

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Freeman v Department of Transport and Main Roads*  
[2023] QCAT 416

PARTIES: **LESLEY FREEMAN**  
(applicant)

v

**DEPARTMENT OF TRANSPORT AND MAIN  
ROADS**  
(respondent)

APPLICATION NO/S: GAR446-23

MATTER TYPE: General administrative review matters

DELIVERED ON: 19 September 2023

HEARING TYPE: Decision on the papers

HEARD AT: Brisbane

DECISION OF: Senior Member Aughterson

ORDERS: **1. The application to extend a time limit filed on 14 August 2023 is refused.**

**2. The application to stay a decision filed on 18 August 2023 is dismissed.**

CATCHWORDS: HIGHWAYS – CONSTRUCTION, MAINTENANCE AND REPAIR – ROADS – GENERAL MATTERS – where carport and gate constructed on a State-controlled road – where the Department made a decision to remove unauthorised structure – where the applicant filed review and stay applications out of time in relation to that decision – whether to extend time to file review

*Limitation of Actions Act 1974 (Qld), s 6(4)*  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 22(3), s 22(4), s 33, s 36, s 61(1)(a)*  
*Transport Infrastructure Act 1994 (Qld), s 23, s 24, s 33(1)(b), s 50, s 52(1), s 62, s 485A, Sch 3, Sch 6*

*Jensen v Queensland Building and Construction Commission* [2019] QCATA 11  
*Willmott v Carless* [2021] QCATA 132

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] On 26 June 2023, the applicant filed an application to review an internal review decision of the respondent made on 26 May 2023. The original decision was made under s 52(1) of the *Transport Infrastructure Act 1994* (Qld) ('the TI Act'), which allows the chief executive to, among other things, remove an unauthorised structure constructed on a State-controlled road. The structure in question is a carport and gate ('the carport'). In making the application for internal review, the applicant requested that the timeframe for removal be extended to 15 May 2025. In the internal review decision the required removal of the structure was confirmed and it was stated that the removal will be undertaken by the chief executive 'on or from 15 August 2023'.
- [2] Review by the Tribunal of a decision made under s 52(1) of the TI Act is available by virtue of s 485A and Schedule 3 of that Act. The review application was filed in the Tribunal a few days outside the time allowed under s 33(3) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act').
- [3] On 7 August 2023, directions were issued in relation to the filing of any application to extend the time limit for the filing of the review application and any application to stay a decision, with supporting submissions. It was directed that a decision on those issues would be made by the Tribunal on the papers.
- [4] On 14 August 2023, the applicant filed an application to extend time, with supporting submissions filed on 15 September 2023. An application to stay the decision was filed on 18 August 2023. An interim stay was granted, pending determination of the application to extend time.
- [5] On 25 August 2023, the respondent filed submissions opposing both the application to extend time and the application to stay a decision.
- [6] On 19 September 2023, the application to extend a time limit was refused and the application to stay a decision was dismissed. An application has been made for reasons for those decisions. These are the reasons.
- [7] Section 61(1)(a) of the QCAT Act provides that the tribunal may extend a time limit fixed for the start of a proceeding by this Act or an enabling Act, while s 22(3) allows for the stay of a reviewable decision.
- [8] Relevant to any consideration of an application for extension of time are the length of the delay, the explanation for the delay, the strength of the applicant's case, any potential prejudice arising from any extension, and the interests of justice.<sup>1</sup> The question of whether the applicant has an arguable case is also relevant to consideration of a stay application.<sup>2</sup> See also the relevant factors at s 22(4) of the QCAT Act, which include the public interest and the interests of any person whose interests may be affected by the decision.
- [9] In the present case, it is not disputed that the delay is relatively short and that there had been an earlier attempt to file the review application. Accordingly, the relevant issues are the strength of the applicant's case, potential prejudice arising from any extension of time and the interests of justice.

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<sup>1</sup> *Jensen v Queensland Building and Construction Commission* [2019] QCATA 11, [7].

