

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Dobeson v Ray White Sherwood* [2019] QCAT  
155

PARTIES: **RICHARD DOBESON**  
(applicant)  
v  
**RAY WHITE SHERWOOD**  
(respondent)

APPLICATION NO/S: MCDT2327-18

MATTER TYPE: Tenancy dispute

DELIVERED ON: 5 June 2019

HEARING DATE: 7 May 2019

HEARD AT: Brisbane

DECISION OF: Member Dr Collier

ORDERS: **The Residential Tenancies Authority is to pay out the \$1,980 bond held in this matter to the Respondent.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – residential tenancy – when a residential tenancy agreement starts – conditions precedent – unlawful termination

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – GENERAL APPROACHES TO INTERPRETATION – GENERAL WORDS –  
*Residential Tenancies and Rooming Accommodation Act 2008 (Qld)* – lease agreement – written, oral or implied terms – what must be in writing

*Residential Tenancies and Rooming Accommodation Act 2008 (Qld)*, s 12(3), s 58(1), s 61, s 61(6)(b), s 62(1), s 62(2), s 64(3), s 64(5), s 87, s 159

*Barnet and Anor v Zenbar (Aust) Pty Ltd* [2011] QCAT 314

APPEARANCES &  
REPRESENTATION:

Applicant: Self-represented

Respondent: J Van Tonder, Property Manager

## REASONS FOR DECISION

- [1] During June and July 2018 the Respondent, on behalf of the owner, offered for rent a residential property at 3/66 Skew St Sherwood 4075 (the ‘property’).
- [2] On 6 July 2018 three people, Richard Dobeson, Mark Dobeson, and Jackelyn Le Page (the ‘tenants’), applied to rent the property.
- [3] The tenants paid the Respondent an amount of \$1,980 as required by the terms of the lease agreement, which the Respondent duly paid to the Residential Tenancies Authority (‘RTA’) as a bond received.
- [4] However, a Form 18a, General Tenancy Agreement, was never executed by the tenants, and the tenants never occupied the property.
- [5] As a result of not having executed the Form 18a, General Tenancy Agreement, the tenants say that a complete contract was not formed and, therefore, the lease agreement was never on foot, and that they are entitled to be repaid the full amount of the bond now held by the RTA.
- [6] In the alternative, the tenants say that the \$1,980 paid to the lessor by them in this case should properly have been characterised as a ‘holding deposit’ as that term is understood in the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (‘RTRA Act’).<sup>1</sup>
- [7] The Respondent, on the other hand, says that there was a complete contract and that it is entitled to be paid compensation in accordance with the terms of the General Tenancy Agreement resulting from the tenants’ repudiation of the contract. The Respondent seeks to be paid the whole of the bond amount presently held by the RTA as full compensation for the loss of the bargain.
- [8] The Applicant in this matter represents the interests of each of the tenants.

### **The common facts**

- [9] It is uncontested that, at all relevant times, the tenants were in an existing tenancy contract at other premises (the ‘earlier tenancy’). Believing that the earlier tenancy was about to expire, the tenants identified the property as suitable new premises for them to rent. However, because of a misunderstanding as to the date of expiration of the earlier tenancy, if the lease of the property were to proceed, they would have been liable to pay rent on two properties for some months: the earlier tenancy, and the property.
- [10] On 4 July 2018 the tenants made an application to the Respondent to rent the property.
- [11] On 5 July 2018 the Respondent informed the tenants that their application to rent the property had been approved, but made a further statement in its email as follows:

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<sup>1</sup> RTRA Act, s 159.

As part of our application finalisation, we do require payment within 48 hours. Please be advised that while awaiting your payment we will continue to process other applications, so please make this payment quickly.

- [12] While this term says ‘we do require payment within 48 hours’, it does not say payment of what is required within 48 hours.
- [13] Later on 5 July 2018 the Respondent sent a further email to the tenants containing a slew of documents, comprising:
- (a) Form 18a – General Tenancy Agreement (Lease);
  - (b) Form 2 – Bond Lodgement Form;
  - (c) Form 17a – RTA Information Statement;
  - (d) Pet Agreement;
  - (e) Tenant Handover Booklet; and
  - (f) Office Policies.
- [14] This same email also made the following statements:
- Your 12 month lease will commence on 20/07/2018 at \$495 per week.
- We will need to organise a time for all parties on the lease to come in to our office and complete a tenancy sign up.
- You must make the payment within 24 hours ... The property is not secured for you and will continue to be marketed until the full payment of the first 2 weeks rent and 4 weeks bond is paid, and all lease documents are signed in full.* (emphasis in original)
- [15] On 6 July 2018 the tenants paid to the Respondent \$1,980.00. The email from the Applicant said ‘I have made payment of 4 weeks rent’, but it is evident from the correspondence that this was payment of the bond by the tenants. In this email the tenants also said:
- Thank you for accepting our application.
- [16] No further money was paid by the tenants to the Respondent. That is, the first two weeks’ rent in advance sought by the Respondent was never paid by the tenants.
- [17] On 11 July 2018 the Respondent emailed the tenants about having them execute the Form 18a, General Tenancy Agreement.
- [18] On 12 July 2018 Ms Le Page, one of the tenants, emailed the Respondent in regard to completing the documentation and said:
- Is there any chance we can sign this on Saturday morning??
- [19] In reply the Respondent said, by email:
- I will be out and about on open homes [on that day] but I can have everything ready for you to sign in the office and my assistant can help you with this?  
[sic]

- [20] By email dated 13 July 2018 Ms Le Page advised the Respondent about the apparent misunderstanding about dates involving the earlier tenancy and said:

... I'm not sure that we will be able to sign this weekend. ...

