

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Michell v St Vincent De Paul Society QLD Housing* [2022]
QCATA 116

PARTIES: **MIKEALA MICHELL**
(appellant)

v

ST VINCENT DE PAUL SOCIETY QLD HOUSING
(respondent)

APPLICATION NO/S: Appeal

MATTER TYPE: APL158/22

DELIVERED ON: 25 July 2022

HEARING DATE: 25 July 2022

HEARD AT: Brisbane

DECISION OF: Judge Dann, Deputy President

ORDERS: **The application to stay the decision of the Tribunal dated
1 June 2022 is dismissed.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE
TRIBUNALS – QUEENSLAND CIVIL AND
ADMINISTRATIVE TRIBUNAL – where landlord applied
for warrant of possession seeking an order of termination of
the tenancy for failure to leave – where order was granted
and warrant for possession issued at first instance – where
tenant has applied for leave to appeal the decision and in the
interim stay the decision pending outcome of the appeal –
whether a stay should be granted

Queensland Civil and Administrative Tribunal Act 2009
(Qld) s 28, 145

Residential Tenancies and Rooming Accommodation Act
2008 (Qld) s 293, 325, 337

La Macchia v Department of Housing and Public Works
[2015] QCATA 143

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)

Background and Chronology

- [1] Ms Michell, the appellant, has filed a Form 39 application for leave to appeal or appeal.
- [2] Ms Michell seeks leave to appeal against the decision made on 1 June 2022. That decision is recorded as:

“The residential tenancy agreement between the parties be terminated as from midnight on 1 June 2022 on the grounds of failure to leave. A warrant of possession to issue authorising a police officer to enter the premises at 11/200-202 West Street, Toowoomba, Qld 4350. The warrant shall take effect on 2 June 2022 and remain in effect for 7 days to expire at 6pm on 9 June 2022. The warrant to be executed as soon as reasonably practicable after taking effect. Entry under the warrant shall only be between the hours of 8am and 6pm.”

Proceedings before the Magistrates Court

- [3] A review of the Magistrates Court file discloses the following.
- [4] The application before the Magistrates Court from which leave to appeal is sought was an application seeking an order of termination of the tenancy for failure to leave pursuant to s 293 of the *Residential Tenancies and Rooming Accommodation Act 2008(Qld)* (**RTRA Act**). The notices relied on in the application were:
- (a) a notice to remedy breach dated 7 April 2022 for failure to maintain premises, expiring 14 April 2022;
 - (b) a notice to leave dated 22 April 2022 for failure to rectify the breach, expiring on 3 May 2022.
- [5] The application (dated 6 May 2022) set out as the reasons why the orders should be made as:
- “... we are seeking a termination for failure to leave resulting in a warrant of possession for the property managed by St Vinnies Housing. The appropriate notices have been issued and the tenant was aware of the vacate date. The notice to leave expired at midnight on 3 May 2022 and the tenant has not vacated...”*
- [6] The Magistrates Court file contains copies of:
- (a) a notice to remedy breach dated 7 April 2022 and signed by Emma Behrend. That notice is blank in the box designated for “method of issue”;
 - (b) a covering letter dated 7 April 2022 which specifies the notice to remedy breach is included in the letter. The letter also seeks further information as to whether the applicant’s sister is living in the house with her (which, it notes, would be a breach of the tenancy). It asks that specified information to demonstrate that she is living elsewhere be provided on the next visit;
 - (c) a file note to the effect that on 19 April 2022 the tenant would not allow access to the property and that the notice to remedy breach inspection was rescheduled for 22 April 2022; and

- (d) a notice to leave dated 22 April 2022 and noted as to method of issue “person”. The grounds are a failure to rectify a “notice to remedy Breach” for failure to maintain the property.

