SUPREME COURT OF QUEENSLAND

CITATION:	*Thompson v Body Corporate for Arila Lodge & Ors* [2019] QCA 267
PARTIES:	**EMMA THOMPSON** **(applicant)** **v** **BODY CORPORATE FOR ARILA LODGE CTS 14237** (first respondent) **SGR PROP INVEST 01 PTY LTD** ACN 153 375 378 **LYN McCLELLAND** (second respondents)
FILE NO/S:	Appeal No 9215 of 2019 QCATA No 441 of 2016 QCATA No 75 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane – [2018] QCATA 56; [2018] QCATA 133; Unreported 26 July 2019 (Member P Roney QC)
DELIVERED ON:	22 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2019
JUDGE:	Sofronoff P
ORDERS:	**Applications are dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where the applicant seeks an extension of time within which to appeal various orders of the Queensland Civil and Administrative Appeal Tribunal – where the orders of QCATA were delivered on 26 April 2018, 6 September 2018 and 26 July 2019 respectively – where the applicant filed an application for leave to appeal in the Court of Appeal on 16 September 2019 – where the applicant failed to provide written or oral submissions for the delay or reasons for granting the extension of time – whether the proceedings have merit –

whether the proceedings are an abuse of process – whether extensions of time within which to appeal should be granted

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 151, s 153

COUNSEL: A Abaza (*sol*) for the applicant
C Francis (*sol*) for the first respondent
S Reid (*director*) for SGR Prop Invest 01 Pty Ltd and
L McClelland for the second respondents

SOLICITORS: Andrew P Abaza for the applicant
Grace Lawyers for the first respondent
The second respondents appeared on their own behalf

[1] **SOFRONOFF P:** These are applications for an extension of time within which to apply for leave to appeal from certain decisions of the Appeal Tribunal of the Queensland Civil and Administrative Appeals Tribunal.

[2] Ms Lyn McClelland, is the owner of a unit on the first floor of Arila Lodge, a block of units in Toowong. SGR Prop Invest 01 Pty Ltd is the owner of a unit on the second floor of the same block of units. Mr Steven Reid is its sole director. They are, together, the second respondents to this application. The first respondent is the body corporate. The applicant, Ms Emma Thompson, is the owner of a unit on the third floor. These three units are directly above each other. On 8 December 2016 an adjudicator appointed under the *Body Corporate and Community Management Act* 1997 (Qld) made orders that required Ms Thompson to cause repairs to be made to stop water leaking from her unit into the other two units and to effect certain repairs to damage caused by the leak.

[3] Ms Thompson appealed against the adjudicator's orders, in relation to each unit, to QCAT. The *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("QCAT Act") permits such appeals only on questions of law. The learned member, Mr Roney QC, dismissed both appeals. He concluded, in relation to the first appeal:

(a) Ground 1, which had not been advanced before the adjudicator, was without substance.

(b) Grounds 2 and 3, which were also not raised before the adjudicator, raised questions of fact and were, therefore, incompetent.

(c) Grounds 4 and 8 raised a purported failure on the part of the adjudicator to give adequate reasons; Mr Roney found that the reasons (which are lengthy and detailed) were adequate. In addition, Ground 8 sought to agitate factual questions.

(d) Grounds 1, 2, 3, 4 and 8 in the first appeal had corresponding, and equally bad, grounds in the second appeal.

(e) Ground 6 was incompetent because it raised a factual question. This ground was the same as ground 10 in the second appeal.

(f) Grounds 7 (the same as ground 6 in the second appeal) and 9 (the same as 8 in the second appeal), raised matters that were not raised before the adjudicator and these were questions of fact and so the ground was incompetent.

(g) Ground 10(b) (ground 9(b) in the second appeal) raised a baseless factual complaint.

(h) Ground 11 was wrong in law and, in any event, the asserted error was immaterial.

[4] Accordingly, on 26 April 2018, Mr Roney dismissed both appeals and, insofar as an extension of time to appeal was required in one of the appeals, he refused the extension. Subsequently, on 6 September 2018, Mr Roney made three orders pursuant to which Ms Thompson was ordered to pay the costs of each of the three respondents. The order concerning the body corporate required her to pay its costs to be assessed. The orders concerning the other two respondents required Ms Thompson to pay costs in sums fixed by Mr Roney. In due course, on 20 June 2019, a cost assessor gave a certificate stating the amount of costs due to the body corporate and on 26 July 2019 that certificate was made an order of the Tribunal.

[5] Although her appeals were dismissed, Ms Thompson did not comply with the adjudicator's orders. A failure to comply with such orders is made an offence by s 288 of the *Body Corporate and Community Management Act*. On 23 August 2018 Ms Thompson was found guilty of three offences against that section due to her failure to comply. She was released on her own recognisance and upon the condition that she pay compensation, within six months of the date of the orders in the Magistrates' Court, to the respective complainants in the sums of $578.50, $15,823.10 and $19,315.57. She was also ordered to pay court costs in the sum of $6,288. Convictions were not recorded.

