QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Cain v Daudet* [2020] QCATA 78
PARTIES:	**CLINTON CAIN** (appellant) **v** **MARC DAUDET** (respondent)
APPLICATION NO/S:	APL208-19
ORIGINATING APPLICATION NO/S:	MCDT 357/19
MATTER TYPE:	Appeals
DELIVERED ON:	25 May 2020
HEARING DATE:	14 May 2020
HEARD AT:	Brisbane
DECISION OF:	Member Hughes
ORDERS:	**1. Leave to appeal granted.** **2. The appeal is allowed in part.** **3. The Tribunal's finding of $4,600 as a rent reduction is set aside.** **4. The matter is remitted back to the Tribunal to rehear Marc Daudet's claim for compensation for failure to provide quiet and peaceful enjoyment as a claim for compensation under section 419 of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld).** **5. The appeal is otherwise dismissed.**
CATCHWORDS:	LANDLORD AND TENANT – RESIDENTIAL TENANCIES LEGISLATION – OBLIGATIONS, PROHIBITED MATTERS AND PROTECTION FOR LESSEES – RENT – where tenant claimed compensation – where lessor claimed compensation – where findings of fact about condition of property and damages awarded based on evidence adduced at hearing – where Tribunal has mandate to deal with matters fairly, quickly and economically – where Tribunal will not usually disturb findings of fact on appeal – where findings open on the evidence – where appeal is not opportunity for party to

reargue their case - where ground of appeal dismissed

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – IN GENERAL – where applicant applied for leave to appeal – where applicant sought to introduce evidence not adduced at first instance – where applicant did not explain why it did not file its material before original hearing – where evidence had little evidential weight and unlikely to affect outcome - where evidence should not be admitted

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – other cases – where applicant applied for leave to appeal – where error of law in application of section 94 of the *Residential Tenancies and Rooming Accommodation Act* 1994 (Qld) – where provision does not provide for lump sum and only operates prospectively while tenancy continues - where claim properly considered as breach of Tenancy Agreement under section 419 of the *Residential Tenancies and Rooming Accommodation Act* 1994 (Qld)

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 4, s 143, s 146
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 94, s 419

Bourke v Kenjad Rentals [2019] QCATA 81
Bradlyn Nominees Pty Ltd v Saikovski [2012] QCATA 39
Cachia v Grech [2009] NSWCA 232
Campbell v Donker [2013] QCATA 6
Chambers v Jobling (1986) 7 NSWLR 1
Champion & Anor v Laterma Pty Ltd & Ors [2018] QCAT 392
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404
Dearman v Dearman (1908) 7 CLR 549
Fox v Percy (2003) 214 CLR 118
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388
Gould v Mazheiko & Anor [2020] QCATA 10
Hurst v Pyatt [2017] QCATA 101
Masinello v Parker & Anor (No 2) [2013] QCATA 325
McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577
Minister for Immigration and Citizenship v SZMDS & Anor (2010) 240 CLR 611
Olindaridge v Tracey [2015] QCATA 175
Piric & Anor v Claudia Tillier Holdings Pty Ltd [2012] QCATA 152

QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
Slater v Wilkes [2012] QCATA 12
Underwood v Queensland Department of Communities (State of Queensland) [2012] QCA 158

APPEARANCES & REPRESENTATION:

Applicant:	Self-represented
Respondents:	Self-represented

REASONS FOR DECISION

What is this appeal about?

[1] The Tribunal ordered Clinton Cain pay his former tenant, Marc Daudet the sum of $10,697 as follows:

(a) $495.00 – compensation for loss of use of premises.

(b) $154.00 – compensation for loss of use of kitchen.

(c) $3,000.00 – professional clean.

(d) $760.00 – mattress and furniture clean.

(e) $356.00 – pool cover.

(f) $70.00 – pool mart.

(g) $135.00 – gutter clean.

