

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

REGISTRY: Brisbane
NUMBER: APL116/22

APPLICANT: DAVID JAMES BARKER

AND

RESPONDENT: DEPARTMENT OF COMMUNITIES, HOUSING AND
DIGITAL ECONOMY

SUBMISSIONS OF THE RESPONDENT

Application Seeking a Stay - filed 9 May 2022

Background

1. By application for leave to appeal and appeal filed 9 May 2022 (**appeal**), the applicant seeks leave to appeal the decision of the Tribunal at Brisbane, made on 26 April 2022 in matter number 671/21 (**decision**).
2. The decision was:
 1. The Residential Tenancy Agreement between the parties be terminated as from midnight on the 9 May 2021 on the grounds of failure to leave.
 2. A Warrant of Possession to issue authorising a police officer to enter the premises at 5/25 WAVERLEY ROAD TARGINA QLD 4068.
 3. The Warrant shall take effect on 10 May 2022 and remain in effect for 14 days, to expire at 6.00pm on 24 May 2022.
 4. The Warrant to be executed as soon as reasonably practicable after taking effect.
 5. Entry under the Warrant shall only be between the hours of 8.00am and 6:00pm.
3. On 9 May 2022, the applicant filed an application seeking a stay of the decision (**application**). In the application, the applicant relies on his application for leave to appeal filed with his application. The applicant's application for leave to appeal refers to the applicant's affidavit filed on 9 May 2022 and broadly seeks the following orders:
 - a) exclusion of evidence;
 - b) the matter be adjourned for another hearing, or the application 0693/22 be dismissed;

Outline of Submissions

Filed on behalf of the Respondent

The Department of Communities, Housing and Digital Economy

Level 7, 515 St Pauls

Fortitude Valley Qld 4006

Telephone: (07) 3034 6500

- c) the warrant of possession issued on 26 April 2022 be revoked, pending a further hearing of this matter; and
 - d) Adjudicator LeMass be excused from further participation in this matter.
4. In summary, the applicant's affidavit provides the following:
- a) the affidavit of Ms Mollie Beresford is invalid as it is not consistent with the *Uniform Civil Procedure Rules 1999* (Qld) and the *Oaths Act 1867* (Qld), and therefore should be excluded from evidence;
 - b) the Tribunal should not have accepted additional material from the respondent on 21 April 2022 as the hearing was set down for 26 April 2022. This did not give the applicant sufficient time to consider the material and was not consistent with the requirements in QCAT Practice Direction No. 2 of 2022 (**Practice Direction**);
 - c) at the original hearing, the Tribunal did not follow the COVID-19 requirements in the Practice Direction;
 - d) the respondent introduced new evidence at the hearing in the form of photographs after those received on 21 April 2022. The applicant and the Tribunal did not have access to these photographs;
 - e) The applicant was disadvantaged as he presented his case without having access to the relevant documents in the matter at the time of the hearing; and
 - f) adjudicator LeeMass proceeded in an unfair and unequitable manner.
5. By directions dated 12 May 2022, the Tribunal ordered that the applicant:
- a) file an affidavit of service or a form of acknowledgment of service from the respondent, confirming that the appeal and application seeking a stay had been filed on the respondent by 4.00pm on 16 May 2022; and
 - b) file any submissions in support of the application seeking a stay in the Tribunal by 4.00pm on 16 May 2022.
6. The applicant filed a submission in support of the application on 16 May 2022 and served a copy of his submission on the respondent on the same day.
7. The applicant submits that:
- a) reinstatement of the applicant's tenancy would not be possible once the warrant is executed, even in circumstances where the applicant's appeal is successful;
 - b) the alternative accommodation option, RentConnect, does not suit the applicant's current circumstances as the applicant believed this was applicable only to people already in the private rental system;
 - c) the applicant is unable to afford private rental as he is a welfare recipient; and

d) the applicant will become homeless if the warrant is executed.

