subjective sense of injustice, or to express disappointment at an adverse decision. An application of this kind is limited to the question: Has the applicant produced a reasonable argument that an appellable

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21 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 217 on the value of finality.

22 *The Pot Man Pty Ltd v Reaoch* [2011] QCATA 318 at [8] and [10] (emphasis added).

23 *House v The King* (1936) 55 CLR 499 at 505; *Lee v The Queen* [2020] NSWCCA 307 at [152].

24 *Keynes Capital Global Limited v Guo* [2020] NSWCA 178 at [10].

25 *Fox v Percy* (2003) 214 CLR 118 at 125-126; *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131]; *In Re W (an infant)* [1971] AC 682 at 700.

error has occurred, and has a substantial injustice resulted?[26] Nemo has not discharged that onus. Accordingly, the application for leave must be dismissed.

[28] **ORDER:** The application for leave is dismissed.

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[26] *Pickering v McArthur* [2005] QCA 294 at [3]. *FV Rentals (t/a Forbes Realty Rentals) v Anderson* [2014] QCATA 181 at [4].