

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Turner v Nuske* [2020] QCATA 116

PARTIES: **WARD TURNER**  
(applicant/appellant)

v

**PHILLIP NUSKE**  
(respondent)

APPLICATION NO: APL135-20

ORIGINATING APPLICATION NO: MCDO160/19 (Caboolture)

MATTER TYPE: Appeals

DELIVERED ON: 12 August 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Fitzpatrick

ORDERS:

- 1. The application for an extension of time to seek leave to appeal or appeal is dismissed.**
- 2. The application for a stay of the decision made 7 April 2020 is dismissed.**
- 3. The application to seek leave to appeal or appeal is dismissed.**

CATCHWORDS: APPEAL – LEAVE TO APPEAL – MINOR CIVIL DISPUTE - EXTENSION OF TIME TO APPEAL – STAY OF PROCEEDINGS - where application for leave to appeal or appeal filed out of time – whether explanation for delay satisfactory – merits of application for leave to appeal or appeal – prejudice to party – whether circumstances exist for a stay.

*Acts Interpretation Act* 1954 (Qld) s39A  
*Evidence Act* 1995 (C/W) s160  
*Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 48(1)(b), s 143(3)

*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321  
*Fancourt v Mercantile Credits Limited* [1993] HCA 28  
*Hessey-Tenny & Anor v Jones* [2018] QCATA 131  
*Reeve v Hamlyn* [2015] QCATA 133

*Wilkes v Andrew* [2012] QCATA 173

## REPRESENTATION:

Applicant: Self-represented

Respondent: Self-represented

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] Ward Turner is the respondent to an application for a minor civil dispute – consumer dispute, filed 14 October 2019. The application was commenced by Phillip Nuske for moneys owing but unpaid, for customisation and repair work performed by Mr Nuske on Mr Turner’s Ford Mustang Registration Number S 3202. A hearing was held in the Caboolture Magistrates’ Court on 4 February 2020.
- [2] On 7 April 2020, it was decided that Ward Turner pay Phillip Nuske the sum of \$6,664.55. The Tribunal file records that the decision was posted by the Registrar to Mr Turner at his address of 17-19 Walnut Court, Burpengary, Queensland on 8 April 2020. In the ordinary course of post the decision would be received by Mr Turner on 17 April 2020.
- [3] On 26 May 2020, Mr Turner filed an application for leave to appeal or appeal and an application to stay a decision.
- [4] Mr Turner was directed to establish that the application for leave to appeal or appeal and the application to stay a decision had been given to Mr Nuske by 4:00 on 9 June 2020.
- [5] On 19 June 2020, a document was filed in the Tribunal by Mr Turner, which purports to be an affidavit of service of documents. The document is not in the Tribunal form and appears to be a cut and paste amalgam of the form. It is deficient in that it does not swear to the manner of service of the application documents on Mr Nuske.
- [6] I am not satisfied that the application for leave to appeal or appeal and the application to stay a decision have been served on Mr Nuske. There has been no communication by Mr Nuske with this Tribunal.
- [7] Because Mr Turner’s application was filed outside the prescribed time limit, he was directed to file and give to Mr Nuske an application for an extension of time to file the application for leave to appeal or appeal along with any submissions in support by 9 June 2020.
- [8] On 26 June 2020, an application to extend time was emailed to the Tribunal.
- [9] Because no communication has been received by this Tribunal from Mr Nuske it is possible that the application has not been given to Mr Nuske.
- [10] On 26 July 2020, Mr Turner emailed submissions to the Tribunal raising a number of factual matters.

- [11] The Tribunal does not have any response from Mr Nuske to the application for extension of time to file the application for leave to appeal or appeal and does not have any response to the application to stay a decision. As I have previously observed, this may be because Mr Turner's applications have not been given to him, as directed.
- [12] Despite the lack of responses from Mr Nuske, I intend to deal with Mr Turner's application for an extension of time to file and serve the application for leave to appeal or appeal and the application for a stay of decision.

**Application for an extension of time**

- [13] Relevant considerations in the grant of an extension of time to file an application for leave to appeal or appeal include:
- (a) the duration of the delay;
  - (b) whether there is a satisfactory explanation for the delay;
  - (c) the merits of the application for leave to appeal or appeal and its prospects of success;
  - (d) the likelihood of any prejudice to other parties; and
  - (e) whether the extension of time is in the interests of justice.<sup>1</sup>

*Duration of delay and explanation*

- [14] No request for written reasons for the Adjudicator's decision was made. Mr Turner was required to file his application for leave to appeal or appeal by 15 May 2020.<sup>2</sup>
- [15] On 12 May 2020, Mr Turner unsuccessfully sought a stay of the decision. That application was refused on 15 May 2020.
- [16] From 18 May 2020, Mr Turner made some attempts to file by email to the Caboolture Magistrates Court House an incomplete application for leave to appeal or appeal.
- [17] Ultimately the application for leave to appeal or appeal was filed in person on 26 May 2020.
- [18] Mr Turner asserts in his application for an extension of time that he did not receive 'reasons for decision until 4 May'. He asserts that he still has the postal bag. It is not clear what the significance of the postal bag may be. It should bear the date the letter containing the decision was posted, but it will not reveal the date of delivery of the document. Mr Turner gives no evidence as to the circumstances of receipt of the decision. It is unknown if he suggests that he did not have regard to the decision until 4 May 2020 for some reason; or whether the letter was not delivered until 4 May 2020, some 14 days after it is deemed to have been received or delivered.

