QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Corcoran v Simon* [2016] QCATA 109
PARTIES:	Emma Corcoran (Applicant/Appellant) v Veronika Simon (Respondent)
APPLICATION NUMBER:	APL508 -15
MATTER TYPE:	Appeals
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Senior Member Stilgoe OAM**
DELIVERED ON:	5 July 2016
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. Leave to appeal granted.** **2. Appeal allowed.** **3. The proceeding is returned to the tribunal for rehearing on the papers.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL - MINOR CIVIL DISPUTE – LANDLORD AND TENANT – RESIDENTIAL TENANCIES – OBLIGATIONS, PROHIBITED MATTERS AND PROTECTION FOR LESSEES – INSPECTION AND REPAIR – where tenant claimed return of bond – where lessor claimed compensation for damage to tenancy – where tribunal found lessor failed to mitigation loss – where tribunal found damage minor – where tribunal dismissed lessor's claim whether grounds for leave to appeal APPEAL – LEAVE TO APPEAL – PROCEDURE – PARTIES AND REPRESENTATION – PROPER OR NECESSARY PARTY AND STANDING – where lessor's agent named in proceedings below – where lessor sought leave to appeal – whether lessor has standing in appeal *Queensland Civil and Administrative Tribunal*

Act 2009 (Qld) ss 39, 142, 146
Residential Tenancies and Rooming Accommodation Act 2008 (Qld) ss 24, 306, 362

Sotiros Shipping Inc and Aeco Maritime SA v Sameiet Solholt (The Solholt) [1983] 1 Lloyd's Rep 605
Darbishire v. Warran, [1963] EWCA Civ 2
Dearman v Dearman (1908) 7 CLR 549
Fox v Percy (2003) 214 CLR 118
Pickering v McArthur [2005] QCA 294
Ericson v Queensland Building Services Authority [2013] QCA 391
Chambers v Jobling (1986) 7 NSWLR 1

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] Veronika Simon rented a rural property at Canungra from Emma Corcoran, through Ms Corcoran's agent, Aussie Lifestyle Properties Pty Ltd. At the end of her tenancy, Ms Simon claimed the return of her bond. Aussie Lifestyle counter claimed $3,809.30 in compensation. The tribunal ordered the bond be paid to Ms Simon and dismissed the counter claim.

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

[3] Ms Corcoran says the tribunal misapplied s 362 of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) (RTRA Act). She says the tribunal erred in assessing items claimed as 'minor'. She says the tribunal erred in fact.

Does Ms Corcoran have a right to file the application for leave to appeal?

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1 QCAT Act s 142(3)(a)(i).
2 *Pickering v McArthur* [2005] QCA 294 at [3].

[4] Ms Simon points out that Ms Corcoran was not a named party in the tribunal below. She submits, therefore, that Ms Corcoran does not have a right to file the application for leave to appeal.

[5] Only a party to a proceeding may appeal to the appeal tribunal.[3] It is common ground that Aussie Lifestyle was the respondent to the tribunal proceedings below, not Ms Corcoran.

[6] Ms Corcoran submits that she should be permitted to file the application because: Aussie Lifestyle was acting as her agent; Aussie Lifestyle did not correct its listing in the tribunal as the respondent; and she is the owner and lessor of the property.

[7] Section 142(1) of the QCAT Act states that a party to a proceeding may appeal. Section 39(b) states that a person is a party to a proceeding in the tribunal's original jurisdiction if the person is a person in relation to whom a decision of the tribunal is sought by the applicant. Section 39(e) states that a person is a party to a proceeding in the tribunal's original jurisdiction if the person is someone else an enabling act states is a party to the proceeding.

[8] Ms Simon filed the proceedings below. Even though Aussie Lifestyle is named as the respondent, Ms Simon clearly refers to her rights as against the owner, Ms Corcoran. It is arguable therefore, that Ms Corcoran is 'a person in relation to whom a decision of the tribunal is sought by the applicant' even though she was not named as a respondent.

[9] Section 24 of RTRA Act, read as a whole, makes the lessor and the lessor's agent interchangeable for rights and obligations under that Act. Section 206(1) of the RTRA Act allows an agent to stand in the place of a lessor in a proceeding prescribed by legislation. Tribunal proceedings are a prescribed proceeding.[4] Section 206(3) of the RTRA Act states that, if the details of the agent are given to a tenant under s 206(1)(b), the proceeding may be taken against the agent as if it was the lessor and the tribunal may make an order against the agent as if it was the lessor.

[10] The effect of s 206 of the RTRA Act is that it matters not whether a tenant names the agent or the lessor: the action is against the lessor. In my view, s 206 falls within the ambit of s 39(e) of the QCAT Act, so a proceeding against the agent or the lessor in a residential tenancy dispute is, in fact, a proceeding against the lessor. Therefore, Ms Simon's action was against the lessor, however named: the rights, liabilities and interests of the parties in the proceeding below are the same as the rights, interests and liabilities of the parties in the appeal. There can be no suggestion that Ms Simon is disadvantaged by substituting Ms Corcoran for Aussie Lifestyle.

[11] By the unique combination of s 39 of the QCAT Act and s 206 of the RTRA Act, Ms Corcoran is entitled to file the application for leave to appeal.

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3 QCAT Act s 142(1).

4 *Residential Tenancies and Rooming Accommodation Regulation* 2009 (Qld) s 23.

