QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	KTK Property Management v Ho [2015] QCATA 6
PARTIES:	KTK Property Management (Applicant/Appellant) v Victor Ho Blythe Ho (Respondents)
APPLICATION NUMBER:	APL450 -14
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Senior Member Stilgoe OAM**
DELIVERED ON:	16 January 2015
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal granted.** **2. Appeal allowed.** **3. The decision of 5 August 2014 is set aside.** **4. The application for compensation filed 22 May 2014 is dismissed.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL - MINOR CIVIL DISPUTE – RESIDENTIAL TENANCIES – where termite damage to window sill in tenancy – where maintenance request 14 months after termite damage discovered – where tenant claim for compensation – where tribunal ordered compensation - whether date for claiming breach was within 6 month time limit – whether substantial diminution in amenity of property – whether dispute resolution notice gave tribunal jurisdiction to hear dispute - whether grounds for leave to appeal *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) ss 94, 402, 416, 419

Dearman v Dearman (1908) 7 CLR 549
Fox v Percy (2003) 214 CLR 118
Pickering v McArthur [2005] QCA 294
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404
Chambers v Jobling (1986) 7 NSWLR 1
Caruana v Harcourts Proactive Results Pty Ltd [2012] QCATA 55
Masinello v Parker & Anor (No.2) [2013] QCATA 325

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] KTK Property Management managed a property rented by Mr and Ms Ho. The property had termite damage in 2013. The termites were eradicated but the damage, to the window sill in the main bedroom, was not repaired.

[2] In April 2014, KTK issued a notice to remedy breach to remove an illegal structure that Mr and Ms Ho had built in the courtyard. In May 2014, Mr and Ms Ho filed a dispute resolution request with the Residential Tenancies Authority. In late May 2014, they filed a claim for compensation for the loss of enjoyment caused by the terminate damage. Two Justices of the Peace ordered KTK pay Mr and Ms Ho $3,000 compensation.

[3] KTK wants to appeal that decision. It says the learned Justices erred in finding that Mr and Ms Ho filed their claim within six months of the breach of tenancy agreement as required by s 419(3) of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) (RTRA Act). It says Mr and Ms Ho did not follow the dispute resolution process as required by s 416 of the RTRA Act and, therefore, the tribunal had no jurisdiction to hear the dispute. It says that Mr and Ms Ho made false and misleading statements to the tribunal, which caused it disadvantage pursuant to s 48(1)(e) of the QCAT Act. It says the learned Justices erred in fact. It says the learned Justices erred in the application of s 94 of the RTRA Act and erred in the calculation of the amount that should be paid. It also says that the order should have been made against the lessor, not KTK.

[4] Because this is an appeal from a decision of the tribunal in its minor civil disputes jurisdiction, leave is necessary.[1] Leave to appeal will usually be granted where there is a *reasonable argument* that the decision is

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1 QCAT Act s 142(3)(a)(i).

attended by error, and an appeal is necessary to correct a *substantial injustice* to the applicant caused by that error.[2]

[5] KTK has filed fresh evidence with its application for leave to appeal. The appeals 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 such evidence must satisfy three tests. Could KTK have obtained the evidence with reasonable diligence for use at the trial? If allowed, would the evidence probably have an important impact on the result of the case? Is the evidence credible?[3]

[6] The relevant evidence is photographs of the window sill, a report from the repairer and photographs of the timber removed from the window sill.

[7] KTK says this evidence was not available at the hearing because Mr and Ms Ho refused access after they delivered a maintenance request on 17 April 2013. Mr and Ms Ho confirmed this to be the case[4]. KTK could not have obtained this fresh evidence before the hearing because Mr and Ms Ho prevented access.

[8] KTK says that Mr and Ms Ho's filed material refer to "photos attached" but none were available to the learned Justices. It is correct that there are no photos attached to the documents in which Mr and Ms Ho refer to photos. The only photos before the learned Justices were provided by KTK and do not relate to the termite damage. The evidence is credible and does have an important impact of the result of the case. It should be allowed.

[9] Section 419(3) of the RTRA Act states that an application for breach of a term of the tenancy agreement must be made within six months of the party becoming aware of the breach. The requirement is not procedural, but substantive. It defines the limits of the tribunal's jurisdiction[5].

[10] The learned Justices found that the six months applied not from the date in 2013, when Mr and Ms Ho first noticed termite damage, but from 27 May 2014 when Mr and Ms Ho prevented entry to the property in response to a maintenance request[6].

[11] The learned Justices' approach might be justified if the "breach" was the failure to repair the termite-damaged window in response to the maintenance request. I do not think the breach can be so narrowly interpreted. Rather, the breach is the failure to fix the damage.

[12] There was evidence that Mr and Ms Ho asked for the damage to be fixed "on various inspections since 2013"[7]. By their own evidence, Mr and Ms Ho demonstrated that the breach occurred much earlier than May 2014. That

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2 *Pickering v McArthur* [2005] QCA 294 at [3].
3 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408.
4 Transcript pages 1-22, lines 41 – 46;1-23, lines 12 – 17.
5 *Caruana v Harcourts Proactive Results Pty Ltd* [2012] QCATA 55 at [9].
6 Transcript page 1-27, lines 28 – 35.
7 Timeline of events filed 22 May 2014; Transcript page 1-13, lines 21 – 23.

date might be March 2013 when, they say[8] they asked for the window sill to be repaired. It can be no later than 20 November 2013, when Mr and Ms Ho confirmed a request for repair of the window sill[9].

