

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Wright v Matthews* [2023] QCATA 24

PARTIES: **COLIN WRIGHT**
(applicant/appellant)

v

BRETT MATTHEWS
(respondent)

APPLICATION NO/S: APL145-22

ORIGINATING APPLICATION NO/S: MCDT73/22 (Rockhampton)

MATTER TYPE: Appeals

DELIVERED ON: 24 March 2023

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judicial Member Peter Murphy SC

ORDERS:

- 1. Leave to appeal is granted.**
- 2. The appeal is allowed.**
- 3. Set aside the termination order made by the Tribunal on 24 May 2022.**
- 4. Set aside the warrant for possession issued on 24 May 2022.**
- 5. Direct the Registry of the Tribunal forward via email and post a sealed copy of the orders of this appeal Tribunal to the Officer in Charge, Rockhampton North Police Station.**

CATCHWORDS: LANDLORD AND TENANT – TERMINATION OF THE TENANCY – BY NOTICE TO QUIT – VALIDITY – WHAT NOTICE REQUIRED – LENGTH OF NOTICE REQUIRED – where the lessee of residential premises appealed the decision of the Tribunal to issue a termination order and warrant of possession pursuant to a Form 12 notice to leave without ground under the *Residential Tenancies and Rooming Accommodation Act 2008* – where the lessor issued a second Form 12 to the lessee pursuant to a ten-day period of grace on the lease – where the first Form 12 provided for vacant possession later than two months after it was given but was filed after the specified handover date, and the second Form 12 provided for vacant possession earlier than two months after it was given –

whether the second Form 12 should be treated as a notice to leave without ground – whether the Tribunal has the power to vary the length of notice for vacant possession pursuant to s 329 of the Act – whether the Tribunal has the power to extend the time period for filing a notice pursuant to s 293 of the Act

Queensland Civil and Administrative Tribunal Act 2009, s 61, s 142, s 143, Sch 3

Residential Tenancies and Rooming Accommodation Act 2008, s 280, s 281, s 286, s 291, s 293, s 326, s 329

Alikhan v Mian Prestige Real Estate trading as Ray White Runaway Bay [2010] QCATA 21, applied

Decor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397, cited

QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41, cited
Symes v Kahler [2022] QCATA 35, applied

APPEARANCES & REPRESENTATION: 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] Mr Wright is the lessee of residential premises at Allenstown on the outskirts of Rockhampton pursuant to a residential tenancy agreement with Mr Mathews.
- [2] On 15 February 2022, a Form 12 notice to leave without ground¹ was given to Mr Wright. Section 329(1)(j) of the *Residential Tenancies and Rooming Accommodation Act 2008* (“the Act”) requires the notice to be provided for vacant possession not earlier than two months after it was given.
- [3] In compliance with that section, Mr Wright was required to give vacant possession by midnight on 18 April 2022.
- [4] Mr Wright expressed concerns that he could not find alternative accommodation by that date. Mr Mathews, through his agent, allowed Mr Wright a ten-day period of grace.
- [5] That arrangement was, in effect, formalised by the agent issuing a second Form 12. That notice issued on 19 April 2022 and required vacant possession by midnight on 29 April – that is, ten days after it was issued.
- [6] The later Form 12 specifies on its face that it is a notice “with grounds”. The “details” given in the Form 12 for that assertion were:

The owner is seeking vacant possession as per first Notice to Leave exp. 18/04/2022.

¹ *Residential Tenancies and Rooming Accommodation Act 2008* (“the Act”), s 291. The notices here were issued, and the proceedings instituted, prior to amendments to that Act by the *Housing Legislation Amendment Act 2021* which, relevantly, came into force on 1 October 2022.

Owner giving further 10 days only, for vacant possession.

- [7] On 10 May 2022, Mr Mathews applied to the Tribunal for a termination order and a warrant of possession.
- [8] On 24 May 2022, a termination order was made, and a warrant of possession issued, by an acting Magistrate sitting as the Tribunal at Rockhampton consequent upon proceedings before the Tribunal heard the same day.
- [9] Mr Wright applies for leave to appeal that order.
- [10] A stay has earlier been ordered pending the determination of this application. Procedural orders have earlier been made directing the application be heard on the papers.
- [11] Mr Wright acts for himself. His application for leave to appeal asserts:

Error of law.

The termination order was granted after the court was made aware of the applicants failing to: act with regard to Section 293(2) an application under the section must be made within 2 weeks after the handover day.

- [12] No summaries of argument have been filed. The arguments in support of the grant of leave, and if leave is granted, the appeal, will need to be discerned from what transpired at the Tribunal hearing.

Leave to Appeal

- [13] The challenged orders are made in a “tenancy matter” and, therefore, a “minor civil dispute”.² As a result, leave to appeal is required.³
- [14] Section 143 of the *Queensland Civil and Administrative Tribunal Act 2009* (“QCAT Act”) might be seen to contemplate separate consideration of the application prior to the hearing of any appeal.
- [15] No procedural order directed they be heard together but plainly both parties want that to occur. It is appropriate the application and appeal be heard together.
- [16] An applicant for leave must provide a basis for the grant of leave in their application.⁴ The inquiry is directed to whether an arguable case of error attends the decision and whether the error has caused the applicant a substantial injustice.⁵
- [17] If s 143(2)(b) of the QCAT Act – read in light of ss 143(3) and (4)(a) and (b) of that Act – is to be seen as requiring the filed application to specify reasons for leave separate from reasons for the appeal, in this case that requirement should be waived.⁶
- [18] So too, the statutory mandates for speed and informality and the desire of the parties to have this matter determined, and determined expeditiously, should see the application proceed notwithstanding the dearth of material filed specifically for it.

