QCAT

Queensland Civil and Administrative Tribunal

CITATION:	Bertlen Pty Ltd v Porter [2015] QCATA 10
PARTIES:	Bertlen Pty Ltd as licensee of the Gowinta Caravan Park (Applicant/Appellant) v Joseph Porter (Respondent)
APPLICATION NUMBER:	APL384 -14
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Acting Deputy President Stilgoe OAM**
DELIVERED ON:	21 January 2015
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal granted.** **2. Appeal allowed.** **3. The decision of 18 August 2014 is set aside.** **4. The application filed 5 August 2014, to set aside the notice to leave without grounds, is dismissed.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL - MINOR CIVIL DISPUTE – RESIDENTIAL TENANCIES – where notice to leave without grounds – where application to set aside notice – whether application properly served - whether grounds for leave to appeal *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 61 *Queensland Civil and Administrative Tribunal Rules* 2009 (Qld) rr 20, 39 *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) ss 291, 292 *Dearman v Dearman* (1908) 7 CLR 549 *Fox v Percy* (2003) 214 CLR 118 *Pickering v McArthur* [2005] QCA 294

Clarke v Japan Machines (Australia) Pty Ltd
[1984] 1 Qd R 404
Chambers v Jobling (1986) 7 NSWLR 1

APPEARANCES and REPRESENTATION (if any):

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

REASONS FOR DECISION

[1] Mr and Mrs Porter live in the Gowinta Caravan Park. The park is managed by Bertlen Pty Ltd.

[2] On 10 June 2014, Bertlen issued a notice to remedy breach, on the grounds that Mr Porter was causing a nuisance and interfering with the peace and enjoyment of other park residents. On 16 June 2014, Mr Porter issued his own notice to remedy breach, on the grounds that the neighbours were being abusive and threatening. On 23 July 2014, Bertlen issued a notice to leave without grounds. Mr Porter filed an application to set aside the notice. Bertlen did not appear at the hearing. A Magistrate, sitting in the minor civil disputes jurisdiction of the tribunal did set aside the notice to leave.

[3] Bertlen wants to appeal the learned Magistrate's decision. It says that the tribunal did not serve the application in accordance with the *Queensland Civil and Administrative Tribunal Rules* (Qld) 2009 or Practice Direction 8 of 2009. It says that it did not receive sufficient notice of the hearing, as required by the Rules. It says that there was no evidence before the learned Magistrate which met the tests for setting aside a notice to leave without grounds as set out in s 291 of the *Residential Tenancies and Rooming Accommodation Act* (Qld) 2008 (RTRA Act). It says that Mr Porter's health problems are not a valid ground for setting aside a notice to leave without grounds. It says Mr Porter's assertion that it that relied on false allegations is not a valid ground for setting aside a notice to leave without grounds.

[4] Because this is an appeal from a decision of the tribunal in its minor civil disputes jurisdiction, leave is necessary.[1] Leave to appeal will usually be granted where there is a *reasonable argument* that the decision is attended by error, and an appeal is necessary to correct a *substantial injustice* to the applicant caused by that error.[2]

Service of the application

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1 QCAT Act s 142(3)(a)(i).
2 *Pickering v McArthur* [2005] QCA 294 at [3].

[5] In applications under the RTRA Act, the Principal Registrar has the obligation of serving a copy of the application on relevant parties[3]. The method of service is set out in Rule 39. Personal service is not required; it is enough for the Principal Registrar to post the document to the "relevant address"[4]. "Relevant address" is defined[5] as the entity's service address in the entity's address for service or, if the entity does not have an address for service, the address provided for in the service practice direction.

[6] The Rules define both "address for service" and "service address"[6]. "Address for service" means the service address stated in the entity's statement of address for service filed in the registry (whether as part of an application, referral or response). A "statement of address for service" is defined as: "a document or part of a document stating (a) the entity's service address; and (b) the entity's electronic service address (if any)".

[7] Bertlen did not file a statement of address for service. Therefore, it did not have an address for service. The relevant address to which the Principal Registrar had to post the application was, therefore, governed by the Practice Direction.

[8] Paragraph 13 of Practice Direction 8 of 2009 states that, if an entity does not have an address for service, the relevant address for an entity that is not an individual, is the entity's last known business address. The Principal Registrar posted the application to Bertlen at its last known business address. There is no defect in the method of service.

[9] Bertlen also states that it did not receive the application within the prescribed period. Rule 19(2) requires that an application must be given within seven days. Bertlen should have received the application by 12 August 2014.