[6] Ms Thompson has not obeyed any of these orders, although she has paid a relatively small sum towards costs.

[7] On 28 August 2019 the applicant filed a notice of appeal against Mr Roney's orders. On 23 October 2019 that appeal was dismissed by me at the invitation of the appellant. On 16 September 2019 the applicant filed an application "for leave to appeal" against the order dismissing the appeals to QCAT, the two fixed costs orders and the order made on 26 July 2019 in relation to the costs assessment.

[8] The application sought the following orders:

"That Orders and Declarations be made as follows:

a. That this Appeal be allowed under s 153 of the QCAT Act with costs;
b. That time be extended to the extent necessary and under s 151(3)(a) (b) or (c) of the QCAT Act.
c. That the directions and orders in APL441 of 2016 and APL075 of 2017 and [2018] QCATA 56, 26 April 2018; *(No 2)* [2018] QCATA 133, 6 September 2018 and decision 26 July 2019 be set aside;
d. That the order [2016] QBCCM Cmr 563 (Lot 1) made 8 December 2016 and the order [2016] QBCCM Cmr 562, made 8 December 2016 (Lot 2) be set aside and purported proceedings under the *Justices Act* 1886 upon said orders under s 288 of the *Body Corporate and Community Management Act* 1997 (:the BCCM Act") be quashed as resulted in orders, 23 August 2018, under s 19(1) and (3) of the *Penalties and Sentences* Act 1992 on the Complaints of the First Respondent that the Appellant should pay $15,823.10 to McClelland (MAG00128060/17(1)) and $19,315.57 to the owner of Lot 2 Prop Invest 01 Pty Ltd A.C.N. 153 375 378 (MAG00128057/17(0)) and costs to the First Respondent;
e. That M 1417/19 (McCelland) and M 5261/18 (SGR Prop Invest 01 Pty Ltd A.C.N. 153 375 378) be stayed under s 152(2) of the *QCAT Act* until the Appeal is finally decided.
f. That Writ no 719598484 lodged over C/T 50206737, 16 Aaron Avenue Hawthorne be removed on this appeal being allowed."

[9] The QCAT Act permits a party to appeal against an order of an appeal tribunal but only upon a question of law and only with the leave of the Court of Appeal.[1] An application for leave to appeal must be made within 28 days of the order.[2]

[10] In her affidavit sworn on 16 September 2019, the applicant states that she received a copy of the order of 26 July 2019 (which was about the body corporate's costs) from her solicitor on 24 August 2019. Ms Brogan, the solicitor for the body corporate, deposed in an affidavit that she sent a copy of that order to Mr Robinson, who was acting for Ms Thompson in the matter, on 2 August 2019. Otherwise, an email dated 31 July 2019 shows that that order was sent to Ms Thompson by QCAT on that date. That evidence was not challenged. It follows that the application in relation to that order is out of time. There is no evidence that any applications for leave to appeal any other order are within time.

[11] Consequently, the applications for leave to appeal the other orders are all out of time. Not that the basis of the applications matter in this case. Whether it is an extension of time that the applicant is seeking or leave to appeal, these applications must be dismissed as entirely without merit. Indeed, Mr Reid, the sole director of SGR Prop Invest 01 Pty Ltd, submitted on its behalf that these proceedings are an abuse of process because they are vexatious.

[12] The appeal against the costs order of 26 July 2019 can be dealt with briefly. Section 150 allows an appeal against an order of the appeal tribunal if it is a "cost-amount decision" or it is a "final decision". A "cost-amount" decision is one that is made under s 107(1). Mr Roney made such orders in relation to Ms McClelland and SGR Prop Invest 01 Pty Ltd. In relation to the body corporate, he made an order for costs to be assessed. The order of 26 July 2019 was made as a consequence of the process of assessment. It is not, therefore, a "cost-amount" order. Nor is it a "final decision" as defined in the Act. Consequently, the application in relation to that order is incompetent and should be dismissed.

[13] The other two costs orders made under s 107 and were "cost-amount" orders. The orders dismissing the appeals were final decisions. Accordingly, leave to appeal had to be sought within 28 days of their being received.[3] Time to apply for leave to appeal has lapsed. In the case of the two decisions of 26 April 2018, time lapsed about 16 months ago. In the case of the costs orders made on 6 September 2018 time lapsed about 11 months ago.

[14] The applicant must satisfactorily explain her delay and must show that her prospects of obtaining leave are reasonable. She has done neither.

