

CITATION: *Dein v Place Estate Agents* [2018] QCATA 78

PARTIES: Hugo Dein
(First appellant)
and
Nuala Dein
(Second appellant)
v
Place Estate Agents
(Respondent)

APPLICATION NUMBER: APL285-17

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Member Howe**

DELIVERED ON: 25 May 2018

DELIVERED AT: Brisbane

ORDERS MADE: **The application for leave to appeal is refused.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – where application for leave to appeal – where lessor’s claim to bond which was already distributed by RTA – whether claim reasonably to be understood as claim for arrears of rent – where tenants breached tenancy agreement by leaving early – where tenants claimed lessor failed to mitigate loss by reducing rent in timely fashion – where tenant has onus of proof on issue of mitigation – where lessor conceded an amount to the tenant and tribunal accepted such as an equivalence to potential saving to the tenant from possible mitigation

ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where there are no pleadings in the tribunal

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 3, s 28(3)(b), 28(3)(c), 28(3)(d), s 142(3)(a)(i)
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 185, s 362

Currie v Dempsey (1967) 69 SR (NSW) 116
Pickering v McArthur [2005] QCA 294
Thompson and Anor v Jedanhay Pty Ltd [2012] QCATA 246

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

Background

- [1] The appellants were tenants of a property at Indooroopilly. They first commenced their tenancy in 2013. Their last residential tenancy agreement was executed in December 2015 for the period 4 February 2016 through to 6 February 2017. The rent was \$950 per week.
- [2] The tenants decided to purchase a property. They gave notice of intention to leave the rented premises on 14 September 2016, effective for 16 October 2016, and they left on that date.
- [3] Another tenant was not found for the premises until 3 December 2016. The tenants had paid rent through to 24 October 2016. There was a bond of \$4,000 held by the Residential Tenancies Authority (RTA). The RTA gave notice of its intention to pay that out and the bond was refunded to the tenants because the lessor's agent became ill and did not claim any part of the bond within time.
- [4] The lessor through the agents filed an application in the tribunal. The claim was stated to be for the bond of \$4,000, but the application noted rental arrears of \$5,428.57.
- [5] The matter was heard by the tribunal on 10 August 2017 and an order was made that the tenants pay the lessor the sum of \$4,000 within 60 days of order.
- [6] The tenants have applied for leave to appeal the decision and to appeal.

- [7] Given this is an appeal from a decision made in the tribunal's Minor Civil Dispute jurisdiction, leave to appeal must first be obtained before any appeal proceeds.¹
- [8] Leave to appeal will usually only be granted where an appeal is necessary to correct a substantial injustice to the appellant and where there is a reasonable argument that there is an error to be corrected.²
- [9] As in many matters before the tribunal where parties are self-represented, the grounds of appeal are very broadly stated and must be translated in a fashion to make legal sense. Accordingly the grounds of appeal appear to be as follows:
- Ground 1 The tribunal erred in determining the respondent's claim as one for rent due of \$4,000 when the claim in the application was for return of a bond; and
- Ground 2 The tribunal erred in failing to take into account the failure of the lessor to mitigate the lessor's loss by making repairs to the rented premises.

Ground 1

The tribunal erred in determining the respondent's claim as one for rent due of \$4,000 when the claim in the application was for return of a bond.

- [10] The tribunal does not use pleadings. The issues for determination are usually determined by considering the statements of evidence filed by parties.³ In minor civil dispute matters, parties seldom file formal statements of evidence, and the issues for determination are often gleaned from a combination of statements made in the application itself and from the contents of attached documents.
- [11] The tribunal is required by the objects provision of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') to deal with matters in a way that is accessible, fair, economical, informal and quick.⁴
- [12] By s 28(3)(b),(c) and (d) of the Act the tribunal is not bound by the rules of evidence or the practice or procedures applying to courts and may inform itself in any way it considers appropriate and must act with little formality.
- [13] Here at page 3 of the application, the agent sought on behalf of the lessor a 'Tribunal order for payment of bond' and the total amount of the claim is then stated to be \$4,000. In the application it says beneath that 'If you are claiming for compensation (which includes rent) or the rental bond, you

¹ QCAT Act, s 142(3)(a)(i).

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

³ *Thompson and Anor v Jedanhay Pty Ltd* [2012] QCATA 246, [22].

⁴ QCAT Act, s 3(b).

must also complete the following list of claims and attach any relevant documents.'

- [14] Under that sub-heading, the agent has added 'Rent Arrears \$5,428.57 Rental Ledger.'
- [15] On the next page, the form asks what the reasons are for seeking the orders. Here, the agent states 'This application is seeking ... the return of the bond amount of \$4,000.' The explanation continues with the statement that the bond has been returned to the tenants but the tenants owe more than the \$4,000 bond amount. The agent concludes 'I am seeking a tribunal order of the repayment of bond as funds are still outstanding for rental arrears.'
- [16] The relief sought is for the return of the 'bond' of \$4,000 but, it is clear from a reasonable reading of both pages 3 and 4 of the application that the issue to be determined was really the lessor's claim to arrears of rent reduced from the amount outstanding of \$5,428.57 to the amount sought of \$4,000..
- [17] This indeed was the issue determined by the tribunal at hearing. What was unclear from the application was whether the lessor's claim was for the full amount of the arrears of rent said to be outstanding, \$5,428.57, or whether the lessor was abandoning any excess over the amount of the bond amount which had been \$4,000. The agent said the excess was being abandoned and what was sought was only \$4,000.
- [18] The tribunal understood the issue for determination and made a determination about that issue, and such issue would have been readily apparent to any reasonable person reading the initiating application.
- [19] The appellants have no real prospect of success under this ground of appeal.

