QCAT

Queensland **Civil and Administrative Tribunal**

CITATION:	*Arian v Lafaele & Moananu* [2016] QCATA 18
PARTIES:	**Younes Arian** **(Applicant/Appellant)** **v** **Tai Lafaele** **(First Respondent)** **Tessie Moananu** **(Second Respondent)**
APPLICATION NUMBER:	APL396-15
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 in MCDT97-15 setting aside an earlier decision of a Magistrate in the same matter and substituting a lesser monetary order – whether leave to appeal should be granted. *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), ss 8, 137, 139, 138, 142, sch 3 *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
Reihana v Beenleigh Show Society [2015] QCATA 170
Wollongong v Metwally (No 2) (1985) 59 ALJR 481

APPEARANCES and REPRESENTATION (if any):

APPLICANT/APPELLANT L Arian (self-represented)

RESPONDENT T Moananu for the first and second respondents.

REASONS FOR DECISION

[1] This is an application for leave to appeal filed by the applicant on 28 September 2015. The appeal relates to a decision of Magistrate Tonkin exercising the minor civil dispute jurisdiction of QCAT on 1 September 2015.

FACTUAL MATRIX AND PROCEDURAL HISTORY

[2] The applicant and Ms Tautua Tuvale ("Tuvale"), the mother of Ms Moananu (the second respondent), and Mr Michael Toma ("Toma"), entered into a tenancy agreement ("First Lease") at to lease the applicant's duplex Third Avenue, Caloundra. The duplex was divided into two living areas, styled 5A and 5B. The applicant resided in 5A, and Tuvale and Toma resided in 5B. The duration of the First Lease was 7 November 2014 to 6 June 2015.

[3] In early January 2015 Tuvale formed the intention to move to Wagga Wagga to reside with her son. Tuvale invited the respondents to assume ownership and administration of her cleaning business in Caloundra. The respondents agreed to this proposition.

[4] In January 2015, Tuvale informed the applicant of her intention to terminate the lease prior to its expiration. The applicant and Tuvale

entered into an informal collateral agreement whereby the respondents would enter into a lease agreement with the applicant.

[5] The respondents resided with Tuvale and Toma at the premises of the applicant on 14 January 2015. On 15 January 2015 the applicant and respondents signed the aforementioned lease agreement, commencing on 15 January 2015 and concluding 14 June 2015 ("Second Lease"). The respondents paid two weeks rent in advance, and the tenancy bond under the First Lease was transferred by Tuvale to the Second Lease.[1] Clause 15 of the Second Lease prescribed that only four (4) persons were permitted to reside in 5B under the tenancy agreements.

[6] The respondents claim that Tuvale was stricken by disease. As a result of Tuvale's condition, she could not travel to Wagga Wagga as intended on 15 January 2015. The respondents did not adduce medical evidence of her condition. The applicant claims the condition was fabricated to enable all family members to reside under one lease to ameliorate financial pressures.

[7] The applicant became agitated by the overcrowding of the premises. The relationship between the respondents and applicant deteriorated. Police were called to the premises on 17 January 2015.

[8] The applicant issued a Notice of Breach to the respondents on 18 January 2015 purporting to terminate the Second Lease.

[9] The applicant issued a further Notice of Breach to the respondents on 19 January 2015, asserting that the number of persons residing at the duplex exceeded the number permitted under Clause 15 of the Second lease.

[10] The applicant then purported to issue a Notice of Breach to Tuvale and Toma on 20 January 2015 claiming that:

1. the Second Lease had been terminated as a result of the failure of Tuvale and Toma to leave the premises on 15 January 2015;
2. the bond reverted to the First Lease as a result of the extinguishment of the Second Lease; and
3. they had failed to make any payments in satisfaction of their rent obligations since 16 January 2015.

[11] The applicant issued a second Notice of Breach to Tuvale and Toma on 23 January 2015 claiming that, under the First Lease, the conditions only permitted three (3) persons to reside at the premises. The applicant demanded Tuvale and Toma eject the first respondent from the premises.

[12] The applicant issued a third Notice of Breach to Tuvale and Toma on 27 January 2015 claiming they were in arrears of rent under the First Lease.