The stay application

8. A decision of the Tribunal is not affected by the filing of an application for leave to appeal or appeal.¹ The Appeal Tribunal may, in its discretion, make an order staying a decision of the Tribunal, pending finalisation of an appeal proceeding.²
9. Decisions of the Tribunal are not merely provisional pending appeal. The respondent is, prima facie, entitled to the fruits of the litigation.³
10. The applicant is required to demonstrate some reason why a decision should not have immediate effect. The factors for considering whether to grant a stay order include:
 - a) whether a reasonably arguable case of error by the Tribunal has been demonstrated;
 - b) whether a refusal to grant a stay application would cause a material detriment to the applicant for the stay; and
 - c) whether the balance of convenience favours the granting of a stay.⁴
11. Whether there is some compelling disadvantage to the respondent should a stay be granted is also considered a relevant factor. The former President of the Queensland Civil and Administrative Tribunal (**QCAT**), Daubney J stated:⁵

The power to order a stay under s 145(2) of the Queensland Civil and Administrative Tribunal Act 2009 (QCAT Act) is not available where a leave application has not been filed, but not yet granted. However, in such a case an interim order to the same effect may be made under s 58 of the QCAT Act in exceptional circumstances.

For completeness, the conventional principles relating to the granting of stays pending appeal also provide guidance. Some reason must be shown why the original decision should not be given immediate effect, and why the discretion to grant a stay should be exercised. Factors that may be taken into account include whether there is a good arguable case, whether the applicant will be disadvantaged in the absence of a stay, and whether there is some compelling disadvantage to the respondent should a stay be granted, which outweighs the disadvantage to the applicant. Importantly, decisions at first instance should not be treated as merely provisional, and a successful party is entitled to the fruits of its judgment.

[footnotes omitted]

¹ QCAT Act s 145(1).

² QCAT Act ss 58(1) and 145(2).

³ *Cooks Construction Pty Ltd v Stork Food Systems Aust Pty Ltd* [2008] 2 Qd R 453; *Hessey-Tenny & Anor v Jones* [2018] QCATA 131 at [30].

⁴ *Day v Humphreys v Ors* [2017] QCA 104.

⁵ *Tarquin Millard v State of Queensland* [2020] QCATA 223 at [14].

Reasonably arguable case

12. In *Legal Services Commissioner v Baker*⁶, Chesterman J (with whom McMurdo P and Helman J agreed) at paragraph 30 stated:

It goes without saying that the demonstration of an arguable appeal is a condition precedent to obtaining a stay. No court or Tribunal would consider staying the operation of an order where it is clear that there is no realistic prospect of a successful appeal...

13. In respect of the requirement to demonstrate an arguable appeal the Honourable James Thomas AM QC, Member in *Deputy Commissioner Stewart v Kennedy*⁷ stated:

No specific error has ever been articulated or identified in documents or submission, either before the member or in the present appeal. In the absence of particulars, the mere assertion by the appellant Police Officer that he “disputes the findings of the [appellant]” and that “the [appellant’s] findings are fundamentally flawed, and the sanction imposed was grossly disproportionate to the misconduct found” is insufficient. Unless some point is identified, the tribunal cannot begin to enter upon the question whether there is a good arguable appeal. The onus of showing this is upon the party that seeks the stay. It was not discharged here.

14. An arguable case must therefore be more than a mere assertion of appeal, it must be a legitimate basis of appeal and must be adequately particularised.
15. In essence the applicant must establish a reasonably arguable case that the Tribunal made an error of law and/or fact when it made the decision.
16. The crux of the applicant’s appeal appears to be:
- a) the Tribunal did not observe natural justice;
 - b) adjudicator LeeMass proceeded in an unfair and unequitable manner; and
 - c) evidence considered by the Tribunal in its decision was invalid and should have been excluded.