² *Queensland Civil and Administrative Tribunal Act 2009* (“QCAT Act”), Schedule 3, Dictionary.

³ QCAT Act, s 142(3)(a)(i).

⁴ QCAT Act, s 143(2)(b).

⁵ For example, *Decor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397 at 398–400; *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

⁶ QCAT Act, s 61(1)(c), (5).

Appeal Merits and Substantial Injustice?

- [19] The Tribunal below recognised – as did the representatives of the parties⁷ – that it was “necessary to extend time for the notice”.
- [20] Seen in context, that is plainly a reference to the requirement contained in s 329(1)(j) of the Act.
- [21] The Tribunal expressed the view that there was no power to extend the timeframe mandated by that section of the Act, but nevertheless went on to say that he had “to act in fairness”.⁸
- [22] Seen in the context of comments made throughout the transcript, it is tolerably clear that the reference to “fairness” is directed toward the requirements of the QCAT Act.⁹
- [23] A termination order was made and warrant of possession issued based, it seems, on that premise.
- [24] The Tribunal determined to make the orders sought by Mr Mathews “based on the fact that two months notice was given”.¹⁰
- [25] In my opinion, that approach involves an error of law. The proposed appeal consequently has merit.
- [26] Substantial injustice is occasioned to Mr Wright if the appeal is not heard. The error is productive of Mr Wright being dispossessed on a basis not justified in law.
- [27] Leave to appeal should be granted.

The Error of Law

The Second Form 12

- [28] As has been seen, the second Form 12 given to Mr Wright claims to be based on grounds. The Notice does not provide particulars of a ground as s 326(1)(f) of the Act requires.
- [29] The details given in the Form 12 do not support any of the bases for a notice to leave contained in ss 282 – 290 of the Act.
- [30] Nor can the Form 12 be valid as a notice to leave for unremedied breach. Such a Form 12 must, relevantly, be based upon a failure to comply with a notice to remedy breach in Form 11.¹¹ No such notice was issued.
- [31] While the transcript contains references to Mr Mathew’s need to sell the property to finalise an estate, the notice is not given because a sale contract has been entered into.¹²

⁷ Mr Wright was assisted by a person from Tenants Queensland and Mr Mathews was represented by a representative of the managing agents for the property.

⁸ Transcript of proceedings, 24 May 2022, p9, 27-41.

⁹ Presumably, ss 3(b); 4(c).

¹⁰ Transcript of proceedings, 24 May 2022, p9, 33–34.

¹¹ The Act, ss 280; 281(1).

¹² The Act, s 286.

- [32] As a consequence, the second Form 12 should be treated as a notice to leave without ground.¹³
- [33] A notice to leave without ground for a periodic tenancy must not require vacant possession earlier than two months after the notice is given.¹⁴
- [34] The second Form 12 required vacant possession within 10 days. The statutory time period of two months “[cannot] be varied under s 61 of the Act” because it “defines and governs and delimits the Tribunal’s jurisdiction”.¹⁵
- [35] The second Form 12 is ineffective to require Mr Wright to leave. An application to the Tribunal for a termination order and warrant of possession cannot be founded upon it.

The First Form 12

- [36] An application founded upon the earlier Form 12 notice to leave without ground, needed to be filed within two weeks of the specified handover day¹⁶ – that is, by 3 May 2022. The application filed on behalf of Mr Mathews was filed on 10 May 2022.
- [37] For the reasons earlier identified, that time period cannot be extended.
- [38] It follows that the application for termination of the periodic residential tenancy could not be founded on the first Form 12 and should have been dismissed.
- [39] The making of the termination order and the issue of a warrant of possession were both founded on an error of law.
- [40] The appeal should be allowed.
- [41] It should be said that the transcript reveals an attempt by the Tribunal Member to do the very thing he said he want to achieve – that is, to be fair to all parties. Unfortunately, the law did not allow him to do so in the circumstances presented.
- [42] Mr Mathews, of course, is not prevented from issuing relevant notices compliant with the Act and instituting any consequential processes.

Orders

1. Leave to appeal is granted.
2. The appeal is allowed.
3. Set aside the termination order made by the Tribunal on 24 May 2022.
4. Set aside the warrant for possession issued on 24 May 2022.
5. Direct the Registry of the Tribunal forward via email and post a sealed copy of the orders of this appeal Tribunal to the Officer in Charge, Rockhampton North Police Station.

¹³ *Alikhan v Mian Prestige Real Estate trading as Ray White Runaway Bay* [2010] QCATA 21 per Wilson J.

¹⁴ The Act, s 329(2)(j).

¹⁵ *Symes v Kahler* [2022] QCATA 35 citing, among other cases, *Cameron v Cole* (1944) 68 CLR 571 at 584; *Queensland Building and Construction Commission v Watkins* [2014] QCA 172.

¹⁶ The Act, s 293(2).