Ground 2

The tribunal erred in failing to take into account the failure of the lessor to mitigate the lessor's loss by making repairs to the rented premises.

- [20] By s 362 of the *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)* ('RTRAA'), both lessor and tenant have a duty to take all reasonable steps to mitigate their loss or expense caused by the other party's act or omission.
- [21] The lease here was not due to expire until 6 February 2017. The tenants gave notice on 14 September 2016 of their intention to vacate on 16 October 2016. They did vacate on that date. A new tenant was found for the property from 3 December 2016.
- [22] Generally, the lessor would have been entitled to claim rent from the old tenants up to the date the new tenant entered into occupation. The

tenants argued the lessor failed to mitigate loss by reducing rent in timely fashion. As stated in *Currie v Dempsey*:⁵

The burden of proof in the sense of establishing a case, lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, e.g., if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, prima facie, the plaintiff has.

- [23] It was therefore up to the tenants to prove the lessor's failure to mitigate.
- [24] The agents erected a sign in front of the property, presumably advertising its availability for rent, approximately 7 days after the tenants gave notice of intention to leave. The tenants say they telephoned the agents and told them at about this time that they would pay two weeks rent for any new tenant who took over the lease. They said that was because they had 'feedback' that the property was not worth the rent they were paying. They do not say who gave them that feedback. They say mention was made of such things as lack of painting, old ceiling fans and 'just maintenance of the property.'
- [25] They say they also offered to pay an extra \$200 per week until the end of the year to reduce the rent for any future tenants. That offer was not taken up.
- [26] The tenants had the property professionally cleaned, though that was not a requirement under the tenancy agreement. The tenants say they stopped paying rent, apparently on 24 October 2016, which was only a week after they vacated. The tenants claim if the lessor had reduced the rent or allowed the tenants to pay some of the rent (presumably for a replacement tenant) the property may have been rented before 3 December 2016.
- [27] The tenants give no particulars about the maintenance that was not provided. They give no particulars how the rent is excessive. There is no evidence of comparable properties. There was apparently no photographic evidence to support the claim to lack of maintenance of the property.
- [28] It would be a most singular concept that a lessor's duty to mitigate loss generally requires a lessor to spend money to renovate the leased property beyond that condition accepted by the tenant under the tenancy agreement where the tenant breaches it by vacating early.

⁵ (1967) 69 SR (NSW) 116, 125.

- [29] There is no evidence of any application by the tenants to the tribunal under s 185 of the RTRAA for any breach of the lessor during the tenancy of its duty to maintain the leased property.
- [30] Where tenants give notice of intention to break their lease, but they intend to stay in the property for some period, as here, their continued presence is often a bar to finding another tenant prepared to let the property with the previous tenants still in it.
- [31] Further, it should be noted, in break lease situations, it is not always the case that a lessor must immediately reduce rent to attract a new tenant. If the rent under the tenancy agreement is a reasonable rent in the circumstances, the property may appropriately be relisted at the same rent. If the property does not rent within a reasonable period, then it may be appropriate to reduce the rent claimed. If the rent is reduced to entice another tenant, it may be the case that the difference between the rent previously payable under the old tenancy agreement and the lower rent payable under the new tenancy agreement is able to be claimed by the lessor from the old tenant for the balance of the term of the old tenancy. This gap was not claimed against the tenants here.
- [32] The agent found a new tenant within 6 weeks of the respondent tenants leaving. Again, that of itself does not mean excessive delay in finding a tenant on the part of the lessor. There are many similar break lease situations before the tribunal where the relet period exceeds that due to a variety of factors, including seasonal demand and geographical issues.
- [33] The agent's evidence was that the rent was reduced by the lessor from \$950 per week to \$800 per week. Neither party knew when the rent was reduced.
- [34] It was in these circumstances that the tribunal concluded that had the rent been reduced to \$800 per week from the first re-listing of the property it could perhaps reasonably be assumed to have resulted in the property being rented out one week earlier than was the actual case. But given the lessor's claim against the tenants for arrears of rent was reduced from \$5,428.57 to \$4,000, a difference of \$1,428.57, that amount was more than sufficient compensation or equivalence to any saving the tenants would have achieved had the rent been reduced from outset.
- [35] As the tribunal said, all this was a matter of some conjecture. The onus of proving that the lessor failed to mitigate loss was on the tenants. In the circumstances the tenants failed to do this, or at least failed to establish that their loss exceeded the concession as to rent allowed by the lessor.
- [36] In these circumstances, I cannot see that the tribunal below made any error in concluding the sum of \$4,000 claimed from a possible \$5,428.57 arrears of rent was due the lessor.

- [37] There are limited prospects of success in respect of this second ground of appeal.
- [38] In respect of both grounds of appeal, there being no error disclosed in the reasoning of the tribunal, the application for leave to appeal is dismissed.