[7] Section 293 of the RTRA Act provides:

“293 *Application for termination for failure to leave*

- (1) *The lessor may apply to a tribunal for a termination order because—*
- (a) *the lessor gave a notice to leave the premises to the tenant; and*
 - (b) *the tenant failed to hand over vacant possession of the premises to the lessor on the handover day.*
- (2) *an application under this section must be made within two weeks after the handover day.*
- (3) *an application under this section is called an application made because of a **failure to leave.**”*

[8] Section 337 of the RTRA Act provides:

“337 *Failure to leave for unremedied breach*

- (1) *This section applies if—*
- (a) *an application is made to a tribunal for a termination order because of a failure to leave; and*
 - (b) *the notice to leave was given because of an unremedied breach.*
- (2) *The tribunal may make the order if it is satisfied—*
- (c) *the lessor has established the ground of the application and notice to leave; and*
 - (d) *the tenant committed the breach of the agreement stated in the notice to remedy breach about which the notice to leave was given; and*
 - (e) *the breach justifies terminating the agreement.*
- (3) *In deciding if the breach justifies terminating the agreement, the tribunal may have regard to—*
- (a) *the seriousness of the breach; and*
 - (b) *any steps taken by the tenant to remedy the breach; and*
 - (c) *whether the breach was recurrent and, if it was recurrent, the frequency of the recurrences; and*
 - (d) *the detriment caused, or likely to be caused, to the lessor by the breach; and*
 - (e) *whether the lessor has acted reasonably about the breach; and*
 - (f) *any other issues it considers appropriate.*

(4) Subsection (3) does not limit the issues to which the tribunal may have regard.”

- [9] The Magistrate thereby has a discretion to exercise in determining whether to make a termination order.
- [10] The RTRA Act does not mandate that the method of issue of a breach notice be specified in it.¹
- [11] A review of the Court FM of the proceedings before the Magistrate indicates:
- (a) the applicant represented herself on that day;
 - (b) the Magistrate asked her directly whether she had received the letter of 7 April 2022 with the notice to remedy and the applicant was silent in response to that question;
 - (c) the applicant made submissions about her sister having COVID and being at the premises;
 - (d) the Magistrate told the applicant that the warrant of possession was not being sought on the basis of her sister being at the property, but rather because of the failure to remedy the breach relating to the state of the property;
 - (e) the Magistrate had reference to photographs of the property taken on 22 April 2022 in exercising her discretion to make the order sought.
- [12] Again, from a review of Court FM, the Magistrate gave short oral reasons for her decision. In them, in summary, she stated that:
- (a) any issue relating to the applicant’s sister was not the reason for the breach notice;
 - (b) the applicant was disputing the application on the basis that the property was untidy only on the one occasion when the photographs were taken on 22 April 2022, which the Magistrate did not accept;
 - (c) the notice to remedy breach was given on 7 April 2022 and related to the property being untidy at that time, things being stored outside and the property not being kept as required;
 - (d) there was a breach notice attached to the letter which gave the applicant time to remedy until after Easter;
 - (e) the applicant did not allow entry on 19 April 2022 despite the notice;
 - (f) on 22 April 2022 when the property was inspected photographs were taken which clearly indicate the property was not maintained in a suitable condition;
 - (g) the applicant was given a notice to leave by 3 May 2022 but failed to leave the property and remained in possession even at the time of the application being heard on 1 June 2022;
 - (h) whilst she was sympathetic to the applicant’s personal position, the respondent landlord had rights which the applicant was disregarding;

¹ Section 325 RTRA Act

- (i) she would grant the application;
- (j) the tenancy would be terminated at midnight on 1 June 2022;
- (k) a warrant of possession was to issue to enter the premises;
- (l) that warrant would take effect from 2 June 2022 and remain in effect for 7 days; and
- (m) the warrant of possession was to be executed as soon as reasonably practicable and within the hours of 8am and 6pm.

The appeal

[13] On 21 June 2022 the Tribunal received an application to stay the decision pending the outcome of the appeal.

[14] The grounds of the application for leave to appeal are:

- (a) will be homeless with 10-month-old;
- (b) experienced long-term homelessness prior to this tenancy;
- (c) rectified breach, willing to work on this;
- (d) accepted support to address tenancy worries;
- (e) QPS alleged call outs were false. QPS callouts did happen at complex but were for other units;
- (f) after becoming aware of breach was only offered 2 days to rectify. Requests for more time were denied; and
- (g) St Vincents Housing advised they were willing to work with the applicant to maintain the tenancy

[15] The order sought is to appeal the decision to evict.