[13] The evidence does not support Mr and Ms Ho's submission that they filed their dispute resolution request within six months of them becoming aware of the breach. The learned Justices erred in their finding. The tribunal, therefore, had no jurisdiction to consider their claim. Leave to appeal should be granted.

[14] The learned Justices considered the issue of compensation on an alternative basis; as a claim under s 94 of the RTRA Act. A claim under s 94 is not limited to a six-month time limit in the same way as a claim under s 419[10]. However, a claim under s 94 will only succeed if the amenity or standard of the premises decrease **substantially** (my emphasis).

[15] The learned Justices decided that the amenity or standard of the premises had decreased substantially because the termite baits were in the room[11], which created an odour[12], so that Mr and Ms Ho could not live in that room[13]. The learned Justices found that living in the room created a possibility of disturbing the baits[14]. They also found that Mr and Ms Ho had no choice but to relocate from the main bedroom to the back bedroom[15].

[16] There is contradictory evidence about the use of the main bedroom. At the hearing, Mr and Ms Ho stated they moved out of the room as soon as the baits were installed[16]. KTK says that, on routine inspections, it appeared that Mr and Ms Ho were using the main bedroom[17]. In their letter to the RTA[18], Mr and Ms Ho state:

> We have to live all these extra months with the smell of the rotting ledge plus the inconvenience of not being able to open the window to allow fresh air over the recent hot summer months…

They do not say, as they could have, that they were not using that room.

[17] Whether or not they were using the main bedroom, the evidence does not support a finding that the terminate damage resulted in a substantial decrease in the amenity of the property. The baits were removed in August/September 2013[19] so they were in place for no more than five

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8 Letter Ho to RTA dated 19 May 2014.
9 Note on back of Form 9 – document 7 in material filed at hearing.
10 *Masinello v Parker & Anor (No.2)* [2013] QCATA 325.
11 Transcript page 1-27, lines 42 – 43.
12 Transcript page 1-27, lines 43 – 44.
13 Transcript page 1-27, line 44.
14 Transcript page 1-28, lines 1 – 4.
15 Transcript page 1-28, lines 5 – 7.
16 Transcript page 1-22, lines 10 – 13.
17 Transcript page 1-17, lines 42- 47.
18 14 April 2014.
19 Transcript page 1-12, lines 36 – 46.

months[20]. The restriction on opening the window applied only while the baits were in place. There was some light odour from dead termites but otherwise the stations were odourless[21]. The fresh evidence shows very little damage to the window sill, little termite activity and no mould. There is no good reason why Mr and Ms Ho could not use that bedroom.

[18] Mr and Ms Ho renewed their tenancy agreement in March 2014. The rent increased by $10 per week. KTK offered them a six-month tenancy agreement but Mr and Ms Ho asked for a 12 month tenancy agreement. These are not the actions of tenants who consider there has been a substantial diminution in the amenity of the property. Their actions support a finding, consistent with the evidence and contrary to the learned Justices' finding, that there was no substantial diminution in the amenity of the property.

[19] Although it is not necessary for the determination of the application for leave to appeal, I will make some comments about KTK's other grounds for appeal.

[20] KTK submits that the dispute resolution notice did not refer to an application for compensation because of the termite damage. That is true. The letter from Mr and Ms Ho dated 19 May 2014 refers to the damage but simply calls for an explanation for the delay in repairs.

[21] Section 402 of the RTRA deals with making a dispute resolution request. Apart from requiring the request in the approved form[22], the RTRA Act does not proscribe the contents of the request. Section 416(1) of the RTRA Act states that a party may apply to the tribunal about "an issue" if the party has made a dispute resolution request about "the issue".

[22] The "issue" in this dispute was the failure to repair the window sill. The claim for compensation was a possible consequence of this issue remaining unresolved. I am satisfied that Mr and Ms Ho complied with their obligation to file a dispute resolution request about the issue.

[23] A breach of s 216 of the QCAT Act – that a person must not make false and misleading statements – does not necessarily justify granting leave to appeal. Section 216 imposes a penalty for breach; that is not within the jurisdiction of this appeal tribunal.

[24] The test for the appeal tribunal is different. It will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.[23] An appellate tribunal may interfere if the conclusion is 'contrary to compelling inferences' in the case.[24]

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20 See report Surekill Pest Control 17 June 2014.
21 Report Surekill Pest Control 17 June 2014.
22 RTRA Act s 402(3).
23 *Dearman v Dearman* (1908) 7 CLR 549 at 561; *Fox v Percy* (2003) 214 CLR 118 at 125-126.
24 *Chambers v Jobling* (1986) 7 NSWLR 1 at 10.

[25] I have already found that the evidence does not support the learned Justices' finding that the date of breach was May 2014. I have read the transcript and the documents filed in the original dispute and I can see inconsistencies in the evidence that are not explained well by the learned Justices' decision. It is not necessary to consider this point in any more detail. My comments also deal with KTK's submission that the learned Justices erred in their determination of the facts.

[26] KTK has referred the appeal tribunal to s 48(1)(e) of the QCAT Act. The effect of s 48, read as a whole, is that the tribunal can dismiss or strike out a claim if a party is unnecessarily causing disadvantage to another party by attempting to deceive that other party or the tribunal. The proceeding has been completed so there is no proceeding that can be struck out. Section 48 does not assist KTK.

[27] Leave to appeal should be granted, the appeal allowed, and the decision of 5 August 2014 set aside. Mr and Ms Ho's application for compensation should be dismissed.