- [21] In an email dated 18 July 2018 the Applicant, on behalf of the tenants, said the following:

[The tenants] thoroughly read through your initial offer email... prior to making payment of the bond and were satisfied that we weren't making a commitment as the first paragraph after the payment details specifically stated that:

*“The property is not secured for you and will continue to be marketed until the full payment of the first 2 weeks rent and 4 weeks bond is paid, and all lease documents are signed in full”*

... That sentence is clear and concise as to the conditions which needed to be met before we would have secured the property and entered into the Residential Tenancy Agreement. It is also clear that the property would continue to be marketed. We neither signed the lease, nor made the first 2 weeks rent payment. I therefore reject the claim that we had committed to the agreement and reject the claim that the owner has suffered a financial loss as a result of our actions. (emphasis in original)

- [22] In an email sent on 18 July 2018 in response to the tenants' email the Respondent said:

[After 6 July when you paid the bond] ... we were then unable to rent the property to any other potential tenants as you had indicated you had accepted this approval and made payment of 4 weeks rent.

- [23] Following these events the property was advertised by the Respondent and a new tenant occupied the property from 18 August 2018.

### **Has a contract been formed?**

- [24] Under the terms of the RTRA Act a lease agreement may be written, oral or implied, or any combination of these whether wholly or in part.<sup>2</sup>

- [25] The RTRA Act requires that the lessor or lessor's agent must give a prospective tenant a written copy of the lease agreement before doing any of the following:<sup>3</sup>

- (a) accepting a document from the prospective tenant that commits the tenant—
  - (i) to enter into the tenancy; or
  - (ii) to pay an amount in relation to the tenancy;
- (b) accepting an amount in relation to the tenancy;
- (c) entering into a residential tenancy agreement for the tenancy.

<sup>2</sup> Ibid s 12(3).

<sup>3</sup> Ibid s 58(1).

- [26] Section 61 of the RTRA Act requires that the lessor or lessor's agent must give a copy of the written lease agreement to a prospective tenant in writing, however this provision appears designed to regulate the conduct of a lessor for consumer protection purposes rather than regulate the formation of a contract because it provides that:<sup>4</sup>

Nothing in this section affects the enforceability of an agreement that is not in writing.

- [27] Having supplied the tenant with a copy of the lease agreement under s 61, the RTRA Act then requires that the tenant be given a copy of the lease agreement for signing on or before the day the tenant occupies the premises under the agreement.<sup>5</sup> The tenant is then required to return a signed copy of the lease agreement within five days of receipt.<sup>6</sup> If a tenant fails to return the signed copy of the lease within five days the lessor may seek an order of this Tribunal requiring the tenant to sign and return the lease agreement to the lessor by a stated day.<sup>7</sup>
- [28] Taking the sum of these provisions into account, it is clear that it is not a requirement for a valid contract to be formed that a written lease agreement in the nature of a Form 18a, General Tenancy Agreement, be executed by either or both the lessor or the tenant. A valid lease agreement may be formed in writing, orally, or by implication, or a combination of these.
- [29] The evidence demonstrates sufficiently that in this case the lessor has satisfied the statutory requirements canvassed above: the lessor gave the tenants copies of all documents contemplated by the RTRA Act in the time frames required by that Act, and accepted money from the tenants only after satisfying the statutory requirements concerning the prior supply of relevant documents. Therefore, the argument of the tenants that no valid contract was formed based on the failure of them (the tenants) executing the Form 18a, General Tenancy Agreement, is not supported by the facts and law. There has been no failure in the conduct of the lessor to preclude a valid contract having come into existence.
- [30] This leaves two issues to be resolved: whether a valid contract had been made between the parties (based on the conduct of the parties and the written and oral communications between them); and, if a contract had been made between them, the date on which the contract was made.
- [31] On 4 July 2018 the tenants applied to lease the property. On 5 July the lessor advised the tenants that their application had been successful, however, the acceptance contained the statement (paragraphs [14] and [21]):
- The property is not secured for you and will continue to be marketed until the full payment of the first 2 weeks rent and 4 weeks bond is paid, and all lease documents are signed in full.
- [32] Clause 4 of the Form 18a, General Tenancy Agreement, sent by the Applicant to the tenants on 5 July 2018 said:

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<sup>4</sup> Ibid s 61(6)(b).

<sup>5</sup> Ibid s 62(1).