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[1] There was no legal transfer of the bond. On 22 January 2015 the Residential Tenancies Authority issued a notice that it held a bond of $1,480.00 issued in the name of Tuvale in favour of the applicant.

[13] On an unspecified date, the respondents entered into a lease agreement at another residence in Caloundra (the **"**Third Lease**"**). The respondents moved into the new dwelling on 30 January 2015. Evidence establishes that the respondents posted a bond for the Third Lease on 2 February 2015.

[14] The respondents claim to have surrendered possession of the premises under the Second Lease on an unknown date between 2 and 8 February 2015 by placing the keys in the mailbox of the applicant. The respondents did not adduce evidence of the date on which they returned the keys.

[15] On 12 February 2015 the applicant filed an application for a termination of the lease and issuing of the warrant of possession with QCAT. As the respondents had left the premises by this date, the respondents did not receive any notices relating to the tribunal proceedings.

[16] On 20 February 2015 the application was heard *ex parte*, and orders were handed down for the termination of the lease and the issuing of a warrant of possession.

[17] On 3 March 2015 the applicant wrote to the Magistrates Court at Caloundra stating that the warrant of possession was not executed, and that the tenants had moved out of the premises. The warrant of possession was returned by the applicant to the Magistrates Court.

[18] The applicant claims to have taken possession of the premises on 3 March 2015, the date on which the applicant wrote to the Magistrates Court. The applicant obtained a new tenant to lease the premises on 13 March 2015.

[19] The applicant filed a minor civil dispute application with QCAT on 25 May 2015. In the minor civil dispute application, the applicant nominated the respondents address as being at Third Avenue, Caloundra, despite being aware that the applicants had left the premises, at the latest, in March 2015.

[20] An attached ledger shows this claim comprised of:

1. property advertisement (amounting to one week's rent), $370.00;
2. unpaid rent in arrears between 30 January 2015 and 3 March 2015, $1,744.28;
3. loss of rent between 3 March 2015 and 13 March 2015, $528.57;
4. disposal of refuse left at the premises by the respondents, $122.00;
5. professional cleaning of the premises, $200.00;
6. filing fee, $46.00;
7. producing four keys for the premises, $18.20.

[21] The total outstanding items claimed amounted to $3,029.50. The applicant remained in possession of the respondents bond, amounting to

$1480.00. Therefore, the net quantum claimed by the applicant was $1,549.05.

[22] The application was heard on 8 July 2015 before a Magistrate at Caloundra. The respondents failed to appear, because the notices to attend were not sent to the address of the respondents as a result of the applicant's failure to nominate a correct address.

[23] The Magistrate found in favour of the applicant in the absence of the respondents, and ordered the respondents pay the applicant $1,654.05.

[24] The respondents filed an application to reopen the proceedings under s 138 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("QCAT Act") on 20 July 2015. The respondents made out a reopening ground under s 137 of the QCAT Act, which was that the proceedings were heard and determined in their absence.

[25] The Magistrate elected to reopen the proceedings, and the matter was listed on 1 September 2015. All parties entered an appearance.

[26] The Magistrate held that:

1. The amount claimed for the property advertisement was refused because this was not a break-lease case. The respondents had left as a result of the conduct of the applicant.
2. In relation to the unpaid rent between 30 January 2015 and 3 March 2015:
    a) The Magistrate was satisfied that the respondents had left the premises on or before 13 February 2015.
    b) The Magistrate allowed the full amount for rent between 30 January 2015 and 13 February 2015 ($740.00).
3. In relation to the loss of rent between 3 March 2015 and 13 March 2015**:**
    a) The Magistrate allowed this item of the claim in part.
    b) The Magistrate allowed 50% of the claim for loss of rent, amounting to $264.27.
4. The Magistrate refused the items claiming compensation for disposal of refuse and professional cleaning. The applicant failed to complete an entry condition report, and the applicant only completed the exit condition report on 3 March 2015.
5. The Magistrate allowed the filing fee of $46.00.
6. The Magistrate allowed the cost of producing new keys, amounting to $18.20.