17. None of the grounds on which the applicant seeks to rely can be considered reasonably arguable.

Natural justice and adjudicator proceeding in an unfair and unequitable manner

18. The respondent submits that the applicant was not denied procedural fairness by receiving material in this matter from respondent on 21 April 2022, or by the alleged disclosure of new evidence at the hearing.
19. There was no new evidence introduced at the hearing. The photos the applicant referred to in his affidavit⁸ were provided to the applicant by email on 21 April 2022. Further, the

⁶ [2005] QCA 482.

⁷ [2011] QCATA 2054 at [25].

⁸ Affidavit of D Barker filed 9 May 2022, para. 41.

photographs were of the applicant's personal property stored at the subject premises, at various times throughout the tenancy. Various notices of breach and the Notice to Leave that gave rise to the termination order were issued to the applicant because of the property. The applicant could not fairly have been unaware of, or caught by surprise, by content of the photographs at the hearing.

20. The applicant's comments with respect to Adjudicator LeMass in his affidavit are as follows:⁹

- a) adjudicator LeMass reopened the hearing for the applicant;
- b) adjudicator LeMass dismissed the COVID-19 requirements in the Practice Direction as unnecessary;
- c) adjudicator LeMass attempted to explain why the matter had been reopened and the extraordinary circumstances that lead to the applicant's number being provided to the Tribunal;
- d) adjudicator LeMass mentioned that given the extraordinary circumstances the applicant may invoke a right for him to have the matter reopened, without clarifying whether that comment referred to the current hearing or a possible later one;
- e) adjudicator LeMass did not mention that the applicant may invoke a right to have the matter reopened until approximately ten or more minutes into the hearing;
- f) adjudicator LeMass did not make the applicant aware of any rights he may have had to a later hearing;
- g) the hearing conducted by Adjudicator Lemass did not proceed in a manner which provided the applicant with a fair and equitable opportunity; and
- h) due to adjudicator LeMass' exposure to the material in this matter there is the potential that this will irrevocably adversely affect his reasoning and he should therefore be excluded from any further involvement in this matter.

21. The applicant's claim that Adjudicator LeMass proceeded in an unfair and unequitable manner is without merit. The applicant has not provided any evidence from the hearing that there was no adequate explanation of the practice and procedures of the Tribunal or decision relating to the proceeding, no assistance provided to him to assist as necessary throughout the hearing and no opportunity for him to present his case.¹⁰

22. The applicant has deposed to receiving a copy of the application on 25 March 2022. Consequently, the applicant has had the opportunity to prepare for and address the issues raised in the material prior to the hearing and has not plead or produced any evidence from the hearing that there were any new issues raised for the first time in the hearing.¹¹

⁹ Affidavit of D Barker filed 9 May 2022, paras 37, 39-40.

¹⁰ QCAT Act s 29(1)(a).

¹¹ Affidavit of D Barker filed 9 May 2022, para 3.

23. The respondent submits that the applicant is not unfamiliar with the conduct of proceedings in the Tribunal given his prior involvement in Tribunal proceedings in 2021. Relevantly, the level of assistance provided to self-represented litigants will vary depending on the circumstances.
24. The principles in relation to the role of a judge in matters dealing with self-represented litigants were summarised by Derham AsJ in *Owerhall v Bolton & Swan Pty Ltd*.¹² In that case, his Honour stated:
- It is a frequent consequence of self-representation that the Court must assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy. What a judge must do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case.
25. In a tribunal setting, the requirement of the Tribunal to observe procedural fairness¹³ is a flexible notion that must be commensurate with the nature and demands of the jurisdiction – it is a matter of construction of a particular statutory power.¹⁴
26. The minor civil dispute jurisdiction requires Adjudicators to deal with matters fairly, quickly and economically.¹⁵ This means that parties may not be aware of all of the material relied upon by their opponent before the hearing. However, there is no evidence to suggest that Adjudicator LeMass did not give the applicant an opportunity to present his material to prove his case and to rebut the respondent's evidence.
27. The applicant had enough time to consider the evidence and respond. If the applicant had concerns, he could have sought an adjournment at the hearing or requested copies of the relevant documents if required.
28. Notwithstanding the apparent issues identified in the applicant's affidavit with respect to attending the hearing by phone and the contact information the Tribunal had on file, the applicant would have been cognisant of the fact that the hearing could have proceeded on 26 April 2022, as the applicant had a copy of the application that stated the matter was set down for hearing on this date.¹⁶
29. The Practice Direction states that the matter may be dealt with in the party's absence. The onus is on the party who wishes to attend the hearing by phone to provide the telephone number upon which they will be contactable for the hearing. It is irrelevant what contact information the Tribunal already had on file for the applicant, as the applicant was still required to notify the Tribunal of his contact number for the hearing in accordance with paragraph 18 of the Practice Direction.
30. The applicant had multiple email addresses for the Tribunal¹⁷ and the Practice Direction also provides the relevant email address for each QCAT registry in Annexure A.

