

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Exeter Nominees Pty Ltd v Roar Marketing Concepts Pty Ltd* [2020] QCATA 118

PARTIES: **EXETER NOMINEES PTY LTD**
(applicant/appellant)

v

ROAR MARKETING CONCEPTS PTY LTD
(respondent)

APPLICATION NO/S: APL199-19

ORIGINATING APPLICATION NO/S: Brisbane MCDO61148-18

MATTER TYPE: Appeals

DELIVERED ON: 4 August 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS:

- 1. Leave to appeal granted.**
- 2. Appeal allowed.**
- 3. The order made 17 July 2019 is set aside.**
- 4. The appellant pay the respondent the sum of \$2,878.34 within 14 days of order.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – where a tenant under a commercial tenancy was obliged to pay for costs of electricity for the premises – where the electricity meter also measured usage by an adjacent tenancy – where the lessor and tenant disagreed about payment for proportional use - where the tenant failed to give notice of exercise of option to renew – where notice to vacate given the tenant – where the tenant vacated but was responsible for ongoing internet server costs

Pickering v McArthur [2005] QCA 294
Spain v Union Steamship Co of New Zealand Ltd (1923) 32 CLR 138
Yang & Anor v Wellcamp Properties Pty Ltd [2018] QCATA 161

REPRESENTATION:

Applicant: Self-represented by B Wills

Respondent: Self-represented by K Rantall

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] Roar Marketing Concepts Pty Ltd ('Roar') leased commercial premises at Capalaba from Exeter Nominees Pty Ltd ('Exeter') pursuant to the terms of a commercial tenancy agreement from 9 February 2017 expiring on 8 August 2018.
- [2] Ms Rantall, Roar's director, became concerned with the cost of electricity. Pursuant to the terms of the tenancy agreement Roar was responsible for electricity usage within the tenancy.
- [3] The parties became aware that the electricity meter for the premises also measured consumption of an adjacent rented area. The parties disagreed about the usage attributable to Roar's tenancy. Roar continued to pay the entire cost of the electricity bills generated.
- [4] Roar stopped paying rent for a period to force resolution of the issue. Exeter served a notice to remedy breach for failure to pay rent. Roar paid but then Exeter gave notice of termination of the agreement.
- [5] Roar had options to extend the period of the tenancy but failed to give notice of exercise of option as required at least three months prior to expiry. Roar obtained new premises. Roar's business was to take telephone bookings for carpet cleaning and pest control jobs in Brisbane, Sydney and Melbourne. As such it is needed significant internet services.
- [6] The internet provider required a period of six weeks to transfer the internet service to the new premises. Roar needed an additional two weeks after expiry of the date required to vacate to enable that to happen. Exeter refused additional time. Roar left and continued to pay for the internet service.
- [7] Roar instituted proceedings in the Tribunal seeking recovery from Exeter of \$14,462.40 plus the filing fee of \$338.20.
- [8] The matter was heard before an Adjudicator on 17 July 2019 with the Adjudicator ordering Exeter to pay Roar the increased sum of \$22,383 within 14 days.
- [9] Exeter has filed an application seeking leave to appeal that decision. Given this is an appeal from a decision made in the Tribunal's minor civil dispute jurisdiction, leave to appeal must first be obtained before any appeal proceeds.¹
- [10] Leave to appeal will usually only be granted where an appeal is necessary to correct a substantial injustice to the appellant and where there is a reasonable argument that there is an error to be corrected.²

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142(3)(a)(i).

² *Pickering v McArthur* [2005] QCA 294.

[11] The grounds of appeal are as follows:

- (a) The Tribunal did not have jurisdiction to determine the matter because it was not a minor civil dispute under the QCAT Act;
- (b) Exeter was denied procedural fairness by the Tribunal awarding an amount greater than that claimed by Roar in its initiating application;
- (c) Exeter was not in breach of the commercial tenancy agreement.

Ground One: The Tribunal did not have jurisdiction to determine the matter because it was not a minor civil dispute under the QCAT Act

[12] Exeter says minor debt applications are limited to claims to recover a debt or liquidated demand of money by a person to whom the debt or money is owed. Exeter says the claim here was for an unliquidated amount for loss incurred as a consequence of alleged breach of agreement which is outside the scope of minor debt proceedings. The claim necessitated an assessment of compensation for loss occasioned by breach which was not readily quantifiable under the tenancy agreement. The award by the Adjudicator included unliquidated damages for alleged costs of renting other premises.

[13] The words “liquidated demand of money” are usually broadly interpreted. In *Spain v Union Steamship Co of New Zealand Ltd* (1923) 32 CLR 138 Knox CJ and Starke J approved a passage from Odgers’ Pleading and Practice stating that:

whenever the amount to which the plaintiff is entitled ... can be ascertained by calculation or fixed by any scale of charges, or other positive data, it is ... liquidated.³

[14] A claim will be liquidated where the amount claimed is capable of being ascertained by calculation using a formula as contrasted with being ascertained only by an assessment involving the exercise of a discretion or opinion or both.⁴ A claim may constitute a liquidated demand even though it is not a claim in debt.⁵

[15] Roar’s claim was for the balance of the term remaining for its internet contract and the costs for electricity during the tenancy.

