

CITATION: *Professional Atherton Real Estate v Newton and Bond* [2010] QCATA 117

PARTIES: Professional Atherton Real Estate
(Applicant)
v
Ms Cheryl Newton
Mr Alan Bond
(Respondents)

APPLICATION NUMBER: APL273-10

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judge Fleur Kingham
(Deputy President)

DELIVERED ON: **20 December 2010**

DELIVERED AT: Brisbane

ORDERS MADE:

1. Leave to appeal is granted.
2. The Appeal is allowed.
3. The orders made by QCAT on 19 October 2010 are set aside.
4. The application to QCAT in Minor Civil Dispute matter number 30/10 heard in Atherton for a termination order is dismissed.
5. By consent, the tenancy agreement is terminated effective from 25 October 2010.
6. Ms Newton and Mr Bond must pay Professionals Atherton Real Estate \$201.28.

CATCHWORDS : APPEAL – APPLICATION FOR LEAVE TO APPEAL – where error of law

RESIDENTIAL TENANCIES – TERMINATION OF TENANCY – where applicants argued excessive hardship to

terminate tenancy agreement – where learned Adjudicator did not make termination order based on excessive hardship – where learned Adjudicator terminated tenancy for repeated breach – where notice to remedy breach not issued – where notice of intention to leave based on failure to remedy breach not issued – where tenancy terminated by the Tribunal – whether tenancy wrongfully terminated

Queensland Civil and Administrative Tribunal Act 2009 ss 100, 142(3)(a), 146(b)

Residential Tenancies and Rooming Accommodation Act 2008 ss 185(3)(a), 185(3)(b), 378, 379, 383(a), 383 (b)

REASONS FOR DECISION

- [1] This is an application for leave to appeal against a decision of the Tribunal to terminate a tenancy.
- [2] Ms Newton and Mr Bond (the tenants) rented premises at McConnell Street Atherton managed by Professionals Atherton Real Estate (Professionals). On 11 October 2010 they issued a notice of intention to leave on the grounds of excessive hardship for repair and maintenance requests being ignored.¹ They made a minor civil dispute application to QCAT to have their tenancy agreement terminated.
- [3] On 19 October 2010 a Magistrate sitting in his capacity as a member of QCAT made an order terminating the tenancy agreement, effective from 25 October 2010. On 21 October 2010 Professionals made an application for leave to appeal (and, if successful to appeal) that decision. Leave is necessary to appeal from a minor civil dispute decision of QCAT.²
- [4] Professionals argue they were denied natural justice on the basis that though the application was made on the ground of excessive hardship, the learned Member proceeded to terminate the tenancy on the basis that the gas fittings did not comply with regulations. Professionals were not in a position to produce a 'Gas Installation Completion Certificate,' at the hearing, nor given an opportunity to do so. They lodged their application for leave to appeal on the basis that they had new information in the form of a 'Gas Installation Completion Certificate'.
- [5] The learned Magistrate was not satisfied Ms Newton and Mr Bond had made out a case of excessive hardship. The application to terminate the tenancy on that basis was rejected.

¹ *Residential Tenancies and Rooming Accommodation Act 2008 ss 383(a), 383 (b)*
² *Queensland Civil and Administrative Tribunal Act 2009 s142(3)(a)*

