

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Hiscox v PBG Realty* [2019] QCATA 112

PARTIES: **JOEDI HISCOX**
(appellant)

v

PBG REALTY
(respondent)

APPLICATION NO/S: APL262-18

ORIGINATING APPLICATION NO/S: MCDT1297/18 (Brisbane)

MATTER TYPE: Appeals

DELIVERED ON: 29 July 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Gordon

ORDERS: **Leave to appeal against the decision made on 26 July 2018 in MCDT1297/18 (Brisbane) is refused. The appeal fails.**

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN NO APPEAL LIES – leave to appeal – where it is said an Adjudicator should have found differently about a listing on the TICA tenancy database – whether any reasonably arguable grounds of appeal

LANDLORD AND TENANT – RESIDENTIAL TENANCIES LEGISLATION – OBLIGATIONS, PROHIBITED MATTERS AND PROTECTION FOR LESSEES – OTHER MATTERS – where the tenant was listed on the TICA tenancy database – whether there was an approved reason for listing

LANDLORD AND TENANT – RESIDENTIAL TENANCIES LEGISLATION – OBLIGATIONS, PROHIBITED MATTERS AND PROTECTION FOR LESSEES – RENT – where the tenant gave a notice of intention to leave and then vacated the premises – where the grounds on the notice were not recognised by the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) – whether the residential tenancy agreement ended having regard to section 277 of the Act – whether

the tenant's rent obligation continued

Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 277, s 302 – 308, s 327, s 331, s 424, s 459
Residential Tenancies and Rooming Accommodation Regulation 2009 (Qld), s 13 - 19
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 13

REPRESENTATION:

Appellant: Self-represented

Respondent: No appearance

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*

REASONS FOR DECISION

- [1] This is an appeal from a decision of an Adjudicator in a residential tenancy matter. Joedi Hiscox was the tenant of rental premises. He broke his lease and some money was owing to the lessor. Because of this, the property manager listed the tenant on the TICA tenancy database.
- [2] The tenant applied to the tribunal to have the listing removed on the basis that the listing was for rent arrears and there were no such arrears, and there were insufficient grounds to make the listing.
- [3] An Adjudicator heard the tenant's application on 26 July 2018. At the hearing the following facts were agreed. The tenant occupied the premises under a residential tenancy agreement which had a fixed term expiring on 11 October 2018. On 11 November 2017 the tenant gave the lessor's agent a notice of intention to leave with a handover day of 1 December 2017. The tenant vacated the premises on the handover day. The premises were relet with the new tenant paying rent from 18 January 2018.
- [4] The Adjudicator found that the tenant owed money to the lessor in respect of the period up to when the new tenant started to pay rent. It is not suggested in this appeal that this finding was incorrect or that the amount of rent calculated as owed was less than the minimum required to permit a listing on the tenancy database.
- [5] At the hearing the tenant relied on written and oral submissions. The particular point being made in these submissions was that he had no obligation to pay rent after he vacated on 1 December 2017. Instead, any amount owing to the lessor after that date was 'compensation' and not 'rent'. It was said that in those circumstances, the only way the lessor could lawfully list the tenant was to obtain a tribunal order for payment of such compensation and this had not been done.
- [6] The Adjudicator dismissed the application. This meant that the tenant's listing remained.

- [7] The tenant now appeals against that decision. The grounds of appeal which appear from the application for leave to appeal or appeal, and the submissions submitted to the Appeal Tribunal, are that the Adjudicator was in error in not accepting the point being made in the submissions. It is said that instead of concentrating on whether the tenant owed money to the lessor he should have considered whether the statutory requirements had been met.
- [8] The tenant's submissions cited the relevant law in section 459 of the *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)* ('RTRAA') and in the *Residential Tenancies and Rooming Accommodation Regulation 2009 (Qld)*.
- [9] In order to deal with this appeal I need to do the same.
- [10] First there is section 459 of the RTRAA which provides:-

459 Restriction on listing

- (1) A person must not list personal information about another person in a tenancy database unless—
- (a) the other person was named as a tenant in a residential tenancy agreement; and
 - (b) the agreement has ended; and
 - (c) there is a reason prescribed under a regulation for listing the information; and
 - (d) the tribunal has not made an order under section 245(6) prohibiting the listing of the information.
- (2) Without limiting subsection (1), the person must not list personal information about the other person on a tenancy database unless—
- (a) the person has without charging a fee, given the other person a copy of the personal information or taken other reasonable steps to disclose the personal information to the person; and
 - (b) the person has given the other person at least 14 days to review the personal information and make submissions objecting to its entry into the database or about its accuracy, completeness or clarity; and
 - (c) the person has considered any submissions made.