¹² [2016] VSC 91 [8]-[9].

¹³ QCAT Act s 28(3)(a).

¹⁴ *Kioa v West* (1985) 159 CLR 550, 584-5.

¹⁵ QCAT Act ss 3 and 4.

¹⁶ Affidavit of D Barker filed 9 May 2022, para. 3.

¹⁷ Affidavit of D Barker filed 9 May 2022, para. 22. The respondent's email sent on 21 April 2022 was sent to the applicant and also enquiries@qcat.qld.gov.au and qcaturgentmcd@justice.qld.gov.au.

31. On his own admission, the applicant was able to access the internet over the ANZAC day long weekend to login to the online account for his secondary contact number.¹⁸ The respondent submits that the applicant had a sufficient opportunity to address the issues he now seeks to agitate and communicate these to the registry by email, or in person, prior to the hearing on 26 April 2022.
32. The Tribunal is required to focus on the issues and use time and resources efficiently, consistent with the Tribunal's mandate. Extending the requirement of procedural fairness beyond this would be inconsistent with the QCAT Act and would make the minor civil dispute jurisdiction cumbersome.
33. The decision was subject to the Tribunal's discretion. The applicant has failed to provide details of why the decision should be set aside and made differently in the context of the enduring legal principles stated in *House v King* [1936] HCA 40.
34. The applicant has not provided evidence to indicate that the Tribunal acted on a wrong principle, made a mistake of fact and/or error of law affecting the Tribunal's decision or was influenced by irrelevant matters. The onus of proving a good arguable case is on the applicant. In the absence of an adequate explanation of his arguments, appropriate particulars establishing that the Tribunal made an error of law and/or fact and evidence proving the asserted errors, the applicant has failed to prove he has a good arguable case.

Validity of Affidavit of Mollie Beresford

35. The applicant seeks to exclude the affidavit of Mollie Beresford, referring to *Uniform Procedure Rules 1999* (Qld) (**UCPR**) to dispute the validity of the affidavit.¹⁹ However, the UCPR only applies to civil proceedings in the Supreme, District and Magistrates Courts.²⁰
36. The applicant also refers to the *Oaths Act 1867* (Qld) in seeking to exclude the affidavit of Mollie Beresford. Material provided to the Tribunal may be given orally or in writing. The evidence is only required to be given on oath or by affidavit if the Tribunal requires it.²¹ There is no evidence to suggest the Tribunal required this information to be given by way of affidavit. Evidence provided in support of an application in the Tribunal can be provided by affidavit however this is not a requirement.
37. In any event, whilst unsworn documents may not attract the same weight as sworn evidence, documents recording statements of a person may be taken into account in determining factual matters.²²
38. The respondent submits that it was open to the Tribunal to accept the unsigned affidavit of Mollie Beresford when considering the respondent's application to terminate the applicant's tenancy and issue a warrant for possession of the property, as the Tribunal

¹⁸ Affidavit of D Barker filed 9 May 2022, para. 26.

