QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Souwer & Anor v Hodkinson & Anor* [2020] QCATA 133
PARTIES:	**MICHAEL SOUWER & PAZLAR PTY LTD** (Applicants) **v** **MARK HODKINSON & M & P INDUSTRIAL COATINGS PTY LTD** (Respondents)
APPLICATION NO:	APL261-19
ORIGINATING APPLICATION NO:	MCDO1545-18 Brisbane
MATTER TYPE:	Appeals
DELIVERED ON:	24 August 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Dr J R Forbes, Member
ORDERS:	**The application for leave to appeal is dismissed.**
CATCHWORDS:	APPEAL – APPLICATION FOR LEAVE TO APPEAL – where application to admit new evidence – whether application properly founded – where refusal to grant third adjournment – whether within discretionary power – where refusal to transfer proceedings to Magistrates Court – whether this decision within discretionary power – where limitations of appeal against discretionary decisions considered – whether leave to appeal should be granted *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 3, s 4, s 32, s 93, s 142 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 48(3) *Absolon v NSW Technical and Further Education Commission* (1997) 75 IR 47 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 *Clarke v Japan Machines (Australia)* Pty Ltd [1984] 1 Qd

R 404
Cook v ASP Ship Management Pty Ltd (2008) 105 ALD 453; [2008] FCA 1345
Delopez v Barry [2014] WASC 370
Eley v Town of Victoria Park [2014] WASC 103
Gillespie v The Queen [2020] NSWCCA 186
Hawkins v Pender Bros Pty Ltd [1990] 1 Qd R 135
Hillsea Pty Ltd v Joseph McIvor; McIvor v Joseph [2020] NSWCA 55
House v The King (1936) 55 CLR 499
Manonai v Burns [2011] WASCA 165
Minister for Immigration and Citizenship v SZMDS & Another (2010) 240 CLR 611
Minister for Immigration and Multicultural Affairs v Capitly (1999) 55 ALD 365
Orr v Holmes (1948) 76 CLR 632
Pappas v Meiklejohn's Accountants [2017] QCATA 60
PPK Willoughby Pty Ltd v Baird [2019] NSWCA 48
Quinn v O'Rourke; In re O'Rourke (No 1) [2020] FCA 1145
R v Vaughan [2011] QCA 234
Reeve v Hamlyn [2015] QCATA 133
Sali v SPC Ltd (1993) 67 ALJR 841
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014
Singh v Minister for Immigration and Border Protection [2016] FCA 574
Stoney v A & S Boesley Pty Ltd [2014] VSCA 237
Sydney United Football Club v Soccer New South Wales [2005] NSWSC 474
The Pot Man Pty Ltd v Reaoch [2011] QCATA 318
Thomson v Smith [2005] QCA 446
W, In Re (an infant) [1971] AC 682
Westpac Banking Corporation v Tsatsoulis [2003] FCA 40
Wolf v Advance Australia Removals & Storage Pty Ltd APL170 of 2019, 17 July 2020

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

REASONS FOR DECISION

Fresh evidence?

[1] A preliminary question[1] is whether the following medical report, dated 8 November 2019 is fresh evidence which materially affects the primary decision:

> This is to certify that I saw and examined patient (Michael Souwer) when both attached letters were written on 19/6/2019 and 9/9/2019.[2] On both occasions he was diagnosed with a medical condition that rendered him medically unfit to attend court hearings on 20/6/19 and 19/9/19.

[2] Evidence is not `fresh' unless it was not reasonably available at the time of the trial.[3] Even if it is fresh, it must also place such a different complexion upon the case that a reversal of the former result ought certainly to ensue.[4]

[3] The report of 8 November 2019 satisfies neither test. It adds nothing of significance to the medical reports adduced before the primary tribunal. The application with respect to new evidence is dismissed.

The course of the proceedings

[4] Here two one-man companies are in dispute. The second appellant, Pazlar Pty Ltd (`Pazlar') is the *alter ego* of the first appellant, Michael Souwer (`Souwer'), and the second respondent, M & P Industrial Coatings Pty Ltd (`M & P') represents the first respondent, Mark Hodkinson (`Hodkinson'). For convenience the two appellants will henceforth be described as Souwer, and the respondents as Hodkinson.

[5] In a Minor Civil Dispute instituted on 26 October 2018 Hodkinson sued Souwer in debt, claiming the highest amount QCAT can award in such a case, $25,000. The claim involves consultancy services provided by Souwer, and the lease of commercial premises at Crestmead, Brisbane, by Souwer to Hodkinson. For the purposes of the present application for leave to appeal[5] it is unnecessary to describe those arrangements in detail.