[16] The balance of the term of the internet contract was said to be 18.36 months at \$799 per month making a total of \$14,671. Roar had paid a total of \$7,574.59 for electricity over the term of the tenancy. The total of these two sums was \$22,245.59 and the filing fee was \$338.20.

[17] Roar’s claim was for a liquidated demand of money. Roar’s pursuit of that money by minor debt proceedings was not beyond jurisdiction of the Tribunal. Whether Roar was entitled to succeed on its claim of course was an entirely different matter.

Ground Two: Exeter was denied procedural fairness by the Tribunal awarding an amount greater than that claimed by Roar in its initiating application.

[18] Exeter’s complaint here is that Roar’s initial claim was limited to \$14,800.06. During the proceeding Roar increased its claim to \$22,245.59 on the basis that it wished to claim all the costs remaining to pay out its internet contract (18.36 months

³ At 142.

⁴ *Yang & Anor v Wellcamp Properties Pty Ltd* [2018] QCATA 161, [36].

⁵ *Ibid*, [38].

at \$799 per month totalling \$14,671) instead of the cost of transferring the internet to new premises (\$7,500). Ms Rantall for Roar said this to the Adjudicator:

I was given a notice to vacate, even though I'd remedied the breach. I requested a further two weeks to allow time to transfer the fibre till the 2nd of October. Barbara denied this extension of a couple of weeks unless I withdrew my QCAT claim. For this reason, in addition to the electricity, I have attached my early termination fee – fee figure from TPG for \$14,671 that I'd like to claim to add to the claim as I was not given sufficient notice to move it and believe I was vacated from the property when I had made it quite clear that I wanted to stay.⁶

- [19] A party is entitled to know the case it has to meet. The learned Adjudicator perhaps should have invited Exeter to make submissions concerning the very late amendment and substantial increase in the claim brought against it. The silence of a party in proceedings such as this, particularly a self-represented party, is not to be taken as acquiescence.
- [20] The conduct of minor civil dispute proceedings is at the discretion of the Adjudicator but subject to the observation of the rules of natural justice.⁷ Whilst Tribunal resources are finite and it is expected that hearings will be concluded in a single sitting if possible, in circumstances where there is a substantial increase in claim made without explanation why the amendment is brought so late and why the other party has not been apprised of that before hearing, usually enquiry will be warranted to ensure the respondent has not been caught by surprise.
- [21] Exeter says it was deprived of an opportunity to make considered submissions about the additional claim. The Adjudicator did however allow Ms Wills for Exeter full opportunity to make submissions about anything she wanted to including the claim for the ongoing costs of the internet contract instead of the cost of transferring the service. After hearing from Ms Rantall about claiming the ongoing costs of the internet contract rather than costs of transfer the Adjudicator said immediately after that "...Right. So I know what it's about. Okay. Ms Wills, what do you want to say."⁸
- [22] Ms Wills proceeded to talk primarily about the electricity and rent arrears owed by Roar. There was then ongoing exchanges between both party representatives and the Adjudicator about Roar's claim to \$14,671 finishing with Ms Wills saying finally that this was the first time she had been made aware of the extended claim concerning the internet.
- [23] The increased claim was based on the difference between paying out the internet contract as opposed to the cost to transfer the connection to new premises. Roar had provided an update to its claim by an email to the Tribunal on 24 June 2019 but it appears Roar failed to also forward a copy of that email to Exeter. However Ms Rantall for Roar gave evidence at the hearing that on 8 August 2018, well before the hearing, she had also sent an email to Exeter advising that if Roar had to leave there would be an early termination fee of \$14,761 to contend with as a cost of moving.

⁶ Transcript T1-5 Lines 16-23.

⁷ QCAT Act, s 28(3)(a).

⁸ T1-15 L44.

[24] The respondent was given the opportunity to make submissions about the increased claim at hearing. She did not ask for time to consider the matter. Roar's potential loss of \$14,761 was nothing new given past communications between the parties.

[25] I do not accept that the Adjudicator failed to accord natural justice to Exeter in these circumstances such as to warrant leave to appeal.

Ground Three: Exeter was not in breach of the commercial tenancy agreement

[26] Exeter says the Adjudicator based his decision on Exeter having breached the commercial tenancy agreement, but there was no evidence to support that finding.

[27] Indeed the learned Adjudicator said in giving his reasons for decision that Exeter was in breach since April 2018 "and all the way through." The matter troubling the Adjudicator concerned the electricity and correct meter charges, but it is not clear what the breach by Exeter identified by the Adjudicator was. The Adjudicator said:

The circumstances with respect to the electricity are such that the landlord is unable to recover the costs of electricity unless it can prove, either by way of meter or some other agreed method, that the electricity used is that of the tenants, and I find that that would be an impossible matter to prove on the balance of probabilities today and the landlord remains in breach of that obligation.⁹

[28] But the landlord was not recovering the cost of electricity from the tenant. The tenant was paying Origin Energy direct for electricity charged by Origin.