[10] It is usual for the tribunal to serve the application with the notice of hearing but there is no affidavit of service for the application. There is an affidavit of service for the notice of hearing. That document was posted on 12 August 2014. Obviously, even if the application was served at the same time as the notice of hearing, the time of service did not comply with Rule 19(2).

[11] Bertlen received the application on 14 August 2014, just two days outside the prescribed period. The tribunal may waive compliance with a procedural requirement of the rules[7]. While it may be unusual for the tribunal to exercise this power to cure its own default, Bertlen was not entitled to sit on its hands. It had a copy of the application. It knew the hearing date was 18 August 2014 and yet it took no action. It did not appear at the hearing. It did not ask for an adjournment. The learned

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3 QCAT Rules r 20(1), 20(2).
4 Rule 39(1)(b).
5 Rule 39(2).
6 QCAT Rules Dictionary.
7 QCAT Act s 61(1)(c).

Magistrate was entitled to proceed with the hearing. The short notice to Bertlen is not a ground for granting leave to appeal.

Setting aside the notice to leave

[12] Bertlen issued a notice to leave without grounds. The tribunal can set aside a notice to leave without grounds if it is satisfied[8] that giving of the notice constitutes taking retaliatory action against the tenant[9].

[13] The learned Magistrate did not consider whether there was evidence of retaliatory action. She told Mr Porter that, by giving the correct notice, Bertlen could require Mr Porter to leave whether or not he had done the wrong thing[10]. She told Mr Porter that, if Bertlen had appeared that day, she would probably refuse Mr Porter's application[11]. But the learned Magistrate did not turn her attention to the question of retaliatory action.

[14] The learned Magistrate did tell Mr Porter that his medical condition and his tenancy history were not relevant to the question of setting aside a notice to leave without grounds[12]. She told Mr Porter that fault was irrelevant[13]. The learned Magistrate was correct in those comments.

[15] And yet, the learned Magistrate set aside the notice to leave without grounds for the sole reason that Bertlen did not attend the hearing. The learned Magistrate erred in law. Leave to appeal should be granted, the appeal allowed and the decision of 18 August 2014 set aside.

[16] Because the learned Magistrate's decision should be set aside on an error of law, I may substitute my own decision or return the proceeding to the learned Magistrate for a decision[14]. Bertlen issued the notice to leave in July 2014. The learned Magistrate made her decision in August 2014. If Mr Porter is still a resident of the Gowinta Caravan Park, returning the proceeding to the learned Magistrate will not fulfil the tribunal's obligation to deal with matters quickly[15].

[17] I can set aside the notice to leave without grounds if I find that Bertlen issued the notice to leave because Mr Porter: was proposing to apply to the tribunal for an order[16]; had complained to a government entity about Bertlen's behaviour[17]; or taken some other action to enforce his rights[18]. I cannot set aside a notice to leave without grounds because of Mr Porter's

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8 *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) (RTRA Act) s 292.
9 RTRA Act s 291.
10 Transcript page 1-2, lines 43 – 44.
11 Transcript page 1-3, lines 1 – 211 – 12.
12 Transcript page 1-3, lines 22 – 24.
13 Transcript page 1-4, lines 8 – 10.
14 QCAT Act s 146.
15 QCAT Act s 3(b).
16 RTRA Act s 291(2)(a).
17 RTRA Act s 291(2)(b)(i).
18 RTRA Act s 291(2)(b)(ii).

ill health, or because Bertlen has taken action in a dispute between neighbours by preferring the evidence of one set of neighbours over another.

[18] Bertlen issued a notice to remedy breach on 10 June 2014, recording that Mr Porter was causing a nuisance and that he had interfered with the peace, comfort and privacy of other tenants. Mrs Porter wrote “To Whom it May Concern” on 15 June 2014 detailing the Porter’s concerns. Mr Porter issued his own notice to remedy breach – that the neighbours were interfering with his peace and privacy – on 16 June 2014.

[19] That last document is the only evidence which suggests Mr Porter had taken some action to enforce his rights. That might be enough evidence if Bertlen had issued the notice to leave the next day. Instead, Bertlen waited nearly six weeks before issuing the notice. There is no evidence that, in that period, Mr Porter took further action on his notice to remedy breach. There is no evidence of any further correspondence. Mr Porter did not file an application in the tribunal. Bertlen, and the tribunal, was entitled to assume that the issue had gone away and that Mr Porter did not propose to take any further action against Bertlen.

[20] Therefore, I am not satisfied that Mr Porter has established that the notice to leave without grounds was retaliatory. Mr Porter’s application is dismissed.