<sup>2</sup> *Willmott v Carless* [2021] QCATA 132, [12].

- [10] Section 50(2) of the TI Act provides that a person ‘must not construct, maintain, operate or conduct ancillary works and encroachments on a State-controlled road’, other than where approved or permitted under that provision. Section 52(1) then provides that where there is a construction contrary to s 50, the chief executive may cause it ‘to be altered, relocated, made safe or removed’.
- [11] In its decision, the respondent states that the necessary approval for the carport had not been given and that it obstructs access for the purpose of maintenance and upkeep of the road and authorised access to other properties. In relation to the latter, in its submissions the respondent states that a neighbouring lot has approval to construct road access works to their property, including at a point where the carport is located, and that unless the carport is removed they cannot utilise their approved access.
- [12] It is the submission of the applicant that insufficient time had been allowed to reposition the carport onto the applicant’s land. In her submissions the applicant also refers to the opportunity to ‘potentially retain the carport’. The submission in relation to that potential is brief. It is stated that the carport is more than 90 years old and that the applicant has ‘adversely possessed’ the carport land. The reference to adverse possession is not further developed. However, s 6(4) of the *Limitation of Actions Act* 1974 (Qld) provides:
- Notwithstanding any law or enactment now or heretofore in force in the State, the right, title or interest of the Crown to or in any land shall not be and shall be deemed not to have been in any way affected by reason of any possession of such land adverse to the Crown for any period whatever.
- [13] As to the declaration of State-controlled roads and their management and control, see s 23 and 24 of the TI Act.<sup>3</sup> On that basis, there cannot be a claim of adverse possession in relation to State-controlled roads.
- [14] Otherwise, the applicant makes no submissions as to the validity of the removal decision. Indeed, in her review application the order sought by the applicant is for the Tribunal to ‘Grant a period of 2 years to rectify the carport relocation’. That is consistent with what was sought on internal review.
- [15] The respondent submits that the road in question is a State-controlled road and the carport is ‘ancillary works and encroachments’ as defined in the TI Act.<sup>4</sup> This is not disputed by the applicant. The respondent provided photographs and noted that the carport ‘is not a substantial structure’.
- [16] The respondent submits that not only is the carport unauthorised, but also there is no approved access for the applicant to access her lot in the driveway leading to the carport. It is stated that the applicant’s concern is not that the carport be removed, but that she requires more time to reposition it. It is further submitted that the public interest favours the discontinuance of an unlawful act, there are parties in addition to the respondent that are impacted by the structure, and that the applicant has no arguable case. As is noted above, in relation to impact on other parties, it is submitted that unless the carport is removed it will restrict approved access by a neighbour to the road. Accordingly, it is submitted that it is not in the interests of justice for the extension of

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<sup>3</sup> Also, s 33(1)(b) provides that a person must not, without lawful excuse or the written approval of the chief executive, ‘interfere with a State-controlled road or its operation’.

<sup>4</sup> See Schedule 6 of the TI Act.

time to be granted and that, alternatively, the application might be dismissed pursuant to s 47 of the QCAT Act.

- [17] With reference to the impact of the carport on the work of the respondent, it is stated that the road in question is natural-disaster prone and requires frequent and ongoing reconstruction. In particular, it is a hinterland road in steep mountainous terrain and has narrow confines and corridors that make it difficult to carry out rectification works. Further, if there is any restriction in carrying out operations, either by a locked gate or the existence of a structure on the road, that will impede the respondent in carrying out its operations and maintenance obligations.
- [18] The applicant submits that the decision is unreasonable and, in relation to access to the road by a neighbour, submits that the respondent failed to take account of the existing registered easement owned by the neighbour over the applicant's land. It is also submitted that the applicant was not consulted about the proposed access allowed to the neighbour and that this breaches 'administrative law principles, as well as the hearing rule. It is a breach of natural justice'.
- [19] The applicant also disputes the respondent's submissions in relation to access to the road and the impact of natural disasters. It is submitted that the gate has now been removed and that the carport 'can easily be navigated past and around'. Further, in relation to the natural disasters that have occurred along the road, none have been at that site and it is 'very unlikely that the site will experience a natural disaster in the next twelve months or if it did, the loss of property will not be significant'.

