QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Verhey & Anor v Lacutone* [2017] QCATA 81
PARTIES:	Jeremy Verhey Chantel Thoms (Applicants/Appellants) v Elio Lacutone (Respondent)
APPLICATION NUMBER:	APL070-17
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Senior Member Stilgoe OAM**
DELIVERED ON:	24 July 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal refused.** **2. Elio Lacutone may file and serve submissions about the costs of the appeal within 14 days of the date of order.** **3. The tribunal will determine the costs of the appeal on the papers, without an oral hearing, not before 7 August 2017.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL – PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – MOTIONS, INTERLOCUTORY APPLICATIONS AND OTHER PRE-TRIAL MATTERS – EX PARTE APPLICATION OR HEARING – where applicant did not attend hearing – where applicant's agent wrote to tribunal to inquire as to why no hearing had been set – where tribunal treated inquiry as application to reopen – where tribunal waived requirements to give notice of reopening – where tribunal ordered reopening under 'slip' rule – whether grounds for leave to appeal

Queensland Civil and Administrative Tribunal

Act 2009 (Qld), s 3(b), s 47, s 48, s 61, s 135, s 138, s 139

Pickering v McArthur [2005] QCA 294

APPEARANCES:

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] Jeremey Verhey and Chantel Thoms rented a house from Elio Lacutone through his property manager, Place.

[2] The tenants stopped paying rent and vacated the house before the end of the tenancy. Place filed an application for compensation for rent arrears, break lease fees, and the loss of rent until it found a new tenant.

[3] Mr Verhey and Ms Thoms agreed that they left the tenancy early but they filed material showing that they found another tenant for the property – at a reduced rental – and Place unreasonably refused to accept that tenant.

[4] On 26 November 2016, the tribunal refused Place's application for compensation. Neither Place nor Mr Lacutone attended that hearing.

[5] On 13 February 2017, the tribunal ordered a reopening of the proceeding and directed the proceeding be listed for hearing. The reopened hearing has not yet occurred.

[6] Mr Verhey and Ms Thoms want to appeal the decision to grant a reopening. 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]

[7] Mr Verhey and Ms Thoms say the tribunal erred in granting the reopening because it had no power to do so. They say that the tribunal did not comply with the requirement to give them notice of the proposed reopening application. They say the tribunal failed to provide natural justice.

Did the tribunal have power to grant the reopening?

[8] The tribunal purported to reopen the proceeding under s 135 of the QCAT Act. Mr Verhey and Ms Thoms say that s 135 does not give the tribunal that power. They are correct in that submission; the tribunal's power in s

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1 QCAT Act, s 142(3)(a)(i).

2 *Pickering v McArthur* [2005] QCA 294, [3].

135 is to correct a clerical mistake, or an error arising from an accidental slip or omission.

[9] The reopening was granted, apparently, because Place had not received a notice of hearing. The file shows that the tribunal posted the notice of hearing to Mr Lacutone. That is not surprising, as the address for service was Mr Lacutone's address. Although it purported to act for Mr Lacutone, Place had not filed a notice of address for service.

[10] It cannot be said that there was a clerical error in the tribunal's decision to serve the notice on the nominated address for service. Equally, there is no evidence of an accidental slip or omission.

[11] The power to reopen the proceeding lies in s 138 of the QCAT Act. As Mr Verhey and Ms Thoms point out, that requires an application from either Place or Mr Lacutone.

[12] Place sent an email to the tribunal on 7 February 2017 asking why the proceeding had not been listed for hearing. It seems the tribunal treated Place's email as an application to reopen the proceeding. Because the tribunal has an obligation to act informally[3] and the power to waive compliance with a procedural step,[4] it cannot be criticised for deciding to treat Place's email as an application to reopen.

[13] Of course, the application to reopen was well outside the 28-day timeframe required by the QCAT Act[5] but the tribunal has the power to extend the time fixed for starting a proceeding.[6]

[14] Subject to the tribunal's obligation to act fairly, which I will discuss later, the tribunal did have power to grant the reopening.

Did the tribunal comply with the requirement to give Mr Verhey and Ms Thoms notice of the reopening application?

[15] The tribunal did not comply with the requirement to give Mr Verhey and Ms Thoms notice of the reopening application. That much is clear from the order, as the tribunal expressly stated that compliance with s 139(2) – which requires notice to be given – was waived.

[16] As I have already mentioned, the tribunal may waive compliance with procedural requirements.[7] Whether it should have done so is a question of whether it fairly exercised its discretion.

Did the tribunal fail to provide natural justice?

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3 QCAT Act s, 3(b).
4 Ibid, s 61(1)(c).
5 Ibid, s 138(2)(b).
6 Ibid, s 61(1)(a).
7 Ibid, s 61(1)(c).

[17] The tribunal can waive compliance with a procedural requirement if to do so would not cause detriment that could not be remedied by an appropriate order for costs or damages.

[18] There is no evidence that the tribunal turned its mind to whether waiving compliance with the procedural requirements caused Mr Verhey and Ms Thoms detriment, or whether that detriment could have been addressed by an order for costs or damages. There is no evidence on the file that there was any urgency to the reopening, which justified the waiver of notice. There is no evidence that the tribunal properly considered the grounds of the reopening application.

[19] The tribunal failed to provide natural justice to Mr Verhey and Ms Thoms.

Should the decision of 13 February 2017 be set aside?

[20] Even though there is a demonstrable lack of procedural fairness in this decision of the tribunal, I will not allow leave to appeal. Section 139(5) of the QCAT Act states that a decision on a reopening application is final, and cannot be appealed. Even though the order is supposedly made under the power of s 135, the use of the word 'reopening' makes it clear that is the true nature of the application.

[21] In addition, the substantive proceeding is yet to be heard. While I understand that allowing the hearing to continue is not compatible with the tribunal's obligation to deal with matters quickly, Mr Verhey and Ms Thoms have the advantage that they received the bond. The disadvantage of another hearing is only the cost and inconvenience of their attendance. While costs in a minor civil dispute hearing are normally limited to filing fee and service costs, the power to order costs under ss 47 and 48 of the QCAT Act are not so limited. The tribunal may consider an order for costs if Mr Lacutone is not successful in the reopened hearing.

[22] Leave to appeal should be refused. However, because of the tribunal's failure to provide procedural fairness, I am minded to order that Mr Lacutone pay the tenants' costs of filing the application for leave to appeal. Mr Lacutone may file and serve submissions addressing the question of costs within fourteen days of today's date, following which I will decide the question of costs on the papers.