Maximum penalty—20 penalty units.

- (3) The person does not commit an offence under subsection (2) if the person cannot locate the other person after making reasonable enquiries.
- (4) The person is not required to give an opportunity to review or consider submissions made under subsection (2) if—
 - (a) the personal information, at the time of the listing, is contained in publicly available court or tribunal records; or

- (b) the listing involves only an amendment of the personal information under section 461.
- (5) A person must not list personal information about another person if the person is aware that the personal information is inaccurate, incomplete, ambiguous or out of date.

Maximum penalty—20 penalty units.

[11] Paragraph (c) of subsection (1) above requires that there is a reason prescribed by a regulation for the listing of the information. This is a reference to the *Residential Tenancies and Rooming Accommodation Regulation 2009* (Qld). The relevant provisions are set out below:-

Part 4 Approved reasons for listing personal information on a tenancy database

Division 1 Preliminary

13 Purpose of pt 4

The purpose of this part is to prescribe, for section 459(1)(c) of the Act, the reasons for which personal information about a person (the *relevant tenant*), who was a person named as a tenant in a residential tenancy agreement (the *relevant agreement*) that has ended, may be listed on a tenancy database.

14 Amount owing for particular approved reasons

- (1) This section applies to an approved reason stated in division 2 if the reason relates to an amount owed by the relevant tenant.
- (2) The approved reason applies only if the amount owed by the relevant tenant is more than the sum of—
 - (a) the minimum prescribed amount; and
 - (b) the amount stated for a tenancy guarantee, if any, applying to the relevant agreement.
- (3) In this section—

minimum prescribed amount means—

 - (a) if the relevant tenant has paid the rental bond amount for the relevant agreement—the amount of the rental bond paid by the relevant tenant; or
 - (b) otherwise—the amount of 1 week of rent under the relevant agreement.

Note—

See section 180 of the Act for information about tenancy guarantees.

Division 2 Approved reasons

15 Unpaid rent

A reason for listing personal information about the relevant tenant on a tenancy database is—

- (a) the lessor under the relevant agreement gave the relevant tenant, under section 280 of the Act, a notice requiring the relevant tenant to remedy a breach of the relevant agreement relating to unpaid rent; and
- (b) the relevant tenant failed to comply with the notice within the allowed remedy period; and
- (c) the relevant tenant owes all or some of the amount to the lessor.

16 Amount owing under a conciliation agreement or tribunal order

A reason for listing personal information about the relevant tenant on a tenancy database is—

- (a) the relevant tenant owes an amount to the lessor under the relevant agreement, arising from the relevant agreement, that the relevant tenant—
 - (i) agreed to pay under a conciliation agreement; or
 - (ii) was ordered to pay by a tribunal; and
- (b) the time for paying the amount, under the conciliation agreement or tribunal order, has passed.

17 Amount owing after abandonment

- (1) A reason for listing personal information about the relevant tenant on a tenancy database is—
 - (a) the relevant tenant abandoned the premises that were occupied under the relevant agreement; and
 - (b) the relevant tenant owes an amount, under the relevant agreement, to the lessor under the relevant agreement.
- (2) However, subsection (1) does not apply if the relevant tenant has made an application to a tribunal under section 356 of the Act that has not been finally dealt with.

18 Objectionable behaviour

A reason for listing personal information about the relevant tenant on a tenancy database is that, on an application by the lessor under the relevant agreement, a tribunal has made a termination order for the relevant agreement under section 345 of the Act.

19 Repeated breaches

A reason for listing personal information about the relevant tenant on a tenancy database is that, on an application by the lessor under the relevant agreement, a tribunal has made a termination order for the relevant agreement under section 347 of the Act.