[6] On 21 November 2018 Souwer filed a Response in the nature of a counter-application, seeking *inter alia* transfer of the proceedings to the Magistrates Court. However, counter-applications may not be made in response to an application for a minor debt claim.[6] I shall return to this matter later on.

First adjournment

[7] Originally the dispute was listed for hearing on 20 June 2019. On that same day Souwer's solicitors emailed the tribunal seeking an adjournment on medical grounds and attaching a medical certificate dated 19 June 2019.

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1 Raised by Application for Miscellaneous Matters filed by Souwer on 11 November 2019.
2 Referred to and quoted below.
3 *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135;
4 *Orr v Holmes* (1948) 76 CLR 632 at 642 per Dixon J; *Stoney v A & S Boesley Pty Ltd* [2014] VSCA 237; *Clarke v Japan Machines (Australia)* Pty Ltd [1984] 1 Qd R 404.
5 As required by s 142(3) of the QCAT Act.
6 *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) r 48(3).

[8] That certificate was provided by a Dr P L Goldston, and reads as follows:

> This to certify that I have been Mr Souwer's GP for over 10 years and can confirm that he cannot attend court at present given his medical condition/health and would be unable to attend the hearing on 20 June 2019. Therefore, an adjournment is being sought for this hearing until he is fit in future.

[9] No further information was offered, but notwithstanding the last minute timing of the request an adjournment was granted.

Second adjournment sought

[10] The matter was listed again on 19 September 2019, to no avail. In an email sent at 5 pm on 17 September 2019[7] and received by the tribunal on 18 September Souwer, by his solicitor, requested another adjournment. The supporting medical certificate of Dr Goldston is dated 9 September 2019 – that is, 9 days before the adjourned hearing – and reads:

> This to certify that I have been Mr Souwer's GP for over 10 years and can confirm that he cannot attend court at present given his medical condition/health and would be unable to attend the hearing on 19 September 2019. Therefore, an adjournment is being sought for this hearing until he is fit in future.

[11] Again, there is no indication of diagnosis or prognosis, or of a time when Souwer might be expected to be fit to appear. The writer did not indicate, for example, whether his patient as chronically ill for three months or only from time to time.[8] A somewhat less `formulaic' medical report was rejected in *Singh v Minister for Immigration and Border Protection*.[9] A mere assertion that a party is not well enough to attend need not be accepted at face value.[10] The notion that a few stereotyped, perfunctory and uninformative lines upon a medico's letterhead guarantee an adjournment, however late in the day, is misplaced.

Second adjournment refused

[12] On 19 September 2019 the presiding justice refused a second adjournment, stating:

> On Tuesday 17th September at 5 pm an email was sent by the respondent to QCAT asking for an adjournment ... In fact the [present] medical certificate is exactly the same [as the one in Jun 2019] except the dates. ... The tribunal notes that, since the last adjournment, a Notice of Hearing was posted to the respondent on 8th of July. However, the respondent's solicitor did not provide a medical certificate in the two months and 10 days [since the first adjournment].
>
> The decision of the tribunal is not to grant a further adjournment, because this application for an adjournment, like the previous one was within a day or two of the hearing, and it unfair, given such notice, for a second adjournment to be granted, given that there was two months and 10 days notice.

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7 Transcript of hearing 19 September 2019 (`T') page 5 line 6.

8 The interval between the first and second hearing dates.

9 [2016] FCA 574 ("This is to certify that I have examined Sandeep Singh today and I confirm that he will be unfit for attending work or any activities due to his mental condition from 14/5/16 to 14/6/16 inclusive").

10 *Minister for Immigration and Multicultural Affairs v Capitly* (1999) 55 ALD 365 at 372; *Cook v ASP Ship Management Pty Ltd* (2008) 105 ALD 453; [2008] FCA 1345.