[16] A member gave directions on 7 June 2022 inter alia:

- (a) suspending the operation of the warrant of possession until further order of the Appeal Tribunal pending determination of the application to stay a decision;
- (b) requiring the appellant to establish that the respondent had been served with the application for leave to appeal and the application to stay;
- (c) for the filing of submissions by the appellant by 21 June 2022 and the respondent by 28 June 2022; and
- (d) for the stay application to be determined on the papers thereafter.

Applicable legal principles

[17] That an appeal has started does not affect the operation of a decision or prevent the taking of action to implement a decision.² The Tribunal may make an order staying the operation of the decision being appealed against until the appeal is finally

² Section 145(1) *Queensland Civil and Administrative Tribunal Act 2009 (QCAT Act)*

determined.³ The stay application comes before me for determination by reason of section 145(4)(b) of the QCAT Act.

[18] In an application for a stay where leave to appeal a decision is sought, the Tribunal is guided by the following matters:

- (a) a successful party is entitled to the fruits of its litigation and the orders of the original decision maker are intended to be final and not merely provisional, subject to the applicant initiating an appeal. This is particularly so where the applicant requires leave to appeal and is not entitled to appeal as of right. The applicant for the stay must furnish compelling reasons before the Appeal Tribunal will grant a stay of an original decision;⁴
- (b) the appeal tribunal must be satisfied that:⁵
 - (i) the applicant possesses an arguable case;
 - (ii) the applicant will suffer some kind of harm, detriment, prejudice, injury, damage or other disadvantage if the stay is not granted; and
 - (iii) the balance of convenience favours the grant of the stay.

A failure to establish any one of these elements should result in the refusal of the application to stay the decision;

- (c) an arguable case requires the applicant to identify that the original decision was infected, as least prima facie, by some legal, factual or discretionary error. Where leave to appeal is required, the applicant must also establish that she has arguably suffered some kind of substantial injustice as a result of the decision;⁶
- (d) “Detriment” requires the applicant to establish that the refusal of the stay will cause the applicant some kind of loss, detriment, injury, damage, prejudice or other disadvantage. There is to be a logical connection between the refusal to stay the original decision and the relevant detriment relied on. The natural consequences of the order will not ordinarily be enough, although, in an appropriate case, the practical consequences of enforcement of the order *may* establish the required detriment;⁷
- (e) the balance of convenience requires the Appeal Tribunal to consider and weigh the competing rights and interests of the respective parties. This means the Appeal Tribunal may consider:⁸
 - (i) the substantive merits of the application for leave to appeal and appeal;
 - (ii) any loss, detriment, injury, prejudice or other disadvantage caused to the applicant as a result of refusing the application for stay of the original decision, particularly where not remediable by a costs order or other monetary award of compensation;

³ Section 145(2) QCAT Act

⁴ *La Macchia v Department of Housing and Public Works* [2015] QCATA 143 (**La Macchia**) at [67] per Carmody J

⁵ *La Macchia* op cit at [8]

⁶ *La Macchia* op cit at [9]

⁷ *La Macchia* op cit at [10]; italics in the original decision

⁸ *La Macchia* op cit at [11]

- (iii) any loss, detriment, injury, prejudice or other disadvantage caused to the respondent as a result of granting the application for stay of the original decision, particularly where not remediable by a costs order or other monetary award of compensation;
 - (iv) whether refusal of the stay would mean the appeal was futile or nugatory;
 - (v) whether, in an appropriate case, the applicant has offered any undertaking or security as to compensation if the application for stay of the original decision is granted and the appeal is dismissed; and
- (f) there may be overlap in matters which are relevant to the “balance of convenience” and the requirements of the “arguable case” and “detriment” criteria. This is because in considering the balance of convenience the Appeal Tribunal has to consider the cogency of the applicant’s case, rather than whether it is ‘arguable’ and the degree and nature of any detriment which the applicant may sustain if the stay application is refused, rather than simply whether there is any detriment sustained.⁹