[12] In the hearing before the Adjudicator, the tenant correctly submitted that regulation 16 could not be relied on to support the listing because there was no tribunal order. And regulation 17 cannot apply to a situation as here, where the tenant had given notice of an intention to leave and left on the stated handover day, because in those circumstances it cannot be said that the tenant abandoned the premises.¹ So the only possible reason which could apply said the tenant, was regulation 15 but that didn't apply because there was no 'unpaid rent', the rent obligation having ceased and any money owed as a result of the break lease being 'compensation' and not 'rent'. This point is also being made in this appeal.

[13] This argument however, ignores the express provisions of the RTRAA.

[14] Firstly, the definition of 'rent' in the dictionary is:-

rent means—

- (a) an amount payable by a tenant under a residential tenancy agreement for the right to occupy residential premises as a residence; or
- (b) an amount payable by a resident under a rooming accommodation agreement for the provision of accommodation and any other service provided under the agreement.

[15] The question is therefore whether the obligation to pay the amount payable by the tenant under the residential tenancy agreement (the rent) ended at any time, and if so, when. For this we turn to section 277 of the RTRAA:-

277 Ending of residential tenancy agreements

- (1) A residential tenancy agreement ends only in a way mentioned in this section.
- (2) A residential tenancy agreement ends by written agreement of the lessor and tenant.
- (3) A residential tenancy agreement ends if—
 - (a) the lessor gives a notice to leave the premises to the tenant; and
 - (b) the tenant hands over vacant possession of the premises on or after the handover day.

Notes—

1 See section 326 for requirements for the notice.

2 See sections 329 and 330 for requirements about the handover day.

- (4) A residential tenancy agreement ends if the tenant—
 - (a) gives a notice of intention to leave the premises to the lessor; and
 - (b) hands over vacant possession of the premises on or after the handover day.

¹ The word 'abandoned' has its ordinary meaning in the RTRAA. It is not defined, except that section 355(5) of the RTRAA gives a list of things which would reasonably indicate abandonment.

Notes—

1 See section 327 for requirements for the notice.

2 See sections 331 and 332 for requirements about the handover day.

- (5) A residential tenancy agreement ends—
- (a) if a tribunal makes an order terminating the agreement;
- or
- (b) if the tenant abandons the premises.

Notes—

1 See chapter 5, part 1, division 6 for the making of termination orders by the tribunal.

2 See chapter 5, part 1, division 8 for alternative procedures the lessor needs to follow in the case of abandonment of the premises.

- (6) A residential tenancy agreement ends if, after receiving a notice from a mortgagee under section 317, the tenant vacates, or is removed from, the premises.
- (7) If a sole tenant dies, the residential tenancy agreement ends on the earliest of the following—
- (a) 2 weeks after the tenant's personal representative or relative gives the lessor or lessor's agent written notice that the agreement ends because of the tenant's death;
 - (b) 2 weeks after the lessor or lessor's agent gives the tenant's personal representative or relative written notice that the agreement ends because of the tenant's death;
 - (c) the day agreed between the lessor or lessor's agent and the tenant's personal representative or relative;
 - (d) the day decided by the tribunal on application by the lessor or lessor's agent.
- (8) However, if no notice is given, or agreement or application made, under subsection (7), the residential tenancy agreement ends 1 month after the tenant's death.
- (9) Nothing prevents the withdrawal of a notice or application under subsection (7) so that a day may be agreed under subsection (7)(c).

[16] Section 277(1) says that a residential tenancy agreement ends *only* in a way mentioned in the section. This removes any opportunity for common law or equitable principles to apply. The result of this section is that it is possible for a residential tenancy agreement, in law, to continue indefinitely. It might be thought that a fixed term residential tenancy agreement must end at the end of the fixed term, but that is not necessarily the case. That is because of the operation of section 70, which will convert a fixed term tenancy into a periodic tenancy if one of the notices

referred to in section 277 has not been given, and there is no written agreement to end the tenancy.

