QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Kennett v Natwide Pty Ltd* [2016] QCATA 15
PARTIES:	**Andrew Kennett** **(Applicant/Appellant)** **v** **Natwide Pty Ltd** **(Respondent)**
APPLICATION NUMBER:	APL335-15
MATTER TYPE:	Appeals
HEARING DATE:	12 January 2016
HEARD AT:	Brisbane
DECISION OF:	**Justice Carmody**
DELIVERED ON:	22 January 2016
DELIVERED AT:	Brisbane
ORDERS MADE:	**THE APPEAL TRIBUNAL ORDERS THAT:** **1. Leave to appeal is refused.**
CATCHWORDS:	APPEAL – LEAVE TO APPEAL – where the applicant sought leave to appeal against a decision of a Magistrate ordering the applicants to pay the respondent monies relating to an irregular termination of a tenancy– whether leave to appeal should be granted. *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), ss 8, 26, 27, 142, 147, sch 3 *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld), s 188 *Bruce Moon v Office of State Revenue* (unreported, Queensland Civil and Administrative Appeal Tribunal, APL213-15, 4 December 2015, Carmody J) *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 62 ALR 53 *Chambers v Jobling* (1986) 7 NSWLR 1 *Dearman v Dearman* (1908) 7 CLR 549 *Devries v Australian National Railways*

Commission (1993) 177 CLR 427
Eileen Reed v Department of Public Housing and Works (unreported, Queensland Civil and Administrative Appeal Tribunal, APL484-15, 20 November 2015, President Thomas)
Fox v Percy (2003) 214 CLR 118
Hampton Court Ltd v Crooks (1957) 97 CLR 367
Mobile Building System International Pty Ltd v Hua [2014] QCATA 336
National Australia Bank Ltd v KDS Construction Services Pty Ltd (1987) 163 CLR 668
Park v Brothers [2005] HCA 73
Port Jacks Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd (1978) 139 CLR 231
Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham [2000] HCA 1
Reihana v Beenleigh Show Society [2015] QCATA 440
Service Board of New South Wales v Osmond (1986) 159 CLR 656,
Sun Alliance Insurance Ltd v Massoud [1989] VR 8
Wollongong v Metwally (No 2) (1985) 59 ALJR 481

APPEARANCES and REPRESENTATION (if any):

APPLICANT/APPELLANT A Kennett (self-represented)

RESPONDENT A Ward for the first respondent

REASONS FOR DECISION

[1] This is an application for leave to appeal, filed by the applicant on 25 August 2015, against the decision of Magistrate Carroll, exercising the minor civil dispute jurisdiction of QCAT, on 24 June 2015.

[2] The respondent was a tenant under a lease agreement in a property managed by the respondent real estate agent owned by a third party residing in the Hong Kong Special Administrative Region of the People's Republic of China.

[3] The respondent issued a Notice to Leave under the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) against the applicant. The applicant has not claimed that the Notice to Leave was defective, or that the issuing of the Notice to Leave was unlawful.

[4] The applicant failed to leave in accordance with the Notice to Leave and the respondent successfully obtained a warrant of possession to eject the applicant from the premises. The warrant of possession was executed on the premises on 2 June 2015, although the evidence indicates that the applicant left the premises between 29 May 2015 and 1 June 2015. The applicant notified the respondent of his departure on 1 June 2015.

[5] The respondent completed an exit inspection and identified certain defects in the condition of the premises which required restoration. The applicant was given an opportunity to correct some of the defects in the premises, but failed to avail himself of the opportunity.

[6] The respondent filed an application seeking compensation for the costs associated with restoring the premises to an appropriate condition before having the property leased to another tenant.