[19] The grounds of the application for a stay are:

- (a) that if evicted the appellant and her 10-month-old daughter will “... *enter primary homelessness in Toowoomba in winter*”;
- (b) the appellant had experienced long term homeless prior to the tenancy and has limited experience managing a tenancy;
- (c) if the appellant becomes homeless, it increases the likelihood that the Department of Child Safety will intervene and/or remove her 10-month-old because homelessness increases the risk for children suffering harm;
- (d) the appellant is unlikely to find suitable alternative accommodation in Toowoomba;
- (e) the appellant is working with support services and is willing to work on tenancy concerns; and
- (f) when the appellant was made aware of the breach, she was given two days to rectify. She asked for further time but was refused. If given more time, she could have rectified the situation.

Analysis

[20] The appellant has not filed any document formally identified as submissions in support of her application to stay the decision, in accordance with the Tribunal’s order of 7 June 2022.

[21] There is, however, material on the file which I infer, from its contents, is intended to support her application for the stay and her application for leave to appeal. That material is:

- (a) a letter from Act for Kids dated 21 June 2022 under the hand of Tabina Russell, Child and Family Consultant, Assessment and Service Connect team. There are

⁹ La Macchia op cit at [12]

documents bearing the manual notation Attachment 3 and Attachment 4 which appear from the contents of the letter to be attachments to that document; and

- (b) a letter dated 21 June 2022 from Helen McGrath, Manager Hub Integration Services Toowoomba Housing Hub addressed “To whom it may concern”. The covering email to the Tribunal dated 22 June 2022

[22] There are written submissions on St Vincent de Paul Society Qld Housing letterhead dated 21 June 2022 and date stamped as received 5 July 2022. It seems from paragraph 4 of those submissions that the respondent has been provided with the correspondence from Act for Kids, but not the correspondence from the Hub Integration Services Toowoomba Housing Hub.

[23] The latter correspondence from the Hub Integration Services Toowoomba Housing Hub:

- (a) sets out how the applicant came to be offered the tenancy with the respondent;
- (b) offers the opinion that the applicant is a proud mother who is attached and appropriately attentive to her baby daughter;
- (c) states the applicant has acknowledged challenges of being a single parent with unreliable support from family members;
- (d) offers the opinion that the applicant has had a tumultuous adjustment period settling into a tenancy arrangement, experiencing inadequacy for responsibilities she has not had to manage during a long period of homelessness. The letter identifies long social isolation following a transient lifestyle of rough sleeping, tendency to overcompensate in her home with items that could not be accumulated during homelessness and a need to support others who may also be struggling with homelessness or other life challenges; and
- (e) further opines that the applicant would benefit from sustained housing stability with intensive support from appropriate community partners to continue to help her re-calibrate her lifestyle as a person who has long term stable housing, including support for positive parenting, understanding the extent of her responsibility as a tenant, helping her identify aspirational life goals and developing positive community connections.

[24] None of these matters address the first consideration for the Tribunal on whether to grant a stay, which is whether the applicant has presented an arguable case for the appeal.

[25] The Act for Kids letter of 21 June 2021 states relevantly:

- (a) they are a non-government partner with a role to assess the safety and wellbeing of children and what additional supports the family might need to keep young people safe. Their involvement is short term, for approximately 8 weeks, at which time they provide a written report to Child Safety with suggestions around suitable pathways. Child Safety holds final decision-making responsibility;
- (b) the writer’s team engaged with the applicant and her daughter on 9 May 2022 and had completed 10 visits;