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<sup>1</sup> *Reeve v Hamlyn* [2015] QCATA 133 at [36].

<sup>2</sup> *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 143(3).

- [19] By s39A of the *Acts Interpretation Act 1954 (Qld)*, a document served by post will be taken to have been effected at the time at which the letter would be delivered in the ordinary course of post, unless the contrary is proved.<sup>3</sup>
- [20] Mr Turner has not proved that the decision was not delivered by 17 April 2020. The fact that Mr Turner may have only accessed the decision sometime later does not assist Mr Turner.<sup>4</sup>
- [21] Mr Turner says that he sought legal advice and then submitted the application for leave to appeal or appeal by the end of May.
- [22] Even on Mr Turner's assertion that he did not receive the decision until 4 May 2020, there is no reason given as to why he could not have filed the application for leave to appeal or appeal by 15 May 2020. In this regard, it is relevant that he took legal advice, although it is not known when that advice was sought.
- [23] Although the delay in filing the application for leave to appeal or appeal is relatively short, there is no satisfactory explanation given for the delay in filing the application. This Tribunal has observed on many occasions that time limits are in place for a reason and should be complied with for the efficient conduct of proceedings.

*Merits of the application*

- [24] Relatively weak grounds of appeal will weigh against the grant of an extension of time to avoid prolonging futile proceedings. In this application a preliminary assessment is made of the applicant's merits and prospects.
- [25] The grounds of appeal are that the Adjudicator erred in:
- (a) failing to consider and reconcile a handwritten invoice dated 14 November 2016 with the final typewritten invoice dated 2 July 2018;
  - (b) failing to make any finding as to whether parts were supplied or labour performed;
  - (c) failing to provide reasons or adequate reasons as to:
    - (i) the conclusion that Mr Nuske's calculation is more likely on balance to be correct;
    - (ii) why he did not accept the evidence of Tony Kubel as to the state of the vehicle after termination of instructions to work on it;
    - (iii) why payment should be made for work performed after termination of the contract; and
  - (d) failing to provide natural justice in indicating a likely adverse finding and no opportunity was given to respond or make submissions as to the prospect of an adverse finding.

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<sup>3</sup> *Evidence Act 1995 (C/W)*, s 160: it is presumed, unless evidence raises doubt about the presumption, that a postal article sent by prepaid post addressed to a person at a specified address was received at that address on the seventh working day after having been posted.

<sup>4</sup> *Fancourt v Mercantile Credits Limited* [1993] HCA 28 at para 21: Delivery may be different from receipt by the intended recipient and provided that delivery is not disproved, the fact of non-receipt does not displace the result that delivery is deemed to have been effected at the time at which it would have taken place in the ordinary course of post.

- [26] I note that Mr Turner did not file a response to Mr Nuske's application. However, he filed material for the consideration of the Adjudicator which was not given to Mr Nuske. Mr Nuske was provided with that material in the course of the hearing. The Adjudicator referred to the material in his decision.
- [27] Mr Turner has now emailed 3 pages of factual assertions, including fresh evidence. Mr Turner must seek leave to rely on fresh evidence. I note that the assertions do not relate to the grounds of appeal, other than a submission in relation to calculation of the amount owing.
- [28] I do not have a transcript of the minor civil dispute hearing or decision. However, I have listened to the audio recording of the reasons for decision.
- [29] The Adjudicator found that the parties entered into an oral contract for the customisation and repair of Mr Turner's vehicle. The contract did not provide a price for the work nor a time over which it should be conducted.
- [30] The Adjudicator addressed Mr Turner's evidence and each of his defences to Mr Nuske's claim. The Adjudicator gave a rational basis for each of his findings based on the evidence.<sup>5</sup>
- [31] The Adjudicator found that Mr Nuske's final invoice dated 2 July 2018 was a clear and detailed record of work carried out over a period of more than a year. The invoice gives credit for the sum of \$6,500.00 paid by Mr Turner.
- [32] The Adjudicator preferred Mr Nuske's record of work performed to Mr Turner's handwritten notes which were not specific about dates or sums paid.
- [33] The Adjudicator found that none of the attacks made on Mr Nuske's final invoice were sustained apart from one item relating to a master cylinder. A reduction of \$430.00 in relation to that item was allowed in Mr Turner's favour.
- [34] It was found that there was no correlation between Mr Kubel's invoice, relied on by Mr Turner as evidence of poor workmanship by Mr Nuske, and Mr Nuske's invoice. Mr Kubel's evidence is that he had to re-do Mr Nuske's work. That would not appear to be borne out because it was found Mr Nuske's invoice did not make a claim for work later done by Mr Kubel.
- [35] The Adjudicator found on an analysis of the evidence that there was no evidence to support allegations about Mr Nuske's workmanship. A contentious item was a claim by Mr Nuske for a payment he made on Mr Turner's behalf to Tremec Elite Distributor (Mal Wood Automotive) in an amount of \$1,300.00 which was incurred in attempting to resolve a problem with the gearbox and clutch in the Mustang. The Adjudicator found that a number of parties were involved in working on the problem and there was insufficient evidence to blame Mr Nuske for any defective work. The Adjudicator referred to the available evidence in his decision.
- [36] As to whether work was incomplete, the Adjudicator noted that the contract was verbal and there was no time frame for completion of the work. It was found that Mr Nuske did not have an opportunity to complete the work.
- [37] I am mindful that a finding of fact will generally not be disturbed on appeal if the evidence before the tribunal supports inferences drawn and facts found.<sup>6</sup> An appeal