[7] On 24 June 2015 in MCDT156-15, the Magistrate ordered that the applicant pay the respondent:

1. $600.00 for cleaning of the premises;
2. $400.00 for repairs to fascia and eaves;
3. $340.50 for changing the locks;
4. $200.00 for the cost associated with replacing the clothesline (reducing the amount from $489.50 claimed because it was an older clothesline);
5. $220.00 for carpet cleaning;
6. $110.00 for flea fumigation (as required under the tenancy agreement, as the applicant was permitted to have an outside dog); and
7. $677.85 for outstanding rent for the period between 19 May 2015 and 1 June 2015 (the date on which the applicant informed the respondent that he had vacated the premises).

[8] The applicant filed an application for leave to appeal against the decision of the Magistrate on 25 August 2015, primarily on the basis of procedural unfairness.

JURISDICTION

[9] Sections 26, 27 and 142 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("QCAT Act") define the jurisdiction of the Appeal Tribunal. The Appeal Tribunal has jurisdiction to hear an appeal against a decision of the Tribunal, exercising its original jurisdiction,[1] if a judicial member did not constitute the Tribunal in the proceeding.[2]

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[1] See: *Mobile Bulding System International Pty Ltd v Hua* [2014] QCATA 336; *Eileen Reed v Department of Public Housing and Works* (unreported, Queensland Civil and Administrative Appeal Tribunal, APL484-15, 20 November 2015, President Thomas); *Bruce Moon v Office of State Revenue* (unreported, Queensland Civil and

[10] The applicant will require leave because the applicant is appealing a decision of the Tribunal exercising its minor civil dispute jurisdiction.[3]

PROCEDURE

[11] The grounds of appeal nominated by the applicant include questions of law, and mixed questions of fact and law. If leave to appeal is granted, the appeal must proceed by way of rehearing under s 147 of the QCAT Act.

[12] The Appeal Tribunal will not interfere with the findings of fact of the original decision-maker if the evidence is capable of supporting their conclusions.[4]

[13] However, if the Appeal Tribunal finds that the original decision-maker was in error, making due allowance for the considerable advantages of the original decision-maker in directly observing the evidence and the disadvantage of the Appeal Tribunal in proceeding primarily from the record, the Appeal Tribunal must not eschew give effect its own determinations.[5]

[14] If the findings of fact are based on evidence in respect of which the original decision-maker possesses a manifest and incontrovertible advantage, such as the credibility of witnesses appearing to give oral testimony, the Appeal Tribunal will only interfere with the decision of the original decision-maker where it is "contrary to compelling inferences",[6] "glaringly improbable",[7] or "inconsistent with facts incontrovertibly established by the evidence".[8]

GROUNDS OF APPEAL

[15] The applicant enumerated the following grounds of appeal:

1. the Magistrate erred by failing to provide the applicant with natural justice by:
    a) allocating insufficient time to determine the application;
    b) providing insufficient time for the applicant to make submissions;
    c) accepting evidence of certain invoices which the applicant had not received prior to the commencement of the proceedings;

Administrative Appeal Tribunal, APL213-15, 4 December 2015, Carmody J); *Reihana v Beenleigh Show Society* [2015] QCATA 440.

2 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act), s 142(1). Note that s 8 and Sch 3 of the Act define "judicial member" to exclude a Magistrate.

3 Ibid, s 142(3)(a)(i). "Minor civil dispute" is defined in s 8 and sch 3 of the QCAT Act. "Prescribed amount" is defined in s 8 and sch 3 of the QCAT Act as $25,000.

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

5 *Fox v Percy* (2003) 214 CLR 118, 218; *Chambers v Jobling* (1986) 7 NSWLR 1, 10.

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

7 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 62 ALR 53, 57.

8 *Devries v Australian National Railways Commission* (1993) 177 CLR 427, 479.

d) the invoices relied on were not sufficiently itemised;

e) the applicant was frequently prevented from presenting his case; and

f) the applicant did not understand the nature of the proceedings.

2. the Magistrate erred in failing to consider a relevant consideration, namely an affidavit filed by the applicant;

3. the Magistrate erred by making an allowance for the clothesline, keys, carpet cleaning, and pest control, when the premises was left in the same condition as when the applicant assumed possession;

4. the Magistrate failed to reduce the amount of compensation awarded for the clothesline because of its dilapidated condition; and

5. the Magistrate failed to provide adequate reasons.