> The second aspect is that the respondent had applied to the tribunal for legal representation due to ill health. ... My decision today was to approve the application for legal representation to enable the matter to proceed. The respondent's solicitors took no action to follow up on the status in the last six or eight weeks of [that] application ... and that [*sic*] they knew that the hearing was for today. So there's got to be some responsibility on individual parties to pursue their own interests ... When the hearing support officer, at my request, contacted the respondent's solicitor today ... the solicitor indicated there wasn't enough time for him to appear and that if it proceeded he would appeal.
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> ... One of the obligations that QCAT has is to ensure that we try to deal with these things as efficiently and quickly as possible. So I think there would be an injustice to the applicants not to proceed ... given the amount of notice and opportunities that the respondent has [had] to make their submissions and representation at the hearing in person, by phone, or by legal representative, who could also have appeared by phone.[11]

[13] The solicitor did not appear, although he had been in the case since June 2018, well over a year before the adjourned trial date. Any question concerning professional conduct is not one that I need pursue.

[14] The primary decision does not expound the reasons for refusing a second adjournment at the length of judgments cited below. That is, with respect, perfectly understandable. This tribunal is a very busy one, with limited time to deal with a host of cases. Its legislative charter directs it to deal with its business quickly and economically, as in practice it is required to do.[12] Furthermore busy, if not overworked[13] tribunals are not expected to replicate the judgments of superior courts. `The realities of pressure of work and limited time ... must be acknowledged.'[14] The `comparative perfection of a civil trial ... is not the test.'[15]

[15] However, the learned member made these points: (i) a first adjournment was granted, virtually as a matter of course. (ii) On each of two occasions Souwer gave the tribunal and his opponent minimal notice, although each trial date was notified well in advance. (iii) Despite an order allowing legal representation, no one appeared on either occasion to explain the reasons for seeking an adjournment, or for the lateness of the applications. (iv) The medical certificates that were tendered were perfunctory and uninformative. (v) The expeditious disposal of matters is an important consideration. (v) A second adjournment, with no indication of when the case might proceed, would be an injustice to the opponent. (vi) Parties who approach the tribunal have a responsibility to` pursue their own interests and protect their rights for representation.'[16]

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11 T page 5 lines 6-47, page 6, lines 1-4.

12 QCAT Act ss 3-4.

13 Sympathy is expressed towards `overloaded tribunals' in *Absolon v NSW Technical and Further Education Commission* (1997) 75 IR 47, affirmed [1999] NSWCA 311.

14 *Manonai v Burns* [2011] WASCA 165 at [56].

15 *Sydney United Football Club v Soccer New South Wales* [2005] NSWSC 474 at [54].

16 T page 5 line 35.

A transfer?

[16] As an alternative remedy, and in view of the technical defect of his Response,[17] Souwer sought an order that the proceedings be transferred to the Magistrates Court. Any such decision is discretionary. As the presiding member explained[18], that was unnecessary. The irregularity could easily be cured by Souwer's filing an application of his own and securing a joint hearing, as has been done in a number of cases in the tribunal.[19] At all material times Souwer had the benefit of professional advice, and presumably his advisor was aware of that simple solution to the egregious ban on cross-applications.

[17] Having dismissed the application for further adjournment and the motion for transfer the tribunal proceeded to deal *ex parte* with the substantive claim.[20] Judgment was entered in Hodkinson's favour in the amount of $25,338.20, filing fee included.

Leave to appeal sought

[18] On 4 October 2019 Souwer applied for leave to appeal, and on 11 November 2019 he applied for leave to adduce new evidence. On 11 December 2019 Souwer was granted a stay of execution pending determination of those applications.

[19] The application for leave to appeal does not address the substantive issues, as set out in Hodgkinson's statement of claim and Souwer's informal response. Instead, it attacks the primary decision, root and branch, as contrary to natural justice, and erroneous in its rejection of the transfer application. Accordingly I am not required to consider the treatment of the substantive issues for trial.

[20] The right to be heard is really the right to an opportunity to be heard. The right may be waived or forfeited.[21] As the adjudicator pointed out, Souwer might have appeared by telephone, or if unable to do so, could have instructed his solicitor to appear in person, or by `phone. After all, Souwer was able to instruct the solicitor to forward medical certificates, such as they were. Loss of the first opportunity to be heard may be counted as a misfortune, despite lack of notice and informative medical evidence. But the tribunal might be forgiven for suspecting that the second, similarly unheralded and unexplained non-appearance looks like carelessness towards the opponent and even, perhaps, trifling with the tribunal.

[21] The granting of an adjournment is a discretionary decision[22], not to be taken for granted. Adjournments, particularly when opposed, are not available for the asking.[23] Eleventh-hour

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17 See paragraph [6], above.