¹⁹ Affidavit of D Barker filed 9 May 2022, para. 11(a).

²⁰ UCPR r 3(1).

²¹ QCAT Act s 95(4).

²² *Robert Legat v Queensland Law Society Incorporated* [2022] QCAT 57 at [25].

may inform itself in any way it considers appropriate and is not bound by the rules of evidence.²³

Will the applicant be disadvantaged in the absence of a stay

39. If the stay is not granted the applicant may suffer the disadvantage of not having a property to reside in. Whether he suffers that disadvantage is dependent on the steps and efforts that are taken to find alternative accommodation.
40. The applicant has now had 24 days to ameliorate that risk by seeking alternative accommodation in the private rental market, or with friends and family. The applicant has not applied for a Bond Loan, rental grant or made an appointment with the respondent to discuss obtain assistance to find alternative accommodation. Without any additional income the applicant receives from his business his weekly income is \$540.10, and the private rental market range in a similar rental area he resides in is upwards of \$340.00 per week.
41. The Park Hotel is currently being operated by the department as temporary accommodation for the homeless. It accepts referrals from the respondent, Communify, MICAH Projects and HART. During the RentConnect appointment, the respondent can make referrals to support organisations to obtain access to the Park Hotel and the services that it offers. The respondent has not attempted to make an appointment with the respondent to discuss these options.
42. In respect of ameliorating the risk of the disadvantage occurring, the respondent has:
 - a. reviewed the applicant's affordability based on known income. However, the applicant may receive income from his business that has not been disclosed and considered. The applicant's affordability is between \$180-220.00 per week which means he is currently able to rent a one bedroom in shared accommodation;
 - b. attended the applicant's property on numerous occasions to encourage the applicant to attend the Housing Service Centre to discuss alternate housing options;
 - c. On 29 March 2022, staff attended the applicant's property to offer Rent Connect services/attend the Fortitude Valley Housing Service Centre to discuss his housing options and left a calling card;
 - d. On 5 April 2022, staff attended applicant's property to discuss the upcoming QCAT hearing, and the applicant advised that he didn't want to discuss this, and everything will come out in court during this conversation the applicant was encouraged to attend the HSC for an appointment through the Rent Connect program to assist him in alternative accommodation;
 - e. On 21 April 2022, staff attended applicant's property to hand deliver the QCAT hearing reminder letter and offer support services to assist find alternative accommodation. The applicant was not home, and this letter was placed in his mailbox;

²³ QCAT Act s 28(3)(c).

- f. On 27 April 2022, staff attended applicant's property to discuss what assistance the HSC could provide in assisting him find alternative housing a letter was left requesting the applicant engage with the HSC with a list of community support services;
- g. On 5 May 2022, staff attended applicant's property to discuss what assistance the Housing Service Centre could provide in assisting him find alternative housing;
- h. On 12 May 2022, staff attended applicant's property, the applicant advised he had lodged an appeal and a stay of the decision. Staff discussed supports and engaging with the department around the Rent Connect program, and that if he did not wish to attend the Housing Service Centre for an appointment, a phone interview could be arranged.
- i. On 20 May 2022, an email response was sent to the applicant in response to the applicant's email of 16 May 2022 regarding the Rent Connect Service. The respondent discussed the variety of products available for customers through this program however there were varying factors to consider including the suburb, financial limits, housing requirements and what kind of property was suitable for the household.