- (c) that Child Safety believes the most suitable way forward to support the applicant and her daughter is with additional agency support, which can only occur and be successful if the applicant and her daughter have somewhere safe and stable to reside. (There is no information directly from Child Safety as to what its views may be);
- (d) the home has presented as cluttered though not unhygienic, acknowledging the outside area of the home needs attention;
- (e) that Housing Hub and Act for Kids have made a commitment to support the applicant to de-clutter including funding property removal;
- (f) the Applicant has enrolled in a Tenancy Skills Course to take place on 21 and 22 July 2022 at the Housing Hub in Toowoomba;
- (g) the applicant has acknowledged some of the worries raised by the respondent but disputes their request for her to leave and the lack of opportunity she received to remedy their worries;
- (h) that if the warrant for possession is upheld the applicant and her daughter will become homeless, which will significantly increase the likelihood of the applicant's daughter being removed from her care;
- (i) the applicant believes the grounds for the Notice to Leave were unfair and she was not given adequate opportunity for success in this Supported Housing Service tenancy;
- (j) the applicant says she did not receive the letter of breach of 7 April 2022 and was surprised by the inspection on 19 April 2022. She was told on 19 April 2022 that if she did not bring the property to a standard the respondent was satisfied with within 2 days (by 22 April 2022) she would be given a notice to leave. She requested more time to remedy the breach on the basis she did not know about the breach notice until 19 April 2022 but this was denied;
- (k) the 7 April 2022 breach notice does not state a method of issue and this may be why she never received it;
- (l) whilst she cleaned her house the best she could over the two days, she could not satisfy the inspection and was then given a notice to leave;
- (m) she did not leave the property on 3 May 2022 because:
 - (i) she had nowhere else to go with her daughter and attempted to work with the respondent about the tenancy;
 - (ii) the applicant did not believe she had been given a fair opportunity and hoped to attend a QCAT hearing and be supported to stay;
 - (iii) it was the applicant's understanding and that of her supports that the respondent wanted to give her the opportunity to stay and engage better with their services; and
- (n) the applicant received a breach notice that an issue was that her sister was living with her. Her sister did not live with her, although she did stay with her at different periods to assist with the care of the applicant's daughter.

- [26] None of these matters set out any basis for the Tribunal's first consideration on whether to grant a stay, which is the applicant's arguments as to why the Magistrate was in error in making the decision which was made.
- [27] The respondent, in its submissions dated 21 June 2022, makes the following points, in summary:
- (a) photographs taken on the inspection of 22 April 2022 were provided to QCAT and viewed on the day of the hearing. The property was highly cluttered and unclean when the photographs were taken. There was excessive maintenance reported costing the respondent considerable amounts of money;
 - (b) on 16 May 2022 the respondent's staff were at the complex to complete routine inspections for other units when approached by a member of the public who was looking for the unit where he needed to collect solar panels he had purchased. He was seen by the respondent's staff collecting the solar panel from the applicant and loading it onto his vehicle;
 - (c) on 6 June 2022 when the Housing Coordinator Southwest Qld attended the property she was approached by residents from the complex who made serious allegations about the tenant regarding her daughter's welfare and stolen property. A report was made to the local police who advised that they would alert Child Safety;
 - (d) On 16 June 2022, following delivery on 14 June 2022 of an entry notice to check maintenance, the applicant told the respondent's representative she did not know they were coming and asked them to come back later. Material in the respondent's possession inferred she did know about the entry. At an attendance later that day, the respondent observed the property to be in the same state as at 22 April 2022. Photographs of the property that day are attached to the submissions. (The Tribunal has viewed the photographs and accepts that description of the property is supported by the photographs). That same day a pest controller who attended to conduct an annual pest spray advised the respondent there was very little space to conduct the spray and that the property was presented in a poor state. The respondent has had many reports from trades people concerning the poor state of the property;
 - (e) the respondent's submissions also state there have been reports from a number of people of stolen goods and drug use. No further particulars are provided of this in the respondent's submissions;
 - (f) on 20 June 2022 when the respondent's representatives attended the complex on other matters they observed the yard to be in the same if not worse state than when the initial notice to leave was issued and the condition of the property has not improved;
 - (g) on 21 June 2022 when the respondent's representatives attended the complex on other matters they observed a large printer and trolley jack outside the front of the property which was not there the day before;
 - (h) on 22 June 2022 when the respondent's representatives attended another property in the complex which had been vacated they observed the applicant going through belongings left behind and taking items back to the property,

including old bottles, unwanted household items, pot plants and general household items; and

(i) Acting for Kids provided some options for housing in an email of 7 June 2022.