[27] The Magistrate ordered that:

1. the respondents pay the applicant $1,068.47 in full satisfaction of the applicant's claim.

2. the applicant pay the respondents the bond of $1,480.00.

JURISDICTION

[28] Sections 26, 27 and 142 of the 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,[2] if a judicial member did not constitute the Tribunal in the proceeding.[3]

[29] The applicant will require leave to appeal against the decision of the Magistrate in MCDT97-15 because it is a decision of the Tribunal in a minor civil dispute proceeding.[4]

GROUNDS OF APPEAL

[30] The applicant has enumerated the following grounds of appeal:

1. the Magistrate erred by reopening the original decision and setting aside the original court order, dated 8 July 2015, requiring the respondents to repay the applicant $1,654.05;
2. the Magistrate erred by failing to allow the full value of rent between 13 February 2015 and 3 March 2015;
3. the Magistrate erred by failing to allow the claim for professional cleaning and the disposal of refuse;
4. the Magistrate erred by failing to allow the applicant to claim loss of rent between 3 March 2015 and 13 March 2015;
5. the Magistrate erred by requiring the applicant to repay the bond to the respondents.

PROCEDURAL LAW

[31] The applicant's enumerated grounds of appeal raise questions of fact, or mixed questions of law and fact. 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.[5]

[32] 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

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2 See: *Mobile Building 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 Administrative Appeal Tribunal, APL213-15, 4 December 2015, Carmody J); *Reihana v Beenleigh Show Society* [2015] QCATA 170.

3 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 142(1).

4 Ibid, s 142(3)(a)(i). "Minor civil dispute" is defined in s 8 and sch 3 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld). "Prescribed amount" is defined in s 8 and sch 3 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) as $25,000.

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

disadvantage of the Appeal Tribunal in proceeding primarily from the record, the Appeal Tribunal must not eschew give effect its own determinations.[6]

[33] 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",[7] "glaringly improbable",[8] or "inconsistent with facts incontrovertibly established by the evidence".[9]

ANALYSIS

First Ground of Appeal

[34] The first compound ground of appeal contains two distinct complaints:

1. the Magistrate erred by reopening the original decision; and
2. the Magistrate erred by setting aside the original decision.

[35] The Appeal Tribunal has no jurisdiction to hear and determine an appeal against a decision of the Tribunal, exercising original jurisdiction, to reopen a proceeding.[10] Therefore, the Appeal Tribunal has no jurisdiction to hear the first limb of the first ground of appeal nominated by the applicant.

[36] The second limb of the first ground of appeal is an unparticularised complaint against the decision to set aside the original decision. This limb is vague or uncertain, and alleges no substantive factual or legal error.

[37] Leave to appeal should not be granted on the first ground of appeal.

Second Ground of Appeal

[38] The second ground of appeal asserts that the Magistrate erred by failing to allow the full claim for rent between 30 January 2015 and 3 March 2015.

[39] The Magistrate found that the respondents had surrendered possession of the premises, at the latest, on 13 February 2015.

[40] This is a finding of fact based on an assessment of the credibility and reliability of oral testimony presented by the applicant and respondent, and the unlikelihood of the respondents continuing to occupy the applicant's residence when they had entered into the Third Lease.

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6 *Fox v Percy* (2003) 214 CLR 118, 218; *Chambers v Jobling* (1986) 7 NSWLR 1, 10.
7 *Chambers v Jobling* (1986) 7 NSWLR 1, 10.
8 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 62 ALR 53, 57.
9 *Devries v Australian National Railways Commission* (1993) 177 CLR 427, 479.
10 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 139(5).

[41] This finding was open on the evidence adduced during the hearing, and is not glaringly improbable, contrary to compelling evidence, or otherwise unreasonable.

[42] Leave to appeal should not be granted on the second ground of appeal.

Third Ground of Appeal

[43] The third ground of appeal asserts that the Magistrate erred by failing to allow the claims for professional cleaning or the disposal of refuse.

[44] The applicant failed to complete an entry condition report. The applicant did not complete an exit inspection until 3 March 2015. The exit inspection was not performed in the presence of the respondents, and the results of the exit inspection were not supplied to the respondents before the claim.