[15] Rule 41(3) of *Practice Direction 3 of 2013* provides that in the case of an application for an extension of time to apply for leave to appeal, the first paragraph of the written outline must address the reason for the delay and why time should be extended. Rule 43(1) of the *Practice Direction* requires an applicant for an extension of time to file a supporting affidavit which sets out:

(a) The reason for the delay;
(b) Why time should be extended;
(c) Whether any prejudice might result to a respondent because of the delay.

[16] The affidavit must exhibit, *inter alia*, a copy of the proposed notice of appeal.

[17] The applicant filed and relied upon two affidavits sworn by her. Neither of these affidavits explains her delay or gives any reason why time should be extended. The question of prejudice to the respondent is not addressed.

[18] None of that would matter if these crucial matters were otherwise addressed. They were not.

[19] Instead, the applicant's solicitor, Mr Abaza, who appeared for Ms Thompson on the hearing of the applications, submitted in writing that if his client is granted an extension of time to apply for leave and if granted leave to appeal, she would wish to contend that:

(a) There is a "right of appeal" and this right is "in the nature of judicial review";[4]
(b) The Court of Appeal has power under s 29 of the *Supreme Court of Queensland Act* 1995 (Qld) to "quash the unconstitutional convictions";[5]
(c) "Time does not speak in the same way to the absence of jurisdiction";[6]
(d) And so on, for 61 paragraphs.

[20] Mr Abaza has caused notices under s 78B of the *Judiciary Act* 1903 (Cth) to be delivered to the State, Territory and Commonwealth Attorneys-General.

[21] The first three paragraphs of the notice are as follows:

> "1. s.288 of the *Body Corporate and Community Management Act (Q)* 1997 ("BCCM Act") makes an order of an adjudicator without a hearing a declaration of guilt, as to defeat the application of common law principle to read down the legal burden thus created.
> Such an order makes the Magistrates Court under s.19 of the *Justices Act* 1886 a rubber stamp to an order of an adjudicator where the only fact required to be proved before that Court is the fact of such an order and alleged breach resulting in a criminal offence, in essence allowing an adjudicator to pronounce on the validity of her own edicts.
> 2. Absent merits review, s.289(2) of the *BCCM Act*, when read with s.146 of the QCAT Act, requires the appeal tribunal to act in a way incompatible with the function of a court compelling the denial of procedural fairness on contested matters on the balance of probabilities applying recognized principles *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 to an alleged escape of water, rather than strict liability as prevents the law of Australia being applied where proof of *actual damage or injury as a necessary element is ('the gist') of tort liability for negligence.*
> 3. Absent merits review, s.289(2) of the *BCCM Act* precludes QCAT from giving adequate or comprehensible reasons for its decision in respect of what is meant by "*ancillary*" in s.284 of the *BCCM Act* 1997 absent findings by the adjudicator or any evidence as to how the purported orders exceeding the monetary limit in s.281(2)(b) came to be made.
> 4. Absent merits review an adjudicators order:
> a. prevents a Court of the State and the High Court from reaching a just determination in accordance with law;
> b. is above the rule of law as to be unconstitutional;
> c. violates the principles that underlie Ch III of the *Australian Constitution* contrary to the inhibitions which, if not express, are implicit in Ch III";
> d. deprives QCAT of the minimum characteristics of institutional independence and impartiality of a court;
> e. causes a rent in the fabric of structural integrity where common law rights have been trampled." (citations omitted)

[22] Ms Thompson has exhibited a draft notice of appeal to her affidavit. The proposed grounds are as follows:

> "1. There was no jurisdiction in the Commissioner to make the orders of 8 December 2019 because:
> a. The preconditions in s. 184 and s. 185(2) of the *Body Corporate and Community Management Act 1997* ("*BCCM Act*") were never met;
> b. The conditions in s.186(3)(a) and (b) of the *BCCM Act* 1997 were never satisfied;
> c. s. 170(5) of the *Body Corporate and Community Management (Standard Module) Regulation* 2008 excluded a lot in a Community Title Scheme from the operation of s.160 of the *BCCM Act*; and

d. by the terms of s.281(1)(b) and s.281(2)(b) of the *BCCM Act* 1997 those orders could not be made because they exceeded the monetary limit provided.

e. The First Respondent had no standing to make an application for SGR Prop Invest 01 Pty Ltd A.C.N. 153 375 378 where the conditions of s.238 of the *BCCM Act* were never met.

f. There was a denial of procedural fairness in the making of the said orders without a hearing, sworn evidence, or the testing of any evidence, without proof of actual damage and having a monetary effect in excess of the limit prescribed by s. 281(2)(b) of the Act.