18 T page 6 lines 34-38.

19 See for example, most recently, *Wolf v Advance Australia Removals & Storage Pty Ltd* APL170 of 2019, 17 July 2020.

20 QCAT Act s 93.

21 QCAT Act s 93.

22 *Delopez v Barry* [2014] WASC 370 at [25]; *Eley v Town of Victoria Park* [2014] WASC at [4] per Edelman J; *Westpac Banking Corporation v Tsatsoulis* [2003] FCA 406 at [13]; *Gillespie v The Queen* [2020] NSWCCA 186 at [69].

23 *Delopez v Barry* [2014] WASC 370 at [4].

applications, with no opportunity for negotiations to protect the other party's position, are not favoured.[24]

Balancing process

[22] It is clear that the adjudicator appreciated the need to balance the parties' and other interests. Justice, after all, is a two-way boulevard. On balance, he considered that another adjournment – which, if allowed, may well have been followed by similar applications on similarly inarticulate grounds. Also in the balance were the interests of other litigants in the queue.[25] Then there is a public interest in conserving the resources of the tribunal, and in finality of litigation, a matter in which there is a `high public interest'.[26]

[23] In *The Pot Man Pty Ltd v Reaoch*[27] a former President of the tribunal reminded parties that their own cases are not the centre of the legal universe and emphasised:

> QCAT has a statutory obligation to deal with matters in ways that are accessible, economical and quick ... The Minor Civil Disputes jurisdiction, in particular, is one in which the Tribunal has a broad jurisdiction to make orders that it considers fair and equitable ... It is common knowledge that the jurisdiction is a busy and demanding one, in which parties are expected to present their own cases, and act in their own interests ... The legislation, and the demands upon public resources which fund QCAT necessarily impose an expectation and an obligation upon a party that it will ensure that it acts in its own best interests, *or accept the consequences.*

[24] As Muir J observed in *Thomson v Smith,*[28] where the Court of Appeal dismissed an appeal against a refusal to adjourn, `there was no assurance that if the matter was adjourned ... the same problem would not reoccur when the matter again came on for trial.' That comment is pertinent here. Souwer had already confronted the tribunal, on two occasions, with what he seems to have believed, would be *fait accomplis.* And the request for a transfer to the Magistrates Court would, if granted, have been the source of another postponement of the evil day. In *Thomson v Smith*, above, McPherson JA feared that `the plaintiff lacked willingness to pursue her claim and would never be ready for a timely and just trial of the action'.[29] It is worth noting that the applicant in that case desired a course that held her out of a probable large award. That is not so here; a party facing a possible judgment debt has an obvious interest in delay. A second adjournment to a third trial date would, for the time being at least, prevent Hodkinson from enjoying the fruits of his judgment.[30]

[25] I can find no error in the tribunal's discretionary decision to refuse a further adjournment or a transfer to the Magistrates Court. Nor am I persuaded that those decisions were so unreasonable as to amount to a failure by the primary tribunal properly to exercise its

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24 *Quinn v O'Rourke; In re O'Rourke (No 1)* [2020] FCA 1145 (application refused).

25 *Sali v SPC Ltd* (1993) 67 ALJR 841, quoted with approval in *Thomson v Smith* at [113]; *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; *Manonai v Burns* [2011] WASCA 165 at [56].

26 *R v Vaughan* [2011] QCA 234 at [5]; *Pappas v Meiklejohn's Accountants* [2017] QCATA 60 at [10] (Thomas QC).

27 [2011] QCATA 318

28 [2005] QCA 446 at [73].

29 [2005] QCA 446 at [5].

30 Cf *Reeve v Hamlyn* [2015] QCATA 133 at [37]-[38].

discretion. On an appeal against a discretionary decision it is not enough that the appeal tribunal considers that, if it had been in the position of the primary judge, it would or might have reached a different conclusion[31]:

> Discretionary decisions, whether in the context of substantive or procedural relief ... engage the strictures against over-ready appellate interference and the correlative need for added restraint associated with *House v The King*[32].

[26] Where reasonable minds may differ, a decision cannot properly be called erroneous, simply because one conclusion has been preferred to another possible view.[33]

[27] The application for leave to appeal must be dismissed.

ORDER

The application for leave to appeal is dismissed.

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31 *House v The King* (1936) 55 CLR 499 at 505.

32 *PPK Willoughby Pty Ltd v Baird* [2019] NSWCA 48 at [5]. See also *Hillsea Pty Ltd v Joseph McIvor; McIvor v Joseph* [2020] NSWCA 55 at [33].

33 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131]; *In Re W (an infant)* [1971] AC 682 at 700; *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1025.