[45] The photographic evidence adduced by the applicant in the original proceedings do not have a timestamp. There is no evidence of the date on which the photographs were taken, aside from the oral evidence of the applicant. The applicant has adduced further photographic evidence on appeal which is new, not fresh, evidence and should not be admitted.

[46] The applicant has failed to establish that the respondents did not leave the premises in an appropriate condition on leaving the premise.

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

Fourth Ground of Appeal

[48] The fourth ground of appeal asserts that the Magistrate erred by allowing only 50% of the claim for loss of rent between 3 and 13 March 2015.

[49] The Magistrate was satisfied that:

1. this was not a break-lease situation – the respondents left the premises on the insistence of the applicant; and
2. the respondents left the premises on or before 13 February 2015.

[50] There was no basis for the Magistrate to grant compensation for any economic loss after 13 February 2015. Any allowance for loss of rent after 13 February 2015 constitutes an error of law.

[51] The applicant has established that the Magistrate committed legal error by allowing 50% of the claim for loss of rent between 3 and 13 March 2015.

[52] However, the error of law favoured the applicant, not the respondents.

[53] The respondents have not filed a cross-appeal against the decision of the applicant. Indeed, this error was not pressed in the submissions filed by the respondents with the Appeal Tribunal.

[54] It would be inappropriate for the Appeal Tribunal to allow the appeal and reduce the monetary award in favour of the applicant on this ground as it would have the effect of taking the applicant unfairly by surprise.

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

Fifth Ground of Appeal

[56] The fifth ground of appeal is that the Magistrate erred by requiring the applicant to pay the full value of the bond to the respondents.

[57] The applicant submits, for the first time on appeal, that the applicant had corresponded with the Residential Tenancies Authority regarding the bond posted by Tuvale. The applicant claims that the Residential Tenancies Authority found in favour of the applicant, and deposited the full value of the tenancy bond into the applicant's personal financial account.

[58] An appellant cannot raise a point or objection for the first time on appeal,[11] unless the evidence for the point has been established beyond controversy, or the point is one of law or construction which is incontrovertibly correct.[12]

[59] Appellate courts are more reluctant to allow a point or objection for the first time on appeal if it was either expressly, or in effect conceded, in the proceedings below.[13]

[60] The applicant did not raise this point, or adduce any evidence in support of this argument, in the original proceedings. The applicant, in effect, conceded this point in his application by reducing the amount claimed against the respondents by the amount retained in the form of a bond.

[61] The Appeal Tribunal should not allow this point to be raised for the first time on appeal, when there have been two prior hearings in the original jurisdiction within which the applicant effectively conceded that the amount claimed should be reduced by the value of the bond retained. Further, the applicant has not adduced evidence of the decision of the Residential Tenancies Authority, nor any correspondence with the Authority.

[62] Even if the applicant possessed the ability to adduce such evidence, it would be new, not fresh, evidence, and therefore would require leave of the Tribunal. The Appeal Tribunal would be unlikely to grant leave because the evidence could have been obtained through the exercise of reasonable diligence in the original proceedings, unless the applicant could show a refusal to admit such evidence would result in gross injustice.

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11 *Park v Brothers* [2005] HCA 73; *Wollongong v Metwally (No 2)* (1985) 59 ALJR 481, 483.

12 *National Australia Bank Ltd v KDS Construction Services Pty Ltd* (1987) 163 CLR 668, 679-680; *Hampton Court Ltd v Crooks* (1957) 97 CLR 367.

13 *Port Jacks Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231, 241, 283-284.

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

CONCLUSION

[64] The applicant has failed to establish a reasonably arguable case that the decision of the Magistrate in MDCT97-15 was infected by legal or factual error in relation to the first, second, third and fifth grounds of appeal.

[65] Although there is a reasonably arguable case that the Magistrate erred by making any allowance for rent between 3 and 13 March 2015, any such error was in favour of the applicant. Therefore, this caused no substantial injustice to the applicant.

[66] Leave to appeal should be refused.

ORDERS

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