- [6] A claim for relief on the ground of excessive hardship under the *Residential Tenancies and Rooming Accommodation Act 2008* (RTRA)³, will require consideration of the particular circumstances in each case⁴. Hardship may encompass *any matter of appreciable detriment whether financial, personal or otherwise*⁵. Ms Newton and Mr Bond demonstrated cause to complain about the maintenance of the premises, in particular whether repairs to a gas stove were properly performed by a qualified gas fitter. However, I see no error in the decision by the learned Magistrate to reject the argument that this constituted a case of excessive hardship.
- [7] Rather, their case was that there was a breach of the conditions of the tenancy agreement. The learned Magistrate was correct to identify their case in that way. However, he erred in proceeding to terminating the tenancy for failure to remedy breach⁶.
- [8] The RTRA is prescriptive about the requirements for terminating a residential tenancy. Those requirements are not merely a matter of form; they are preconditions to QCAT's jurisdiction to grant relief under the RTRA. The learned Member needed to be satisfied that those requirements had been met by Ms Newton and Mr Bond.
- [9] Ms Newton and Mr Bond led evidence that Professionals may have been in breach of their obligations under the tenancy agreement for failure to maintain the premises⁷ in good repair.⁸ In order to have their agreement terminated on that basis, the tenants were required to first issue a notice to remedy breach⁹. If the breach was not remedied within the notified period, they would have been entitled to issue a notice of intention to leave for failure to remedy that breach.¹⁰ In this case, Ms Newton and Mr Bond did not issue a notice to remedy breach, instead commencing the proceedings by issuing a notice to leave. That notice was not valid. Consequently, the learned Magistrate could not rely on it to terminate the tenancy.
- [10] Professionals is granted leave to appeal, the appeal is upheld and the orders made on 19 October 2010 are set aside.
- [11] Since these proceedings commenced circumstances have changed for both parties. Ms Newton and Mr Bond vacated the premises on 25 October 2010 and a new tenancy commenced on 5 November 2010. The parties agree the former tenancy agreement has been overtaken by events and should be terminated.
- [12] Professionals have sought a further order for compensation for termination of the tenancy. The learned Magistrate did make an order that Ms Newton

³ *Residential Tenancies and Rooming Accommodation Act 2008* ss 383(a), 383 (b)

⁴ *Leddicoat v Walker* [2010] QCATA 18 at [14]

⁵ *F.G. O'Brien Ltd v Elliott* (1965) NSWLR 1473 Asprey J at 1475

⁶ *Residential Tenancies and Rooming Accommodation Act 2008* s379

⁷ *Residential Tenancies and Rooming Accommodation Act 2008* s185(3)(a)

⁸ *Residential Tenancies and Rooming Accommodation Act 2008* s185(3)(b)

⁹ *Residential Tenancies and Rooming Accommodation Act 2008* s378

¹⁰ *Residential Tenancies and Rooming Accommodation Act 2008* s379

and Mr Bond pay \$270 in compensation and this was done. In doing so he took into account the costs involved in readvertising the premises and the real estate agent's fee. He considered a week's rent sufficient compensation for that expense.

- [13] In the appeal, Professionals has made claims for the following:
- (a) Rent – 4 days from 1 November 2010 to 4 November 2010 \$154.28
 - (b) Re-let fee – one week's rent plus GST \$297
 - (c) Carpet cleaning - \$187
 - (d) Flea Treatment - \$135
 - (e) Re-filling of the gas bottles - \$47
 - (f) Appeal Application fee - \$255
- [14] In fact the premises were not readvertised and a new tenancy commenced 10 days after the tenants vacated. The tenancy was effectively ended on 25 October and is now terminated, by agreement, from that date. Had the learned Magistrate identified the Notice to Leave was not validly issued, there would have been a delay in dealing with the application and the tenants would have been liable for further rent while Professionals were given proper notice and an opportunity to remedy the breach. Given that, it is reasonable for compensation to include the further rent now claimed.
- [15] The claim for re-filling the gas bottles is made out on the material provided by Professionals on appeal.
- [16] Ms Newton and Mr Bond doubted the carpets would endure professional cleaning, given its state. Their complaints about the state of the carpet (but not its capacity to endure a further clean) are made out by the Entry Condition Report which notes the carpet "smells" and in parts was torn and frayed with tufts coming out. Other complaints made by the tenants are also confirmed by that Report (such as the state of the doors, inside and external). This evidence was before the learned Magistrate. Apparently he accepted the tenants' evidence about these issues and took them into account in deciding what amount of compensation should be ordered. I am not persuaded further compensation should be ordered for these items.
- [17] As for the claim for the appeal application fee, the starting point for QCAT proceedings is that each party bears their own costs.¹¹ I accept Ms Newton and Mr Bond brought their proceedings to terminate their tenancy agreement after obtaining advice, in good faith believing they were entitled to proceed on the basis they did. I do not consider, in those circumstances, they should have to pay the filing fee.
- [18] Taking those matters into account, Ms Newton and Mr Bond are ordered to pay Professionals \$201.28 by way of further compensation for rent and gas usage.