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<sup>5</sup> *Wilkes v Andrew* [2012] QCATA 173 at [19].

<sup>6</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355 per Mason CJ.

is not an opportunity to run a different and better case than that conducted below. Mr Turner has been afforded natural justice by being given the opportunity to call evidence and make submissions in defence of the claim against him. He has not been denied natural justice at the hearing by not being given a second opportunity to conduct his defence and not being given an intimation that the applicant may succeed in his claim.

- [38] In all, on the grounds submitted by Mr Turner, I do not think his prospects of succeeding in the grant of leave to appeal or on the appeal are strong.

*Prejudice to parties*

- [39] Mr Nuske's invoice for work performed by him was rendered over two years ago. Further litigation will involve him in delays and costs before finalisation of the matter. To that extent, he will suffer prejudice if an extension of time is granted to Mr Turner.

*Interests of Justice*

- [40] The interests of justice require an examination of the relevant circumstances of the case and balancing the competing interests and rights of the parties.

- [41] I have concluded that:

- (a) there has been a failure to give evidence of service of the application for leave to appeal or appeal on Mr Nuske, despite directions to do so;
- (b) there has been no satisfactory explanation given by Mr Turner for failure to file his application within the time prescribed by the *Queensland Civil and Administrative Tribunal Act 2009* (Qld);
- (c) Mr Turner's prospects of succeeding in the grant of leave to appeal or on appeal are not strong; and
- (d) there is a strong interest in finality of proceedings.

- [42] For these reasons, I do not consider it to be in the interests of justice for Mr Turner to be granted leave to extend time for the filing of an application for leave to appeal or appeal.

- [43] The application for grant of an extension of time is refused.

**Stay of decision**

- [44] Mr Turner also filed an application to stay the 7 April 2020 decision. The effect of my decision refusing to extend time to seek leave to appeal or appeal is that the proceeding is now at an end. Accordingly, it is not necessary to decide the stay application. However, I will deal with the application for completeness.

- [45] Mr Turner's reason for the application is that, if he is required to comply with the order and pay money to Mr Nuske, it is likely that even if the appeal is successful he will not recover the money. No evidence is given to support the assertion that Mr Nuske would be unable to comply with an order requiring return of the judgment money to Mr Turner.

- [46] Circumstances must be exceptional before an order in the nature of a stay will be granted, pending the granting of leave to appeal.<sup>7</sup> No exceptional circumstances have been established.
- [47] Apart from any exceptional circumstances raised by an applicant, the Tribunal considers:
- (a) that a successful party is entitled to the fruits of its judgment. Generally speaking, the Tribunal should not delay the enforcement of its orders;
  - (b) whether there is a good arguable case. My earlier consideration of this issue is relevant. I do not consider there to be a good arguable case;
  - (c) disadvantage to the parties. I do not think any disadvantage to Mr Turner has been demonstrated given the lack of evidence that he would not be able to recover the judgment sum from Mr Nuske or that he will suffer any irreparable harm if the stay is refused.
- [48] For these reasons I refuse the application for a stay of the decision of 7 April 2020.

### **Dismissal of the proceedings**

- [49] The application for leave to appeal or appeal is dismissed pursuant to s48(1)(b) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

### **Orders**

The Tribunal orders that:

1. The application for an extension of time to seek leave to appeal or appeal is dismissed.
2. The application for a stay of the decision made 7 April 2020 is dismissed.
3. The application to seek leave to appeal or appeal is dismissed.

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<sup>7</sup> *Hessey-Tenny & Anor v Jones* [2018] QCATA 131 at [21] and [24].