Is there some compelling disadvantage to the respondent should a stay be granted

43. If the Stay is granted the respondent will suffer the following disadvantage:

- a. the respondent will be denied the fruits of its efforts in the contested legal proceedings and the decision of the Tribunal;
- b. the respondent will be unable to recover possession of its property pursuant to the termination order and Warrant issued on 26 April 2022;
- c. the applicant will remain at the property in circumstances where:
 - i. the applicant has received multiple warnings including 3 Notices to Remedy Breaches and 2 Notices to Leave in respect of property condition issues;
 - ii. the applicant has previously not accepted the respondent's offer to receive support to sustain his tenancy and has failed to engage with the respondent to rectify the issues;
 - iii. throughout the above breach, notice, and QCAT period, the respondent has continued to receive complaints from neighbours and the Brisbane City Council regarding the state the applicant's property;
 - iv. the complaints have been ongoing since the tenancy commenced and the condition of the property as a result of the actions of the applicant poses a serious health and safety risk to those in the surrounding properties. This is also a substantial fire risk due to the applicant's hoarding, the flammability of stored goods and the close proximity of neighbours in the multiunit complex;
 - v. the respondent previously attended QCAT following a Notice to Leave being issued to the applicant in respect of property condition issues. The matter was adjourned on two occasions for the respondent to continue working with the

- applicant. The respondent attended a third hearing at QCAT in April 2021, at which point the applicant removed all the items and the matter was dismissed;
- vi. in June 2021, the respondent identified that the applicant had returned all the recyclables and rubbish to the property. The respondent attempted to work with the applicant again rectify these issues;
 - vii. the respondent has previously organised the removal of rubbish and recyclables from the property on 3 occasions, with the cost totalling \$1,125.55; and
 - viii. the applicant has been provided with extensive opportunities to rectify these issues. On each occasion he has been unable maintain the condition of the property to a safe standard.
- d. The respondent is obliged to take reasonable steps to ensure the other tenants right to quiet enjoyment of their properties is not breached by the applicant. While the applicant remains at the property the respondent may be unable to comply with its obligations to the other tenants. The respondent may consequently:
- i. be issued with a Notice of Breach, or Notice of intention to leave in respect of the other properties in the unit complex; and
 - ii. the respondent will incur significant expense responding to those notices (including any associated QCAT hearings related to them) and if a property is vacated will suffer a loss of rental income until it is re-tenanted.
- e. the State will be unable to utilise the property to provide public housing assistance to a deserving person and/or family. The State instructs that there are currently more than 68 customers waiting for a property that is similar to the one the applicant is currently residing in. The applicant who has been on the waiting list the longest, applied for public housing assistance on 1 April 2016.

The balance of convenience – the disadvantage to the respondent outweighs the disadvantage to the applicant.

44. The balance of convenience favours refusing to grant the stay, where:

- a. The applicant has failed to demonstrate a good arguable case;
- b. If the stay is granted the respondent will be denied the fruits of the litigation and will be unable to recover possession of the property pursuant to the Warrant;
- c. Refusing the stay may result in some disadvantage to the applicant. However, the respondent has attempted to provide the applicant with assistance to locate accommodation and a referral for appropriate support services and accommodation in the Park Hotel. The respondent has also confirmed that the applicant may apply for a bond loan and/or rental grant from the respondent to assist him entering a suitable rental property;
- d. The applicant has not attended an appointment to seek further assistance from the respondent to locate suitable rental accommodation. Further, he has not applied for a Bond Loan or rental grant;

- e. Refusing the stay will not make the appeal nugatory because the appeal has poor prospects of success and is unlikely to be successful for the reasons detailed at [12] – [38] above;
- f. If the stay is granted the respondent may be unable to comply with its obligation to ensure that the other tenants in the multi-unit complex where the applicant is residing, do not have their right to quiet enjoyment of their properties breached. Consequently:
 - i. The other tenants may issue Notices of Breach and/or of their intention to leave their properties; and
 - ii. If the respondent does receive those notices it will incur the cost and inconvenience of dealing with them (including any associated legal costs) and/or a loss of rental income.

Orders

- 45. The application for an order to stay the decision of the Tribunal dated 26 April 2022 be dismissed.

Cara Quod
Senior Legal Officer
Legal Services
Department of Energy and Public Works
20 May 2021