

CITATION: *Bauer v McMillan & Anor* [2013] QCATA 140

PARTIES: Mr Stefan Bauer
(Applicant/Appellant)
v
Ms Jennifer McMillan
Mr Grant McMillan
(Respondents)

APPLICATION NUMBER: APL016-13

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Peta Stilgoe, Senior Member**

DELIVERED ON: 20 May 2013

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Leave to appeal granted.**
- 2. Appeal allowed.**
- 3. Paragraph 2 of the decision dated 6 December 2012 is set aside.**
- 4. Mr and Mrs McMillan's claim for compensation is dismissed.**

CATCHWORDS: MINOR CIVIL DISPUTE - where urgent application to set aside notice to leave without ground – where also application for compensation – where evidence of referral to dispute resolution not clear – where claim for compensation arose from breaches more than 6 months prior to claim – tribunal powers on application for emergency repairs – tribunal powers on application for breach of liveability - whether grounds for leave to appeal

Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 191, s 221, s 292, s 416, s 419

Adams v Scowcroft [2012] QCATA 25
Cachia v Grech [2009] NSWCA 232

Chambers v Jobling (1986) 7 NSWLR 1
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
Lowe v Aspley [2010] QCATA 59
Mclver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41

APPEARANCES and REPRESENTATION (if any):

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

REASONS FOR DECISION

- [1] Mr and Mrs McMillan lived in a house they rented from Mr Bauer for about three years. From time to time, Mr McMillan complained to Mr Bauer about the condition of the house. Matters came to a head in October 2012. Mr McMillan was tired of complaining but getting no action, so he told Mr Bauer that he was going to take the issue further. Mr Bauer issued a notice to leave without grounds on 8 October 2012. Mr McMillan issued a notice to remedy breach on 10 October 2012.
- [2] Mr McMillan filed an urgent application in the Tribunal, asking for emergency repairs, an order about the failure to comply with maintenance obligations, and an order to set aside the notice to leave. Mr and Mrs McMillan also claimed compensation and a rent reduction for loss of amenity. The Tribunal found that Mr Bauer's notice was retaliatory and set it aside. The learned Adjudicator also ordered Mr Bauer pay Mr and Mrs McMillan compensation of \$2,600.
- [3] Mr Bauer wants to appeal the learned Adjudicator's decision to give Mr and Mrs McMillan compensation. He says that the learned Adjudicator did not refer to the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (RTRA Act) in his reasons for decision. Mr Bauer says that the learned Adjudicator failed to consider whether it is the tenant or the lessor who has the obligation to keep the tenancy in good repair. Mr Bauer says that the learned Adjudicator considered the wrong evidence, ignored evidence or misinterpreted the evidence
- [4] Because this is an appeal from a decision of the Tribunal in its minor civil disputes jurisdiction, leave is necessary. The question whether or not leave to appeal should be granted is usually addressed according to established principles. Is there a reasonably arguable case of error in the primary decision?¹ Is there a reasonable prospect that the applicant will obtain

¹ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

substantive relief?² Is leave necessary to correct a substantial injustice caused by some error?³ Is there a question of general importance upon which further argument, and a decision of the Appeals Tribunal, would be to the public advantage?⁴

- [5] The Appeals Tribunal will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.⁵ An appellate tribunal may interfere if the conclusion is ‘contrary to compelling inferences’ in the case.⁶ As the High Court said in *Fox v Percy*:

In such circumstances, the appellate court is not relieved of its statutory function by the fact the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses. In such a case, making all due allowances for the advantages available to the trial judge, the appellate court must “not shrink from giving effect to” its own conclusion.⁷

- [6] I do not propose to consider Mr Bauer’s submissions about the evidence in any detail. There is a more fundamental error by the learned Adjudicator which justifies leave to appeal being granted.
- [7] As I have already identified, Mr and Mrs McMillan filed an urgent application on three grounds. The first was the issue of emergency repairs. In an application about emergency repairs, the Tribunal may order (s 221): that Mr Bauer carry out the repairs; that Mr and Mrs McMillan arrange for the repairs to be carried out for an amount the Tribunal decides; and that the lessor pay or reimburse the tenant for work the tenant has arranged.
- [8] Mr and Mrs McMillan did not do any repairs. They did not ask for compensation for any repairs they did. They asked for orders that Mr Bauer do repairs but the learned Adjudicator did not make that order. In an application about emergency repairs, the Tribunal has no general power to order compensation.
- [9] The second ground for Mr and Mrs McMillan’s urgent application was for an order about Mr Bauer’s failure to comply with his maintenance obligations (s 191). The Tribunal may order Mr Bauer to remedy the failure but it has no power to order compensation.
- [10] The third ground for Mr and Mrs McMillan’ urgent application was to set aside the notice to leave without ground (s 292). The Tribunal may set aside the notice but it has no power to order compensation.

² *Cachia v Grech* [2009] NSWCA 232 at 2.

³ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.

⁴ *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388 at 389; *Mclver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577 at 578, 580.

⁵ *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Fox v Percy* (2003) 214 CLR 118 at 125-126.

⁶ *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

⁷ *Fox v Percy* (2003) 214 CLR 118 at 128 per Gleeson CJ, Gummow and Kirby JJ.

- [11] The Tribunal's power to order compensation for lack of amenity lies in either s 94 or s 419. An application under either section is not an urgent application. Therefore, the Tribunal may not consider the application unless Mr and Mrs McMillan first made a dispute resolution request.⁸
- [12] The learned Adjudicator did not turn his mind to this issue. I note the advice that Mr and Mrs McMillan did ask the Residential Tenancies Authority for assistance and were advised to bring the dispute straight to the Tribunal. Unfortunately, because the regime under the Act is prescriptive,⁹ and the nature of the request to the RTA is not clear, leave to appeal should be granted.
- [13] There is another reason to grant leave. Section 419(3) of the RTRA Act provides that an application for compensation must be made within 6 months of a person becoming aware of a breach of the tenancy agreement. On any view of the facts, Mr and Mrs McMillan were aware of the problems with this house long before they issued their notice to remedy breach. The Tribunal cannot simply restrict the amount of compensation to a six-month period preceding the application. The learned Adjudicator had to consider whether, in fact, the claim was valid. The claim was not valid because, as I have identified, Mr and Mrs McMillan had known about the problems for some time. Their claim for compensation must fail.
- [14] Leave to appeal should be granted and the appeal allowed. Paragraph 2 of the decision dated 6 December 2012 should be set aside. Mr and Mrs McMillan's claim for compensation is dismissed.

⁸ RTRA Act, s 416.

⁹ *Lowe v Aspley* [2010] QCATA 59; *Adams v Scowcroft* [2012] QCATA 25.