[28] In response specifically to the Act for Kids correspondence of 21 June 2022 the respondent submitted:

- (a) the correct notice periods were given for the breach notice of 7 April 2022. The applicant refused entry on 19 April 2022 and it was agreed by both parties that the respondent would attend again on 22 April 2022. On this date there was very little change to the state of the property. This was not the first time that the respondent's representatives had been denied access to the property after the correct notice had been given;
- (b) the accommodation at 11/200 West Street is not Supported Housing Service tenancy. It is long term community housing. The level of support needed by this tenant is not available from the respondent;
- (c) the respondent's representatives do not feel safe attending the property having noted the applicant's behaviour of an aggressive nature;
- (d) there is no material to indicate who will be providing support services after the 8 week period of support from Act for Kids ceases on 4 July 2022; and
- (e) as at 21 June 2022 the lawn had not been moved and rubbish had not been removed from the external of the property;
- (f) the state of the property has not improved and the maintenance issues reported due to tenant care have cost a considerable amount to rectify. The respondent is concerned about the costs which may be incurred if the tenancy continues. The cost to remove the huge amount of belongings at the property both inside and out will be very expensive; and
- (g) whilst the respondent is sympathetic to the tenant, it believes she needs more support than long-term housing can provide to help her maintain a tenancy. Both she and her daughter need a high level of care and guidance from many social support agencies and she needs to be in a supported housing arrangement with a number of social supports in place on a daily basis.

[29] Both parties refer, in writing, to matters arising after the Magistrate made the decision which is being appealed from. As both parties do so, whilst those matters are untested, I will have regard to those matters as relevant to each party in circumstances where the Tribunal is not bound by the rules of evidence¹⁰, is to inform itself in any way it considers appropriate¹¹, and is dealing with the stay application on the papers.

[30] As I have already noted, the applicant's material before the Tribunal does not articulate the arguments as to why the decision on 1 June 2022 was in error. As to the grounds in the application for leave to appeal:

- (a) The evidence before the Magistrate was that the breach was not rectified;

¹⁰ Section 28(2)(b) QCAT Act

¹¹ Section 28(3)(c) QCAT Act

- (b) There was no breach notice in respect of the applicant's sister and the Magistrate did not act on the basis of anything to do with the applicant's sister;
- (c) the applicant did not dispute before the Magistrate that she received the notice to remedy breach dated 7 April 2022;
- (d) no issue of the QPS attending the complex was raised at the hearing before the Magistrate. Thus it could not have formed part of the considerations of the Magistrate in coming to the decision; and
- (e) the respondent, in persisting with seeking a termination order, was plainly not supportive of the applicant staying in the property. It made this plain in its submissions on the appeal.

[31] The applicant points to detriment if the stay is refused. The practical impact of the order would be to render the applicant and her daughter homeless. I accept that the material filed in support of the applicant's application for a stay demonstrates, in particular circumstances that she, and to the extent her young child is reliant on her, her young child, will experience detriment in the event that a stay is not granted. That is, however, only one of the considerations for the Tribunal on the issue of a stay.

[32] The respondent points to ongoing detriment if the applicant is allowed to remain in the property, in the form of:

- (a) incurring ongoing high maintenance costs; and
- (b) concerns for its staff's well being if attending the applicant at the property.

[33] The respondent also submits that the service it provides is not one which is capable of providing the level of support which the applicant has been assessed as needing to maintain the tenancy.

[34] The Magistrate weighed the matters put before her by the applicant in exercising her discretion to come to the decision she came to to grant the order terminating the tenancy. Having made a decision to make a termination order, the Magistrate was required by s 350(1) of the RTRA Act to issue a warrant of possession. Whilst the Magistrate referred to the warrant of possession remaining in effect for seven (7) days, the effect of s 351(4) of the RTRA Act is that the warrant of possession remained in effect for 14 days.

[35] Where there is no evident basis to argue for any error of the original decision maker and each party can point to detriment in the event the decision on the stay application goes against them, the balance of convenience does not favour the grant of a stay.

[36] In the circumstances the Tribunal refuses the application to stay the decision of the Magistrate on 1 June 2022.