First Ground of Appeal

[16] The applicant claims that the duration of the hearing was insufficient for a fair presentation of his case. The time for the hearing was 33 minutes – 4:48PM – 4:52PM, adjournment until 5:08PM, case closed at 5:37PM. This is sufficient for a minor tenancy dispute, involving standard claims for restoration of the property, where the property manager gave documentary evidence of most elements of the claim.

[17] The applicant claims that he was provided with insufficient time to present his case. Most of the facts and elements comprising of the claim were undisputed. The applicant appears to have been given an opportunity to respond to each item of the claim. The applicant's attention was specifically drawn to critical matters which may have changed the disposition of the claim. The Magistrate accepted the applicant's submissions on certain matters, including the dilapidated state of the clothesline.

[18] The applicant claims that the Magistrate erred by receiving invoices or quotes in respect of certain works performed which were not supplied to the applicant before the commencement of the proceedings.

[19] QCAT is not bound by the rules of evidence[9]. The Tribunal must ensure all relevant material is disclosed to the Tribunal to enable it to decide the proceeding with all the relevant facts[10]. It may admit evidence despite non-compliance with any time limit or other requirements under the QCAT Act or the QCAT Rules relating to the document or service of the document.[11]

[20] Page 4 of the Transcript demonstrates that any material – including invoices and quotes – were given to the applicant before the Tribunal adjourned at 4:52PM – 5:08PM. As the documents appear to have

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9 QCAT Act, s 28(1).
10 Ibid, s 28(3)(e).
11 Ibid, s28(4).

comprised of invoices for certain services rendered (and the applicant had previously been given quotes for most of the invoices), 16 minutes should have been sufficient for the applicant to consider the material. If it was not, the applicant might have requested and extended adjournment.

[21] It would have been erroneous for the Tribunal to refuse to admit invoices which established the actual cost of certain restoration works performed. There was no reason to doubt, or challenge, the veracity of the invoices. The applicant has not shown that any additional adjournment would have enabled him to more effectively present his case.

[22] The applicant claims that certain invoices were inadequately itemised. The Magistrate drew the respondent's attention to this fact, on the basis of the submissions of the applicant, on pages 6 and 7 of the Transcript. The applicant was able to explain the nature of the works performed, and the basis for costing, to the satisfaction of the Magistrate.

[23] The applicant claims that he was frequently prevented from presenting his case. The applicant points to para 41 of p 3, para 98 of p 5, para 153 of p 6, para 175 of p 7, of his prepared transcript attached to his submissions.

[24] In relation to paragraph 41, immediately after the interruption by the Magistrate, his Honour provides the applicant with an opportunity to explain his version of events. The interruption was to seek evidence to explain the ambiguous, and potentially misleading, response of the applicant.

[25] In relation to paragraph 98, the applicant was claiming to have left an exit condition report with keys to the premises, contrary to the submissions of the respondent. The exit condition report was not in issue; it was raised by the Magistrate only to identify evidence in respect of which the testimony of the applicant and respondent deviated. The Magistrate preferred the evidence of the respondent (the property manager). The Magistrate interrupted to draw the applicant's attention to the matter in dispute, namely whether the applicant had left the keys at the premises.

[26] In relation to paragraph 153, the applicant sought to draw the Magistrate's attention to his affidavit served on the respondent earlier on the day of the hearing. The applicant's prepared transcript deviates from the transcript prepared by Auscript, at lines 38 to 47 on page 19. It clearly demonstrates that the applicant had been given an opportunity to explain his delay in informing the respondent that he had cleaned the carpets. This caused the respondent, which was under a duty to ensure the carpets were adequately cleaned before the assumption of occupation by the next tenant, to have the carpets cleaned.