(h) $132.00 – air-conditioner and filter clean.

(i) $657.00 – four days' rent.

(j) $338.00 – QCAT application costs.

(k) $4,600.00 – rent reduction.

[2] The Tribunal also dismissed Dr Clinton's counter-application for $14,865.15.

[3] Dr Clinton seeks the Appeal Tribunal's leave to appeal the Tribunal's decision.[1]

[4] In determining whether to grant leave, the Appeal Tribunal will consider established principles including:

(a) whether there is a reasonably arguable case of error in the primary decision;[2]

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1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 143(3).
2 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

(b) whether there is a reasonable prospect that the appellant will obtain substantive relief;[3]

(c) whether leave is needed to correct a substantial injustice caused by some error;[4] and

(d) whether there is a question of general importance upon which further argument, and a decision of the Appeal Tribunal, would be to the public advantage.[5]

[5] I will address the grounds of appeal below.

Were the Tribunal's findings of fact open on the evidence?

[6] Dr Cain's application for leave to appeal essentially sought to re-argue his case by focusing on the Tribunal's findings of fact, attaching numerous documents including quotes, invoices, correspondence and photographs.

[7] The appeal process is not an opportunity for a party to again present their case.[6] It is the means to correct an error by the Tribunal that decided the proceeding.[7] The Tribunal's mandate to deal with matters fairly, quickly and economically[8] is most acute in its minor civil disputes jurisdiction, where it determines around 30,000 applications each year.

[8] Dr Cain did not identify which of the attachments were provided at the original hearing. To the extent that the attachments are fresh evidence, they are not admitted. This is because the Appeal Tribunal will only accept fresh evidence if it was not reasonably available at the time the proceeding was heard and determined. Ordinarily, an applicant for leave to adduce fresh evidence must satisfy three tests:[9]

(a) Could the parties have obtained the evidence with reasonable diligence for use at the trial?

(b) If allowed, would the evidence probably have an important impact on the result of the case?

(c) Is the evidence credible?

[9] Dr Cain did not provide any explanation for why he did not provide his fresh evidence at the original hearing. The onus is always upon Dr Cain to present his case and bring all relevant material and witnesses to the hearing.

[10] Dr Cain had an obligation to act in his own best interests, including providing all evidence to support his denials and counter-application at the original hearing:

> The statutory regime under which QCAT operates places obligations upon parties themselves to take care in their dealings with Tribunal matters, and to

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3 *Cachia v Grech* [2009] NSWCA 232, 2.
4 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
5 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 577, 580.
6 *Bradlyn Nominees Pty Ltd v Saikovski* [2012] QCATA 39, [9].
7 Ibid.
8 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 3, s 4.
9 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404, 408.

> act in their own best interests. QCAT's resources for the resolution of disputes are in high demand and serve, as the High Court has recently observed in relation to court resources,
>
> > "… the public as a whole, not merely the parties to the proceedings".
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> Finality in litigation is highly desirable, because any further action beyond the hearing can be costly and unnecessarily burdensome on the parties.[10]

[11] This alone is sufficient to not allow the fresh evidence. However, even if the fresh evidence were admitted into evidence, it has little evidential weight and is unlikely to affect the outcome of the case. The photographs are not dated. The quotes are not proof of actual loss.[11] The correspondence post-dates the tenancy.

[12] To arrive at its decision, the Tribunal made findings that Dr Cain did not give Mr Daudet quiet possession, the premises were not fit to live in, the premises and its inclusions were not in good repair and not properly cleaned and maintained, and that the counter-application was not sufficiently supported.[12] These are findings of fact. The Appeal Tribunal will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.[13] An appellate tribunal may only interfere if the conclusion is 'contrary to compelling inferences' in the case.[14]

