

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Rio Villa Pty Ltd v Quay West Brisbane Body Corporate*  
[2018] QCATA 96

PARTIES: **RIO VILLA PTY LTD ACN 082 511 741**  
(applicant/appellant)  
v  
**QUAY WEST BRISBANE BODY CORPORATE**  
**CTS 16610**  
(respondent)

APPLICATION NO/S: APL022-18

ORIGINATING APPLICATION NO/S: 0917-2015

MATTER TYPE: Appeals

DELIVERED ON: 9 July 2018

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Paratz

ORDERS: **The time provided for in section 290(1) of the *Body Corporate Management Act 1997 (Qld)* for appealing the Adjudicator's decision in 0917-2015 is extended to 19 January 2018, pursuant to s 61 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – GENERAL PRINCIPLES AS TO GRANT OR REFUSAL

*Body Corporate and Community Management Act 1997 (Qld), s 290*  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 61*

*Busby & Anor v Body Corporate for Balmattum* [2016] QCATA 28  
*Campaigntrack Victoria Pty Ltd v The Chief Executive, Department of Justice and Attorney-General & Ors* [2016] QCA 37  
*Thompson v Body Corporate for Arila Lodge & Anor* [2017] QCATA 151

REPRESENTATION:

Applicant: Cleary Hoare Solicitors

Respondent: Shand Taylor Lawyers

APPEARANCES:

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] Rio Villa Pty Ltd ('the owner') filed an Application in the Tribunal on 19 January 2018 for leave to appeal or appeal a decision of an Adjudicator in 0917-2015 made on 30 November 2017.
- [2] The decision concerned the validity of a motion passed by the Body Corporate for Quay West Brisbane at its Annual General Meeting on 21 September 2015 to close and demolish the existing common property spa and to refurbish the spa area.
- [3] The time provided for in Section 290 of the *Body Corporate and Community Management Act 1997* (Qld) ('the Act') to start an appeal is within 6 weeks after a copy of the decision appealed against has been received.
- [4] In this matter, that date would have been 11 January 2018, so the application for leave to appeal or appeal was therefore 8 days out of time.
- [5] Directions were given on 30 May 2018 for the filing of submissions and the determination of the application to extend time on the papers. The owner filed an Application to extend a time limit in the Tribunal on 20 June 2018.
- [6] I have been constituted as the Appeals Tribunal, and this is the decision on that application.
- [7] The owner submits that the Tribunal has jurisdiction to extend time, and submits the cause of the delay was primarily due to miscommunication between solicitor and client as to the date of receipt of the adjudication decision.<sup>1</sup>
- [8] The body corporate submits that the Tribunal does not have jurisdiction to extend time, and opposes the application, and seeks that the Appeal be dismissed.

**Jurisdiction**

- [9] The provision in s 290(1) of the Act is as follows:

**290 Appeal**

- (1) An appeal to the appeal tribunal must be started within 6 weeks after the aggrieved person receives a copy of the order appealed against.

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<sup>1</sup> Applicant's submissions filed 20 June 2018, [13].

- [10] The Court of Appeal in *Campaigntrack* considered the jurisdiction of the Tribunal to extend time under s 61 of the QCAT Act,<sup>2</sup> and noted that the issue is whether the provisions are procedural or not:<sup>3</sup>

[33] I regard the Appeal Tribunal's reference to 'mandatory' in this context as unhelpful. The requirements, whether substantive or procedural, are in a sense always 'mandatory'. As counsel for the Chief Executive acknowledged, the issue of whether the requirement is procedural or substantive does not depend upon the requirement being mandatory or otherwise. The issue is whether the provision are procedural or not.

- [11] The Court of Appeal went on to consider the Act in question in that matter and held the provision to be procedural:<sup>4</sup>

In the present statutory context, the time within which to make an application for an extension of the time stated in s 472 is a matter governing the procedure by which a claim against the fund is processed, heard and decided. The provisions impliedly state that a claimant may make an application to extend time within a certain period, and say nothing about whether the Tribunal may allow an extension of time in a deserving case. The 14 day period within which a claimant 'may' make an application for an extension of time may be characterised as a time limit fixed by PAMDA or another procedural requirement. Campaigntrack is correct in its submission that any time limit contained in s 511(1)(a)(i), when read together with s 473(5)(b) is procedural. The Appeal Tribunal erred when it concluded that the relevant provisions of PAMDA were not procedural.

- [12] Justice Carmody held in *Busby*, that s 290 of the Act is procedural:<sup>5</sup>

[17] The time limit in s 290 of the BCCM Act is prescribed mainly for the convenience of the QCAT Appeal tribunal in managing its workload. The fact it can be dispensed with or varied under s 61 of the QCAT Act means that it is directory not mandatory and is therefore not jurisdictional.

[18] Noncompliance is excusable by the Tribunal for good reason as long as it does not have the consequence of prejudicing another party or encouraging laxity.

- [13] The Tribunal in *Thompson* noted that the tribunal can extend the time provided in s 290(1) of the Act for appealing, under s 61 of the QCAT Act,<sup>6</sup> and made an order extending time.

- [14] The Tribunal has jurisdiction under s 61 of the QCAT Act, on these bases of these previous cases, to extend the time limit under s 290 of the Act.

## Discussion

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<sup>2</sup> *Campaigntrack Victoria Pty Ltd v The Chief Executive, Department of Justice and Attorney-General & Ors* [2016] QCA 37.

<sup>3</sup> *Ibid* [33].

<sup>4</sup> *Ibid* [36].

<sup>5</sup> *Busby & Anor v Body Corporate for Balmattum* [2016] QCATA 28, [17], [18].

<sup>6</sup> *Thompson v Body Corporate for Arila Lodge & Anor* [2017] QCATA 151, [21].

[15] The considerations as to whether to extend time were put in *Thompson* as follows:<sup>7</sup>

[20] In considering whether to extend time to appeal it is necessary to consider whether it is in the interests of justice in the circumstances to extend time, having regard to the length of and reasons for the delay, the prejudice to the other side if time is extended and to the merits of the appeal itself.

[16] The Body Corporate submits that there is not sufficient explanation of the delay, but concedes the delay is relatively short.

[17] In the absence of any prejudice caused by the short delay, and the owner having given an explanation for the delay, I do not consider that this factor weighs against an extension.

[18] The body corporate submits that the owner's case is weak and bound to fail.

[19] The owner submits that the question of whether the spa is common property or a body corporate asset has not been determined,<sup>8</sup> and that the primary arguments of the owner are as follows:<sup>9</sup>

[28] The primary argument of the applicant is that:

- (1) The spa is a fixture and common property
- (2) Motion 14 resolved to dispose of (by demolition) the spa
- (3) Motion 14 was passed despite 25 dissenting votes
- (4) Motion 14 was required to be passed without dissent
- (5) Motion 14 is invalid

[20] I consider that the owner has outlined an arguable case sufficient for the matter to proceed.

[21] I consider that it is in the interests of justice that an extension should be granted to allow the owner to pursue the Appeal.

[22] I order that the time for filing of the appeal be extended to the date of filing of the appeal.

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<sup>7</sup> Ibid.

<sup>8</sup> Applicant's submissions filed 20 June 2018, [24].

<sup>9</sup> Ibid [28].