[27] In relation to paragraph 175, the Magistrate sought to draw the applicant's attention to the critical issue – that under cl 17.2 of his tenancy agreement, the applicant was required to have the property fumigated because he had a dog residing outside the premises. The applicant had been given an

opportunity to adduce evidence that he had fumigated the premises, and was given a further opportunity immediately thereafter.

[28] The applicant was provided with a sufficient opportunity to present his case. The interruptions by the Magistrate were not unreasonable, and were often designed to draw the applicant's attention to the critical issues in dispute. This did not amount to a deprivation of natural justice.

[29] The applicant claims that he was not given a sufficient opportunity to understand the proceedings, as required under s 29(1) of the QCAT Act. The applicant clearly understood the nature and effect of the proceedings before the Magistrate, making reference to the relevant tenancy agreement.

[30] There is nothing in the Transcript suggesting that the applicant was unfairly prejudiced in presenting his case by a lack of understanding of the proceedings.

[31] For the abovementioned reasons, there is no reasonable argument that the applicant was denied procedural fairness.

[32] Leave to appeal should be refused on this ground.

Second Ground of Appeal

[33] The applicant claims that the Magistrate failed to consider a relevant consideration, namely the affidavit provided by the applicant.

[34] The statements referred to by the applicant are not sufficient to establish that the Magistrate failed to consider the affidavit. Indeed, at different stages in the proceedings the Magistrate's attention as drawn specifically to the affidavit. I am satisfied that the Magistrate gave adequate consideration to the affidavits.

[35] Nevertheless, it is difficult to describe the Magistrate's alleged failure to consider the applicant's affidavit as a "failure to consider a relevant consideration". This ground of appeal ordinarily applies in respect of a failure to consider a relevant fact. An affidavit is not a fact, but evidence seeking to establish the existence of certain facts on which a party relies.

[36] Provided that all relevant facts were considered by the Magistrate, it does not matter whether such facts were put before the Magistrate in the form of a written affidavit or sworn oral testimony.

[37] The applicant has not identified any facts that the applicant claims the Magistrate failed to consider. It is not sufficient for the applicant to put forward a generalised complaint that the Magistrate failed to adequately consider the affidavit.

[38] The applicant was given a reasonable opportunity to provide oral submissions and testimony to the Magistrate, having regard to the nature of the matter. The Magistrate also admitted the affidavit into evidence.

[39] The applicant has failed to establish that the Magistrate failed to consider the affidavit, or that the applicant has been deprived of natural justice.

[40] Leave to appeal should be refused on this ground.

Third Ground of Appeal

[41] The applicant claims that the Magistrate erred by making an allowance for the:

1. clothesline;
2. keys;
3. carpet cleaning; and
4. flea fumigation.

because, under s 188(4) the applicant is only required to leave the premises and its inclusions, as far as possible, in the same condition they were at the start of the tenancy, fair wear and tear accepted.

[42] The Magistrate accepted the applicant's submission that the clothesline was aged. The Magistrate reduced the respondent's claim for replacement of the clothesline from $489.50 to $200.00. The entry condition report stated that the clothesline was in good condition and undamaged. At the end of the tenancy, the clothesline was damaged and non-operational. In such circumstances, it is reasonable to award $200.00 for the clothesline.

[43] The Magistrate found that the applicant had failed to return all keys to the premises. Although there was no list of keys, the Magistrate found in favour of the respondent's evidence that not all keys had been left. The Magistrate also observed that it would be absurd for the applicant to suggest that the respondent spontaneously decided to change all locks and keys, when all keys had been returned.

[44] The Magistrate accepted that the locks and keys had to be changed before the next tenant assumed exclusive possession, because it would otherwise present a significant security risk. This finding was open on the evidence, and is not a matter which relates to the state of the premises at the time of assuming occupation.

[45] The Magistrate found that the applicant should be required to compensate the respondent for the costs of carpet cleaning. The respondent contacted the applicant on 2 and 4 June 2015 to enquire as to whether the applicant had performed carpet cleaning. The applicant failed to respond. As the respondent was required to ensure the carpets were properly cleaned before the next tenant assumed occupation of the premises in mid-June 2015, the respondent arranged for carpet cleaning to be performed.