<sup>6</sup> Ibid s 62(2).

<sup>7</sup> Ibid ss 64(3) and 64(5).

(1) The tenancy starts on the day stated in this agreement for item 6.2

- [33] Item 6.2 nominated the start date of the tenancy as 21 July 2018.
- [34] The learned Adjudicator in *Barnet and Anor v Zenbar (Aust) Pty Ltd* [2011] QCAT 314 distinguished the date of formation of the lease agreement from the date on which occupancy by a tenant is to begin. This is an appropriate distinction and, in this case, I conclude that from 5 July 2019, the tenants knew that they were entitled to occupy the property on and from 21 July 2018. Therefore, in this case, the lease agreement was formed on 5 July 2018. From this date the tenants' remaining obligations were to: pay the first two weeks' rent and four weeks' bond; and sign the lease documents.
- [35] The obligation to sign the lease documents is not a pre-condition to a valid contract in this case for the reasons set out above. A failure by the tenants to sign the General Tenancy Agreement does not affect the validity of the lease agreement.
- [36] The tenants paid the four weeks' bond to the lessor as concluded above. The only remaining obligation of the tenants was to pay the first two weeks' rent. The tenants did not pay this. Is the payment of two weeks' rent in advance a condition precedent upon which the contract – the lease agreement – is contingent? Rent in advance is contemplated by clause 9 of Form 18a.<sup>8</sup>
- [37] The Respondent, in its assertion that '... the property is not secured for you and will continue to be marketed...' until, *inter alia*, the first two weeks' rent was paid, was, in reality, meant as an encouragement to the tenants to meet their contractual obligation to pay rent in advance. It was not, in these circumstances, intended to be a condition precedent to the formation of the contract.
- [38] Given the following facts, I am satisfied that a contract was concluded between the parties on 6 July 2018, namely:
- a) All documentation required by the RTRA Act was sent by the Respondent to the tenants on 5 July 2018, including the completed but unsigned Form 18a that nominated the date for commencement of the tenancy as 21 July 2018;
  - b) The payment of the full bond by the tenants on 6 July 2018;
  - c) The acknowledgement by the tenants on 6 July 2018: 'Thank you for accepting our application'; and
  - d) The request on 12 July 2018 by Ms Le Page to arrange a date for the tenants sign the Form 18a.
- [39] By 18 July 2018 the Respondent's email made it evident that the tenants had evinced their intention to repudiate the contract based on their interpretation of the terms of the contract. The evidence satisfies me on the relevant test that the tenants purported to repudiate the contract after it had been formed for their convenience based on an apparent misunderstanding as to dates concerning their earlier tenancy. This is not sufficient ground to repudiate a contract, and I conclude that the tenants have unlawfully terminated the contract. The Applicant is, therefore, entitled to a remedy.

<sup>8</sup> And allowed under RTRA Act, s 87.

[40] Even if I had not reached this conclusion in reliance on the terms of the contract, I would have concluded that the tenants were estopped from repudiating the contract on the basis that the Respondent had, with the knowledge of the tenants, acted reasonably and lawfully to its detriment in reliance on the terms of the agreement between them. This conclusion is reinforced by oral evidence given by Ms Van Tonder on behalf of the Applicant at the hearing and as stated by her in writing on 18 July 2018 when she told the tenants that, from 6 July 2018:

... we were then unable to rent the property to any other potential tenants as you had indicated you had accepted this approval and made payment of 4 weeks rent.

[41] Turning briefly to the argument by the tenants that the four weeks' rent they paid, which I concluded earlier was intended to be payment of the bond should, in fact, be characterised as a holding deposit.

[42] I do not accept this argument. There was no mention by the parties during their discussions that the four weeks' rent paid by the tenants should be characterised as a holding deposit. I conclude that raising this issue during the hearing was an attempt to raise an issue that never existed.

### **Appropriate remedy**

[43] I am satisfied that the tenants repudiated the lease agreement without any lawful basis on which to do so. They repudiated the contract for their convenience. The Respondent is entitled to a remedy.

[44] The lease agreement provides that, in the event of early termination by the tenant of the lease agreement, the lessor is entitled to, *inter alia*:<sup>9</sup>

...the rent and service charges until the lessor re-lets the premises or the end of the tenancy as specified in item 6 whichever is the earlier

[45] The tenants were due to occupy the premises (but did not) from 21 July 2018. The lessor re-let the premises from 18 August 2018. The difference between these dates is four weeks. At the hearing the Respondent did not seek any further damages than the four weeks' rent held as the bond. The Respondent is entitled to damages amounting to four weeks' rent, being \$1,980.

### **Conclusions**

[46] The application by the Applicant is dismissed.

[47] The Respondent is entitled to damages in the amount of \$1,980.

### **Decision**

[48] The Tribunal makes the following decision:

1. The Residential Tenancies Authority is to pay out the \$1,980 bond held in this matter as follows:

(a) to the Lessor: \$1,980;

<sup>9</sup> Lease Agreement, Special Terms, cl 48.

(b) to the Tenants: nil.