### **Discussion**

- [20] Other than making a passing reference to adverse possession, the applicant does not contest that the carport is an unauthorised structure and it is not submitted that the respondent is not entitled to require removal of the structure pursuant to s 52(1) of the TI Act.
- [21] Rather, the submissions of the applicant principally focus on what is said to be the unreasonableness of the respondent in not allowing the requested timeframe for removal of the carport. There are several difficulties with the applicant's position. First, other than by passing reference to adverse possession, it is not in dispute that the carport is an unauthorised structure. Any hearing before the Tribunal is likely to take many months, so that if the matter proceeds and a stay is granted effectively the Tribunal would be allowing an unauthorised structure to remain standing for a significant amount of time; a structure which has the actual or potential negative impacts noted below.
- [22] Second, in the context of the carport being an unauthorised structure that extends onto what appears from the supplied photos to be a narrow unsealed road, there is a public interest consideration given that there is at least some potential for it to impede the respondent in effectively reacting to natural disasters. It is no answer for the applicant to say that there have been no natural disasters at that particular point. The public interest is germane given the nature of the terrain and of the road and the potential risks in relation to access, as against the private interest of the applicant in seeking to extend the life of an unauthorised structure for a significant amount of time.
- [23] Third, if there were an extension of time to file the review application and the granting of a stay, it could impact the rights of the neighbour to utilise an approved access. It is

no answer for the applicant to say that there is an alternative access through an easement over the applicant's property. That might or might not suit the neighbour, as to which no submission has been made. Whether or not the applicant was given an appropriate hearing in relation to the granting of that approval might have been considered in the context of any available challenge to the decision. It remains that an approval was given. Allowing the ongoing maintenance of an unauthorised structure by the applicant should be considered in the context of any impact on the opportunity for a third party to exercise an authorised right.

- [24] Fourth, as submitted by the respondent and not disputed by the applicant, the applicant has no authorised right of access to the property at the point where the carport stands. The respondent further submits that in order to access the road, either by pedestrian or vehicular traffic, an approval is required under s 62 of the TI Act. On that basis, both the structure itself and access to the property at that point is unauthorised.
- [25] Finally, there is no indication as to why a timeframe for removal of two years is appropriate. In the application to review, the applicant simply asserts that the specified three months 'provides insufficient time to prepare plans, obtain all necessary approvals and to undertake the work'. From the respondent's submissions, it seems that the reference to plans and approvals refers to local government approval to build a structure on the applicant's land. In any event, there is no reference in the applicant's submissions as to why a two year delay is required or warranted. In relation to the carport itself, the respondent submits that the structure is not substantial. That is borne out by the provided photographs. It is difficult to discern any justification for a delay of two years, particularly in the context of the other considerations noted above.
- [26] The applicant's case is far from strong and given the potential prejudice arising from an extension of time and any stay of the respondent's decision, an extension of time is not in the interests of justice. It is noted that any final hearing before the Tribunal is unlikely to be concluded before at least the middle of 2024. In the circumstances, the application for an extension of time should be refused. While by s 22(3) of the QCAT Act a stay may be granted where a proceeding for review of a decision has 'started' under the QCAT Act,<sup>5</sup> there is no power to grant a stay independently of the review proceedings, which now will not proceed. In any event, the questions of whether there is an arguable case, the interest of any person whose interests may be affected by a decision, and the public interest are also relevant to the question of whether a stay should be granted. In the circumstances outlined the stay application should be dismissed.
- [27] The application to extend a time limit filed on 14 August 2023 is refused and the application to stay a decision filed on 18 August 2023 is dismissed.

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<sup>5</sup> As to when a proceeding 'starts', see s 36 of the QCAT Act.