

CITATION: *Menso v Devir & Anor* [2017] QCATA 80

PARTIES: Michael Menso
Maria Menso
(Applicants/Appellants)
V
John Devir
Beverley Campbell
(Respondents)

APPLICATION NUMBER: APL088-17

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Senior Member Stilgoe OAM**

DELIVERED ON: 20 July 2017

DELIVERED AT: Brisbane

ORDERS MADE: **1. Leave to appeal refused.**

CATCHWORDS: APPEAL – LEAVE TO APPEAL – LANDLORD AND TENANT – RESIDENTIAL TENANCIES LEGISLATION – OTHER MATTERS – where lessor had contracts of sale requiring vacant possession – where tenants still in possession at settlement – where lessors had to pay buyer compensation for extended settlement date – where lessors claimed reimbursement of compensation from tenants – where tribunal refused compensation – whether grounds for leave to appeal

Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 70(1)(b), s 70(2), s 286, s 362

Pickering v McArthur [2005] QCA 294

APPEARANCES:

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] Michael and Maria Menso had a contract for the sale of their house at Beachmere. Unsurprisingly, the buyer wanted vacant possession. Settlement was scheduled for 22 February 2016.
- [2] John Devir and Beverley Campbell were tenants of the house, under a written tenancy agreement due to expire on 17 February 2016. On 3 December 2015, Mr and Ms Menso gave the tenants a notice to remedy breach, stating that the tenants were operating a business from a residential premises without the necessary permission. On the same date, Mr and Ms Menso issued a notice to leave, based on the alleged breach, requiring the tenants to leave by 17 February 2015. On 21 December 2015, Mr and Ms Menso gave the tenants a notice of intention to sell the house. That form does not operate to give tenants notice of a need to vacate the house.
- [3] The tenants left the property on 29 February 2016. Consequently, Mr and Ms Menso could not give the buyer vacant possession on the proposed settlement date of 22 February 2016. The buyer agreed to extend the date for settlement by a month if Mr and Ms Menso paid \$4,653 compensation. They did agree. They then wanted to recover the buyer's compensation from the tenants. The tribunal refused to order in favour of Mr and Ms Menso.
- [4] The Mensos want 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
- [5] There are two grounds of appeal. Firstly, the Mensos say that the tribunal failed to consider the application of s 362 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld). Secondly, they say the tribunal erred in finding that the tenants were entitled to stay beyond the expiry date of the tenancy and in finding that this fact was immaterial to Mr and Ms Menso's duty to mitigate.

Did the tribunal fail to consider s 362 of the *Residential Tenancies and Rooming Accommodation Act*?

- [6] The answer to this ground of appeal must, categorically, be 'no'. The tribunal gave detailed reasons as to why s 362 did not apply in this case.³
- [7] In any event, Mr and Ms Menso's reference to s 362 was misleading. They wanted to rely on s 362 as a basis for claiming compensation⁴ whereas

¹ QCAT Act, s 142(3)(a)(i).

² *Pickering v McArthur* [2005] QCA 294, [3].

³ Transcript page 1-15, line 20 to page 1-16, line 6.

⁴ Transcript page 1-8, lines 45 – 47.

the section sets out a party's duty to mitigate loss if there is a breach of the tenancy agreement.

Did the tribunal err in finding that the tenants were entitled to stay beyond the expiry date?

- [8] The tribunal told the parties that a tenant staying in a tenancy after the expiry date is not a breach of the tenancy agreement, but merely a trigger point for further action.⁵
- [9] That statement is not strictly true. The *Residential Tenancies and Rooming Accommodation Act* contemplates tenants holding over – staying in a tenancy after the expiry date⁶ but only if no notice to leave was given.⁷
- [10] Mr and Ms Menso gave the tenants a notice to leave but it was not a valid notice to leave. It nominated a breach of the tenancy agreement as the reason for the notice but the tenants had not been given appropriate notice. Mr and Ms Menso did not, as they were entitled to do, give a notice to leave because the property had been sold.⁸ They did not give a notice to leave without grounds. Therefore, the tenants were entitled to hold over the lease after the agreement expired.

Was the tenants' continued occupation of the premises irrelevant?

- [11] The tribunal found that the tenants' continued occupation was irrelevant to Mr and Ms Menso's claim for compensation because they were not in breach of their tenancy agreement.⁹
- [12] As I have already identified, the tribunal's finding on that point was correct. Therefore, the tenants' continued occupation of the tenancy was not a relevant consideration. The tribunal's failure to consider this issue was not an error for which leave to appeal should be granted.
- [13] Mr and Ms Menso failed to manage their affairs in a way that would have ensured they could give vacant possession at settlement. The tenants should not have to compensate Mr and Ms Menso for their errors.
- [14] Leave to appeal is refused.

⁵ Transcript page 1-15, lines 18 – 20.

⁶ *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld), s 70(2).

⁷ *Ibid*, s 70(1)(b).

⁸ *Ibid*, s 286.

⁹ Transcript page 1-16, lines 9 -11.