Did the tribunal misapply s 362 of the RTRA Act?

[12] Section 362(3) of the RTRA Act requires a lessor to take all reasonable steps to mitigate loss or expense caused by the tenant's breach of the tenancy agreement. Ms Corcoran says the tribunal misapplied this section because it found, wrongly, that many of the matters for rectification were 'minor' matters.

[13] The tribunal, in considering s 362 said:

> So the Act is telling me that the order I should make, with respect to compensation to a landlord in these circumstances, is the least possible order that I could make.[5]

[14] The cases say something different:

> The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.[6]

and

> ... the claimant is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is entitled to be as extravagant as he pleases but not at the expense of the defendant.[7]

[15] It cannot be said that the duty to mitigate means that the tribunal must make the 'least possible order'. Instead, the tribunal was required to look at:

a) Did Ms Simon's loss cause Ms Corcoran loss?

b) Is Ms Corcoran's claim for damages reasonable?

c) Whether the steps Ms Corcoran took to mitigate further loss were reasonable.

[16] It is important to understand that the duty to mitigate loss, in the case of a residential tenancy claim, has two facets. Firstly, the tribunal must look at direct loss; the cost of making good the damage caused by the tenant to the property. Secondly, the tribunal must look at whether the lessor took reasonable steps to mitigate the potential for further loss, through loss of rent. This requires the tribunal to achieve a balance. What might be

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5 Transcript page 1-16, lines 26 – 28.

6 *British Westinghouse Electric and Manufacturing Co. Ltd. v Underground Electric Railways Co. of London Ltd* [1912] AC 673 at 689.

7 *Darbishire v Warran* [1963] EWCA Civ 2.

reasonable to make good direct loss might become unreasonable when looking at whether the loss of future rental income is reduced. The tribunal might, for example, find the cost of making good a direct loss is reasonable but, at the same time, find that the time taken to make good is not reasonable.

[17] The tribunal therefore erred in applying the 'least possible order' test. Applying the wrong test is a question of law. Where the appeal tribunal finds an error of law, it is governed by s 146 of the QCAT Act. Section 146 allows the tribunal to substitute its own decision but:

> Plainly, it is only if the determination of the question of law is capable of resolving the matter as a whole in the appellant's favour that the appeal tribunal will be in a position to substitute its own decision. Section 146, as already noted, does not entail any re-hearing of the matter, whether on the evidence below or on fresh evidence.[8]

[18] A proper application of the duty to mitigate damages does require a rehearing. Whether or not a person has taken reasonable steps is a question of fact[9] and the tribunal did not make any findings about the reasonableness of Ms Corcoran's actions. The proceeding should be returned to the tribunal for reconsideration in light of these reasons for decision.

Did the tribunal err in characterising the damage as 'minor'?

[19] Ms Corcoran claimed:

Turf reinstatement	$385.00
	$220.00
	$50.00
Exit clean	$510.00
Water delivery	$185.00
Repairs to walls	$275.50
Rent	$2,160.00

[20] The tribunal dealt with the claims for rent and cleaning and then characterised the balance of the claim as 'minor'.[10] The characterisation of a claim is not important: the tribunal was required to assess whether Ms Simon caused the damage claimed, whether Ms Corcoran was entitled to compensation and whether the claim for compensation could be substantiated by the evidence.

[21] The tribunal's reasons for decision state:[11]

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8 *Ericson v Queensland Building Services Authority* [2013] QCA 391 at [25].

9 *Sotiros Shipping Inc and Aeco Maritime SA v Sameiet Solholt (The Solholt)* [1983] 1 Lloyd's Rep 605 at 608.

10 Transcript page 1-16, line 33.

11 Transcript page 1-16, lines 34-40.

> …some of which are so minor as to wonder why the cost was spent to attend to then and others are not in the nature for which one would expect on a 50 acre rural property including sending tradesman back on more than half a dozen occasions in order to water two metres of turf. For that – for that – the landlord wants to charge the tenant the amount of time for the rent that it would have taken to do this. This could all have been done in a matter of days and it certainly did not prevent a tenant from entering the premises

[22] Again, the test for granting compensation is not whether the costs are 'so minor' but whether they were reasonably incurred, and/or whether they were reasonable steps to mitigate loss.

[23] There is no doubt the costs were incurred. The only question for the tribunal was whether the costs were reasonable and/or reasonable to mitigate the loss. The tribunal's comment that the damage did not prevent a (new) tenant from entering the premises might go to the question of reasonableness for the loss of rent claim, but it is difficult to see how all action to repair physical damage to the premises could be considered unreasonable. The tribunal was in error. Because it was an error of law, and the determination of the question required a rehearing, the matter should be returned to the tribunal for reconsideration.

Did the tribunal err in fact?

[24] The appeal tribunal will not usually disturb findings of fact on appeal if the evidence is capable of supporting the conclusions.[12] An appellate tribunal may interfere if the conclusion is 'contrary to compelling inferences' in the case.[13]

[25] Given my findings on the questions of law, it is inappropriate for me to consider this issue further. No doubt, the tribunal's findings of fact will be relevant when it reconsiders the issues of law.

Conclusion

[26] The tribunal erred in law in applying the principles of mitigation of loss. Leave to appeal is granted and the appeal allowed. The proceeding is returned to the tribunal for rehearing on the papers.

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

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