[13] Although the Tribunal did not expressly refer to every item of evidence when delivering its findings, it is implicit that the Tribunal preferred Mr Daudet's evidence supported by the documents he presented, over Dr Cain's evidence. Having heard the evidence of both Mr Daudet and Dr Cain, the Tribunal was in the best position to assess credibility. It is not an error to prefer one version of facts to another.[15]

[14] At most, the attachments to Dr Cain's application and his original counter-application allow the drawing of possible alternative inferences. But they do not prove this. Attempting to explain away each of the Tribunal's findings with a possible alternative inference does not demonstrate error. A decision cannot properly be called erroneous, simply because the Tribunal preferred one conclusion to another possible conclusion.[16] An application for leave to appeal is not and should not be an attempt to reargue a party's case at the initial hearing.[17]

[15] The Tribunal made findings about the condition of the property, awarded the tenant compensation and dismissed the counter-application based on the oral evidence of the parties, as supported by documentary evidence adduced at the hearing. The Tribunal did not accept Dr Cain's evidence and explained why.[18] The Tribunal referred to relevant evidence provided at the original hearing to support its findings,

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10 *Creek v Raine & Horne Mossman* [2011] QCATA 226, [13], citing with approval *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, 217.
11 *Olindaridge v Tracey* [2015] QCATA 175.
12 Transcript, page 1-40, lines 17 to 46; pages 1-41 to 1-46, lines 1 to 38.
13 *Dearman v Dearman* (1908) 7 CLR 549, 561; *Fox v Percy* (2003) 214 CLR 118, 125-126.
14 *Chambers v Jobling* (1986) 7 NSWLR 1, 10.
15 *Slater v Wilkes* [2012] QCATA 12, [6].
16 *Slater v Wilkes* [2012] QCATA 12, [6], citing *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611.
17 *Bradlyn Nominees Pty Ltd v Saikovski* [2012] QCATA 39, [9].
18 Transcript, page 1-42, lines 9 to 46; page 1-45, lines 1 to 42; page 1-46, lines 26 to 37; page 1-47, lines 9 to 34.

including the exit condition report, statutory declarations, photographs and admissions.[19]

[16] Having considered material filed with the application and counter-application and oral evidence from both parties at the hearing, the Tribunal was in the best position to assess credit and make findings accordingly. Nothing in the material or the transcript persuades the Appeal Tribunal its findings of fact were not open on the evidence. An appeal is not an opportunity for a party to simply re-argue its case on existing or additional evidence,[20] or to simply conduct a retrial on the merits of the case.[21]

[17] The minor civil disputes jurisdiction requires the Tribunal to deal with matters fairly, quickly and economically.[22] A party cannot expect a different outcome by simply re-arguing their case on appeal. Having read the transcript and considered the evidence, nothing persuades the Appeal Tribunal to depart from the Tribunal's findings. The evidence was capable of supporting the Tribunal's conclusions.

[18] This ground of appeal is dismissed.

Was the Tribunal able to award $4,600.00 as a rent reduction or as compensation for loss of use?

[19] Having made its findings of fact, the Tribunal then went on to award a rent reduction of $4,600:[23]

> And the tenant makes a claim for $8000. I've asked him about that and I think he thought about it as best he could and has made up a figure. Right. Now, the tenant left the property, as I said, in January of 2019 – I just can't turn up these dates – having stayed there for about 12 weeks. September '18 he was meant to move in, January he moved out…
>
> I find that to the extent of one-third that the property was unfit to be occupied at least for the rent that was being paid. I have given nothing for the carpets, the safety hazards, the missing deck or chair, the moving, the personal time, etcetera, none of that. The garden hedges, zero. I am allowing, under section 94, a one-third reduction of rent in the sum of $4600. I will note that during the course of the tenancy, the landlord was paid for the property $14,950. I started off by asking how many weeks and what rent, and that's where I started, with the rent that was being paid. One-third of that will be repaid by the landlord to the tenant…