[46] At the hearing (24 June 2015), the applicant furnished an invoice indicating that he had arranged for the carpets to be cleaned on 29 May

2015. Although the Magistrate received the evidence, his Honour found that the applicant's failure to confirm that he had clean the carpets caused the respondent to arrange for professional cleaning. The Magistrate, therefore, allowed the applicant's claim for carpet cleaning.

[47] This finding was open on the evidence. The applicant had been invited twice to confirm that he had cleaned the carpets. The respondent was required to lease the premises to a new tenant as soon as practicable. This required professional cleaning of the carpets. Therefore, the delayed response of the applicant caused the respondent to incur an expense which otherwise need not have been incurred. The applicant has failed to adduce evidence that the carpet was in the same state as it was at the time of occupying the premises. Accordingly, it was open for the Magistrate to make an allowance for carpet cleaning in the order for compensation.

[48] The applicant claims the Magistrate should not require flea fumigation because there is no evidence that the premises had been fumigated before he assumed possession. The Transcript establishes the previous tenant did not have a dog. Clause 17.2 only requires flea fumigation if the tenant is permitted to maintain a dog at the premises. Therefore, even if the premises had not been fumigated prior to the applicant assuming possession, this does not diminish the obligation of the applicant to pay for fumigation.

[49] The applicant has failed to establish that the Magistrate failed to apply s 188(4) of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld) in quantifying the compensation payable by the applicant.

[50] Leave to appeal should not be granted on this ground.

Fourth Ground of Appeal

[51] The applicant claims that the Magistrate erred in failing to apply principles of depreciation in calculating the quantum of compensation payable for the damaged clothesline.

[52] The Magistrate is not required to perform a formal depreciation calculation to determine the compensation payable for an aged item in the premises.

[53] The Magistrate is only required to ensure that the respondent is placed in the position it would have been but for the applicant's failure to maintain the premises, without placing the respondent in a superior position.

[54] The Magistrate diminished the respondent's claim for compensation for the damaged clothesline by 59% on the basis that it was an aged fixture. In the circumstances, there is no evidence that this method of calculation is plainly unjust or otherwise manifestly unreasonable.

[55] Leave to appeal should not be granted on this basis.

Fifth Ground of Appeal

[56] The applicant claims that the Magistrate erred in failing to provide adequate reasons.

[57] The Tribunal, as a court of summary jurisdiction, is required to give reasons for decision, which are a regular concomitant of the judicial process.[12]

[58] Reasons ensure that an unsuccessful party understands the basis on which the Tribunal resolved their matter in a manner adverse to their submissions, and assist appellate tribunals in ascertaining the basis for the appealed decision. They promote judicial transparency and accountability in the administration of justice, whilst ensuring that justice is not only done, but seen to be done, by the participants and the wider community. Reasons assist a party in determining whether to appeal against the original decision.

[59] Adequate reasons require the Tribunal to disclose the essential links in their chain of reasoning that caused the Tribunal to reach its decision. As held in *Re Minister for Immigration & Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1, [65], the inverse of this proposition is that:

> [I]t is not necessary for the Tribunal to give a line-by-line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the Tribunal.

[60] Examining the Transcript, the Magistrate has sufficiently outlined the basis for his Honour's decision. Reasons were given throughout the course of the proceedings, and with the participation of the applicant. On occasion, the Magistrate invested special effort to ensure the applicant adequately understood the reasons for decision.

[61] Leave to appeal on this ground should be not be granted.

CONCLUSION

[62] The applicant has failed to establish a reasonably arguable case that the original decision of the Magistrate was infected by factual, legal or discretionary error.

[63] Accordingly, leave to appeal should be refused.

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12 *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8, 19; *Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 667.

ORDERS

[64] It is the decision of the Appeal Tribunal that leave to appeal is refused.