[29] Then the learned Adjudicator said:

A landlord cannot forfeit a tenant's right to exercise an option capriciously, is usually the word used, and in this case they have. Albeit, the tenant didn't realise that and unfortunately, just left.... in these circumstances where the landlord was in default and continues in default until today, should have had the benefit of her options.¹⁰

[30] From the lease Roar had two one-year options to extend its term. To exercise the option Roar was required to give notice of exercise at least three months prior to expiry of the current term.

[31] Roar did not give the requisite notice.

[32] According to the tenancy agreement, the initial term of the lease expired on 8 August 2018. It is unclear why, but the parties appear to agree that the commencement date was in fact 15 February 2017¹¹ and ended on 14 August 2018. By letter dated 15 August 2018 Exeter informed Roar that it had failed to exercise the option to renew. It referred to the end date of the current term as 14 August 2018 and purported to give Roar notice to vacate by 14 September 2018.¹²

[33] By Clause 2 of the lease if the tenant continued to occupy the premises after the fixed term with the lessor's consent then the tenant did so as a monthly tenant on the same basis as the last day of the term. Either party might terminate the monthly tenancy by giving one month notice expiring on any day.

⁹ T1-23 L18-22.

¹⁰ T1-23 L31-36.

¹¹ Notice to Remedy breach by Exeter to Roar dated 3 August 2018.

¹² Attached to Response.

- [34] The appropriate notice appears to have been given. There was no challenge about that.
- [35] In April 2018 Roar had proposed a resolution to the problem about electricity. It suggested the electricity bill be based on square metreage of the two tenancies concerned. Exeter agreed and calculated Roar should therefore pay 62 percent and they would pay 38 percent of bills to that date and thereafter for the term of the tenancy. Exeter identified the total area concerned was 105 square metres. Roar's area was 65 square metres.¹³ Proportionally Roar's premises comprised 62 percent of the whole.
- [36] Roar however resiled from what appears to have been agreement reached about the matter. Roar required instead either that two separate meters be installed or the electricity account be transferred entirely into Exeter's name. Exeter in turn refused both of those new proposals.
- [37] I see no breach here of any term of the lease by Exeter. Rather the terms of the lease suffered from ambiguity or uncertainty from outset. Exeter was prepared to resolve the ambiguity or uncertainty by accepting Roar's proposal paying for electricity based on square meterage of the demised premises. Agreement was struck about that but Roar then decided it had new requirements.
- [38] In the meantime the option to renew fell due. Roar did not exercise its option. Either Roar decided not to renew the lease, or forgot to renew. Under the terms of the lease notice to renew had to be given before 8 May 2018 (or based on the dates used by the parties at hearing, 14 May 2018).
- [39] Exeter played no part in Roar's failure to give notice on time of exercise of its option. Exercise of the option to renew was something entirely different to the issue about electricity.
- [40] Because of the dispute over electricity Roar stopped paying rent for three months commencing April 2018. On 3 August 2018 Exeter gave Roar notice to remedy that breach. Roar paid the outstanding rent of three months after receiving the notice.
- [41] There was a suggestion on the part of Roar at hearing that its tenancy had been terminated because of the arrears of rent, but the notice to vacate was separate to the arrears issue. Unfortunately the Adjudicator seems to have linked the two when he said Exeter was "...liable for the damages and the consequences that flowed from their breach and denying the tenant the right to exercise her lease, and denying her – or forfeiting her lease on a capricious basis...."¹⁴
- [42] The Adjudicator has fallen into error in finding that Exeter was in breach of the lease and prevented Roar exercising its option to renew. Neither suggestion is correct.
- [43] Leave to appeal must be granted and the appeal allowed.
- [44] The errors on the part of the Adjudicator involved mixed law and fact. As such an appeal must proceed by way of rehearing.
- [45] I have set out in some detail the facts of this matter. It is not necessary to repeat them and I rely upon what is said above in determining the appeal.

¹³ Response page 3.

¹⁴ T1-24 L11-12.

- [46] Roar failed to exercise the option to renew its lease. Responsibility for that lies with Roar, not Exeter. Responsibility to pay for any costs associated with the internet contract also rests with Roar. Roar could have renewed the lease, but chose not to or through inadvertence failed to give notice.
- [47] The parties reached agreement about payment of the electricity bills on a square metreage basis but Roar later refused to accept it despite having originally proposed it. The costs of electricity are known and the parties had agreed that Roar would pay that proportion of the entire costs referable to the square metreage of its premises and Exeter the balance. In its Response to the initial claim Exeter maintained that that arrangement was agreed and continued to apply.
- [48] I accept the total amount of the electricity bills was \$7,574.59. I accept the total square meterage concerned was 105 square metres and of that Roar's premises comprised 65 square metres (62 per cent). Roar was therefore responsible for 62 per cent of the bills and Exeter the balance, 38 per cent. Exeter therefore owes Roar \$2,878.34 for its share of the electricity.
- [49] Given the much reduced final award to Roar, and also given Exeter has paid the filing fee for the appeal, I make no order as to costs.
- [50] Exeter must pay Roar \$2,878.34.