[20] The Tribunal correctly identified that section 94 of the *Residential Tenancies and Rooming Accommodation Act* 1994 (Qld) requires a finding of fact that the premises were at least partly unfit to live in or the amenity or standard of the premises substantially decreased.[24]

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19 *Bradlyn Nominees Pty Ltd v Saikovski* [2012] QCATA 39, [9].
20 *Piric & Anor v Claudia Tillier Holdings Pty Ltd* [2012] QCATA 152, [12] (Wilson J).
21 Ibid.
22 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 3, s 4.
23 Transcript, page 1-44, lines 13 to 17; page 1-46, lines 16 to 24.
24 *Campbell v Donker* [2013] QCATA 6, [22].

[21] However, the President sitting as the Appeal Tribunal has recently upheld the line of authority[25] that section 94 does not provide for compensation by way of a lump sum and that applications under section 94 must be made during the tenancy.[26] In other words, section 94 only operates *prospectively* to allow a tenant to apply for a reduction in their rent while the tenancy continues or until the lessor restores the loss of amenity.

[22] The remedy is also discretionary and the Tribunal may refrain from making an order reducing the rent if it would be unjust to make such an order.[27] Delay may be relevant.[28]

[23] Mr Daudet claimed a rent reduction in May 2019, well after vacating the property in January 2019. The Appeal Tribunal is not satisfied that section 94 permits a 'retrospective' rent reduction, nor would it be just in circumstances where he did not apply for a reduction until months after first becoming aware of issues with the premises and after vacating the property.

[24] However, Mr Daudet's statement of claim did refer to this claim as compensation for failure to provide quiet and peaceful enjoyment. Framed as this, the claim would be for a breach of the Tenancy Agreement under section 419 of the *Residential Tenancies and Rooming Accommodation Act* 1994 (Qld).[29] Unfortunately, it does not appear that the Tribunal considered Mr Daudet's claim under this provision where different considerations apply.

[25] The Tribunal was therefore in error in awarding a rent reduction instead of considering Mr Daudet's claim as compensation for a breach of the Tenancy Agreement. This is an error of law for which leave is granted to correct a substantial injustice. Leave is granted and the appeal allowed to the limited extent of setting aside the rent reduction of $4,600.00 and having it redetermined as a claim for compensation under section 419 of the *Residential Tenancies and Rooming Accommodation Act* 1994 (Qld).

[26] The determination of Mr Daudet's claim for compensation for failure to provide quiet and peaceful enjoyment is remitted back to the Tribunal for rehearing as a claim for compensation under section 419 of the *Residential Tenancies and Rooming Accommodation Act* 1994 (Qld).[30]

What are the appropriate Orders?

[27] Because the Tribunal erred in awarding $4,600.00 to Mr Daudet as a rent reduction, leave to appeal is granted and the appeal is allowed.

[28] Dr Cain's other grounds of appeal are dismissed. This means the Tribunal's other findings stand, including the dismissal of Dr Cain's counter-application.

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25 *Hurst v Pyatt* [2017] QCATA 101; *Champion & Anor v Laterma Pty Ltd & Ors* [2018] QCAT 392; *Bourke v Kenjad Rentals* [2019] QCATA 81.

26 *Gould v Mazheiko & Anor* [2020] QCATA 10, [18] (Daubney J).

27 *Underwood v Queensland Department of Communities (State of Queensland)* [2012] QCA 158, [28], [30].

28 Ibid, [30]; *Masinello v Parker & Anor (No 2)* [2013] QCATA 325, [12].

29 *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld), s 419(3).

30 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 146(c).

[29] Accordingly, the appropriate Orders are:

1. Leave to appeal granted.
2. The appeal is allowed in part.
3. The Tribunal's finding of $4,600.00 as a rent reduction is set aside.
4. The matter is remitted back to the Tribunal to rehear Marc Daudet's claim for compensation for failure to provide quiet and peaceful enjoyment as a claim for compensation under section 419 of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld).
5. The appeal is otherwise dismissed.