2. There was no jurisdiction or power in the learned sessional member under Chapter 6 Part 11 of the *BCCM Act* 1997 or with reference to s.294 to determine the orders made by the Commissioner as validly made under s.284 of the *BCCM Act* [2018] QCATA 56 [33] as equivalent to the powers of Kings Bench in *Smith v Smith* [1925] 2KB 144 [34] or to the powers that might be exercised by a court under s.110 of the *National Consumer Protection Act 2009* [37] to override the express statutory jurisdictional limitations in s.184(2) and s.185(2); s.186(3)(a) and (b) of the *BCCM Act* 1997; the exclusionary provision of s. 170(5) of the *Body Corporate and Community Management (Standard Module) Regulation 2008* and s.281(1)(b) and the monetary limit in s.281(2)(b) of the *BCCM Act* 1997.

3. There was no jurisdiction or power in the learned sessional member to punish the Appellant by a decision 26 July 2019 with a costs order in an amount $73,676.33, without reasons, producing a grand total of $81,798.13 for being right in asserting that there was no jurisdiction in the Commissioner to make the orders of 8 December 2016 and none in the learned sessional member to do otherwise than allow the appeals APL441 of 2016 APL075 of 2017 and set aside the orders of the Commissioner with costs."

[23] It can be seen from the representative samples of the documents set out above that the applicant's intentions are to:

(a) Argue incoherent propositions and incompetent grounds of appeal; and

(b) Agitate differing arguments depending upon whether one is reading her application, her outline, her s 78B notice or her draft notice of appeal.

[24] The applicant's oral submissions did not improve matters. Those submissions included the propositions that:

(a) Section 150 of the QCAT Act enables the Court of Appeal to find that the orders of the adjudicator were without a factual foundation and indeed, that absent a merits review provided by statute, s 288 of the *Body Corporate and Community Management Act* should be "severed".

(b) Section 150 enables the Court of Appeal to look at the validity of the adjudicator's ruling.

(c) Section 288 "makes the Magistrates' Court a rubber stamp" of the adjudicator.

[25] Having regard to the utter incoherence of the applicant's assorted and multifarious contentions, I do not find it either possible or profitable to attempt to decipher them or to address them in these reasons as if they were serious and professionally considered propositions for a Court to consider as part of the solemn business of quelling disputes.

[26] On the contrary, I accept Mr Reid's submission that these proceedings are an abuse of process. None of these matters was the subject of argument before Mr Roney. If they had, they would

have been rejected. The arguments that were actually before him, or most of them, were, as he found, never raised before the adjudicator or impermissibly raised arguments of fact.

[27] The point of the procedure provided by the QCAT Act is to afford parties to small disputes like these an affordable means to have their differences determined. That is why leave is required to appeal to QCAT from an adjudicator's decision. That is why leave is required to appeal to the Court of Appeal against QCAT decisions. That is why not all decisions can be made the subject of appeal to the Court of Appeal. That is why appeals are limited to cases in which a question of law is properly raised.

[28] The present case is an affront to each of these purposes.

[29] As may be apparent from these reasons, I have not had regard to the affidavit filed by Mr Reid. Mr Abaza objected to its being read on two grounds. First, he submitted that its contents were irrelevant to any matter that I had to consider. I would reject that submission because the evidence contained in the affidavit is relevant to Mr Reid's submission that these proceedings are an abuse of process. Second, Mr Abaza submitted that the affidavit was delivered late and that the applicant has not had an opportunity to respond to it. I would uphold that objection. For that reason, I have not taken that affidavit into account in reaching my conclusions.

[30] The applicant also filed an application dated 7 November 2019 seeking, *inter alia*:

(a) that the "leave given ... to SGR Prop Invest 01 Pty Ltd under s 90(1)(b) of the *Supreme Court Act 1991* to appear by its director Steven Gregory Reid be revoked" on several grounds; and

(b) that the written submissions of the second respondents be "uplifted" from the Court file on several grounds.

[31] The application also sought other forms of relief that is not necessary to state.

[32] Presumably the applicant envisaged that the corporate second respondent should be compelled either to spend its money defending this hopeless proceeding or that I should hear no submissions from it at all. In the course of the hearing of these applications Mr Reid made submissions and the written submissions of the parties were not "uplifted". Mr Abaza made no oral submissions in support of the relief sought in this application. As can be seen from these reasons, I have had regard to the respondents' submissions. Their contents were material to my consideration of the respondents' submissions about abuse of process and they are relevant to the exercise of discretion to extend time. I also heard oral submissions from all parties, including Mr Reid. I could not see reason, and none was advanced, why Mr Reid's company or Mr Reid himself should go to the trouble and expense of engaging lawyers to respond to the applicant's utterly unmeritorious proceedings which were doomed to fail as soon as they were filed.

[33] I would dismiss this application.

[34] The applications are dismissed. I will hear the parties on the question of costs including the costs of the appeal that was dismissed.

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[1] s 150.
[2] s 151.
[3] s 151(3)(b) and (c).
[4] Outline, at [1].
[5] *ibid*, at [2]. There were, in fact, no convictions: see para [5] above.
[6] *ibid*, at [4].