- [17] As first the result seems strange and does not match the expectations and beliefs of those who deal with residential tenancies in Queensland on a day to day basis. For example, it will often be the case that a tenant will agree orally with the lessor to vacate the premises. In such circumstances, it cannot be said that the tenant has ‘abandoned’ the premises. Unknown to both sides however, because of the operation of section 277, the residential tenancy agreement will continue and will survive even the reletting of the premises.² There is nothing to end it. Similarly if the premises are destroyed by fire or flood, a residential tenancy agreement will simply continue in law in the absence of any paperwork or a tribunal order ending it.³
- [18] Although this is the legal situation, in practice this does not cause difficulties because if either side sought to take advantage of it, the discretion given to the tribunal whether or not to make an order on an application would not permit any such abuse. For example, if a tenant vacated premises under an oral agreement with the lessor (and so could not be regarded as having abandoned the premises) and then after it had been relet sought to return to the premises, the tenant might apply to the tribunal for an order requiring the lessor to give access to the premises.⁴ However, the tribunal could refuse to make the order in the circumstances. Similarly, after the departure of a tenant under an oral agreement with the lessor, the tribunal could refuse to make an order compensating the lessor for rent accrued if it was just to do so.⁵
- [19] The RTRAA providing that a residential tenancy agreement continues if the tenant departs without the formality required by section 277, facilitates some other provisions. For example, if a tenant ceases to occupy the premises, under section 243 the tribunal can order that another person occupying the premises should be recognised as the tenant. This can be used to formalise a transfer of a tenancy after the informal departure of the tenant in circumstances outside section 277. Such an order could not be made if section 277 provided that a residential tenancy agreement automatically ended on the tenant’s departure. There are similar provisions in the case of domestic violence.⁶
- [20] In this appeal however, the effect of section 277 does have a practical consequence, as can be seen from the discussion below.
- [21] In saying that his rent obligation ceased, the tenant relies on a notice of intention to leave and subsequent handing over vacant possession of the premises as ending the residential tenancy agreement. The tenant therefore relies on section 277(4). To see if this argument works, it is necessary to consider the terms of the notice of intention to leave given by the tenant.

² In such circumstances the RTRAA would require the parties to agree the ending of the agreement in writing.

³ In such circumstances the RTRAA requires either a valid notice to leave or a notice of intention to leave for ‘non-livability’ to be served.

⁴ The tribunal could make an order under section 420(1) of the RTRAA.

⁵ Section 13 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) requires the tribunal to make orders in tenancy matters that it considers fair and equitable to the parties.

⁶ For example sections 245, 246.

- [22] The tenant's notice of intention to leave did give grounds. The grounds explained that the tenant needed to leave the premises for medical reasons.
- [23] At first sight, this appears to come within section 277(4) so as to end the residential tenancy agreement on the handover day. However, a closer study of the requirements for the notice of intention to leave demonstrates that this is not the case.
- [24] Firstly, section 327 gives the statutory requirement for a notice of intention to leave:-

327 Notice of intention to leave

- (1) A notice of intention to leave premises must—
- (a) be in the approved form; and
 - (b) be signed by or for the tenant; and
 - (c) identify the premises; and
 - (d) state the tenant intends handing over vacant possession of the premises to the lessor on the day stated in the notice; and
 - (e) state—
 - (i) the ground on which the notice is given; or
 - (ii) that the notice is given without ground; and
 - (f) unless the notice is given without ground—give particulars of the ground on which the notice is given.
- (2) A notice of intention to leave given for a fixed term agreement is not ineffective merely because the handover day is earlier than the day the term ends.
- (3) A notice of intention to leave given for a periodic agreement is not ineffective because the handover day is not—
- (a) the last day of a period of the tenancy; or
 - (b) another day the tenancy would have ended if this Act had not been enacted.

Note—

See also section 349(2).

- [25] It is notable here that section 327(1)(e)(i) requires a ground to be given in the notice unless it is without ground.
- [26] Then sections 302 to 308 of the RTRAA give the grounds which are available for a notice of intention to leave. They are as follows:-
- (a) Section 302 – a notice of intention to leave for an 'unremedied breach' where the lessor is in breach of the agreement and has not remedied the breach after a

notice to remedy to breach has been given by the tenant (section 303 is supplementary to section 302);

- (b) Section 304 – a notice of intention to leave for noncompliance (tribunal order) because the lessor has failed to comply with an order of the tribunal;
- (c) Section 305 – a notice of intention to leave for non-livability because the premises have been destroyed or have become unfit or cannot lawfully be used as a residence, or a notice of intention to leave for compulsory acquisition if the premises have been compulsorily acquired;
- (d) Section 307 – a notice of intention to leave because of intention to sell if the premises are advertised for sale or a prospective buyer is shown them within 2 months of the start of the tenancy unless notice of this was given to the tenant prior to the tenancy agreement; and
- (e) Section 308 – a notice of intention to leave without ground.

[27] This list of available grounds is also reflected in the provisions of section 331 which mandates the period of notices which must be given before the handover day:-

331 Handover day for notice of intention to leave for premises that are not moveable dwelling premises

- (1) This section applies only to notices of intention to leave given for premises that are not moveable dwelling premises.
- (2) The handover day for a notice of intention to leave given by the tenant must not be earlier than—
 - (a) if the notice is given because of an unremedied breach—7 days after the notice is given; or
 - (b) if the notice is given because of noncompliance (tribunal order)—7 days after the notice is given; or
 - (c) if the notice is given because of non-livability—the day the notice is given; or
 - (d) if the notice is given because of compulsory acquisition—2 weeks after the notice is given; or
 - (e) if the notice is given because of intention to sell—2 weeks after the notice is given; or
 - (f) if the notice is given without ground for a periodic agreement—2 weeks after the notice is given; or
 - (g) if the notice is given without ground for a fixed term agreement—the later of—
 - (i) 14 days after the notice is given; or
 - (ii) the day the term of the agreement ends.

- (3) Nothing prevents a notice of intention to leave under subsection (2)(g) being given at any time before the end of the term of the fixed term agreement.

[28] What is clear from these provisions is that a tenant cannot give a lessor a notice of intention to leave with a ground which is not one of the statutory grounds listed in sections 302 to 308 or in section 331. If a tenant did so, the notice of intention to leave would simply be ineffective, or perhaps not a notice of intention to leave at all. This means that a tenant cannot end a residential tenancy agreement simply by serving a notice of intention to leave containing any ground and vacating on or before the handover day. It must be a ground recognised by the statutory provisions.

[29] There will be some notices of intention to leave which appear to be valid but which may not be, for example if they allege a failure to remedy a breach but where the lessor was not in breach after all. Such notices can be challenged under section 424 which reads:-

424 Disputes about tenants' notices

- (1) If a lessor disputes the ground stated in a notice to remedy breach, or notice of intention to leave premises, given to the lessor by the tenant under an agreement, the lessor may apply to a tribunal for an order about the notice.
- (2) If the tribunal is satisfied the tenant was not entitled to give the notice on the ground stated, it may make an order under this section.
- (3) If the tribunal decides the application before the agreement is terminated, it may make any order it considers appropriate.
- (4) If the tribunal decides the application after the agreement is terminated because of the tenant's action, it may make an order requiring the tenant to pay to the lessor an amount it considers appropriate as compensation for any loss (including loss of rent) or expense incurred by the lessor by the tenant leaving the premises.
- (5) This section does not apply to a notice of intention to leave without ground.

[30] In this appeal, the grounds given by the tenant in the notice of intention to leave did not fall within any of the grounds specified in sections 302 to 308. It follows that the notice of intention to leave was not one contemplated by section 277(4) as one which was capable of bringing the residential tenancy agreement to an end when the tenant vacated the premises.

[31] The result is that the tenant is incorrect to say that following the giving of his notice of intention to leave and the giving of vacant possession he was no longer obliged to pay rent. The truth is that because of the provisions of section 277 his residential tenancy agreement continued, and with it, his rent obligation continued. Hence rent continued to be due after he vacated. And therefore there was 'unpaid rent' within regulation 15. The premise behind the appeal is incorrect.

[32] In the circumstances leave to appeal is not given because the appeal is unarguable. This means that the appeal fails.