QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Arthur & Anor v Husheer & Anor; Gautron & Anor v Husheer & Anor* [2019] QCATA 146
PARTIES:	In APL017-19 **CRAIG ARTHUR AND RENEE ARTHUR** (applicants\appellants) **v** **RICHARD HUSHEER AND ANGELA HUSHEER** (respondents) In APL355-18 **PIERRE GAUTRON AND SEBASTIEN LABOUCARIE** (applicants\appellants) **v** **RICHARD HUSHEER AND ANGELA HUSHEER** (respondents)
APPLICATION NO/S:	APL017-19 APL355-18
ORIGINATING APPLICATION NO/S:	In APL017-19 - MCDT1467/18 In APL355-18 - MCDT1509/18
MATTER TYPE:	Appeals
DELIVERED ON:	21 October 2019
HEARING DATE:	25 July 2019
HEARD AT:	Brisbane
DECISION OF:	Senior Member Brown, Presiding Member Howe
ORDERS:	**In APL017-19** **Leave to appeal refused**

In APL355-18

1. **Leave to appeal granted.**
2. **The decision of the tribunal made 10 December 2018 is set aside.**
3. **Richard Husheer and Angela Husheer must pay Pierre Gautron and Sebastien Laboucarie ONE THOUSAND, SIX HUNDRED AND SIXTY-ONE DOLLARS AND NINETY CENTS ($1,661.90) within fourteen days of the date of this decision.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – DISTINCTION BETWEEN QUESTION OF LAW AND QUESTION OF FACT

PROCEDURE – STATE AND TERRITORY COURTS, POWERS AND GENERALLY- INHERENT AND GENERAL STATUTORY POWERS – TO PREVENT ABUSE OF PROCESS – GENERALLY

ESTOPPEL – ESTOPPEL BY JUDGMENT – RES JUDICATA OR CAUSE OF ACTION ESTOPPEL – ISSUE ESTOPPEL – where landlord awarded damages for breach of management contract claim against agent calculated by reference to loss of rent – where landlord subsequently awarded damages for loss of rent in claim against tenants for breach of tenancy agreement claim against tenants – where landlord compensated for the same loss in both proceedings – whether *res judicata* arises – whether issue estoppel under s 126(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) – whether claim against tenants an abuse of process in relation to the claim for loss of rent where landlord had previously recovered such loss – where error of mixed law and fact – where leave to appeal allowed – where appeal decided by way of rehearing

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 126, s 142, s 147

Blair v Curran (1939) 62 CLR 464
Cachia v Grech [2009] NSWCA 232
Cairns Regional Council v Carey [2012] QCATA 150
Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404
Ericson v Queensland Building Services Authority [2013] QCA 391
Glenwood Properties Pty Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388

Kuligowski v Metrobus (2004) 220 CLR 363
LPD Holdings (Aust) Pty Ltd v Russells [2017] QSC 45
McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577
Moose Plastering Pty Ltd v Habul [2014] QCATA 354
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41
Rogers v The Queen (1994) 181 CLR 251
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507
WJ v Chief Executive Officer, Public Safety Business Agency [2015] QCATA 190

APPEARANCES & REPRESENTATION:

Applicants (APL017-19):	Self-represented
Applicants (APL355-18):	Self-represented
Respondents:	Self-represented

REASONS FOR DECISION

[1] These two appeals from decisions in the tribunal's minor civil disputes jurisdiction are closely related both factually and in relation to the legal issues for determination. Accordingly, the appeals have been heard and decided together.

Appeals – the statutory framework

[2] An appeal from a decision of the tribunal in a proceeding for a minor civil dispute may only be made with the leave of the Appeal Tribunal.[1]

[3] In an appeal against a decision on a question of fact only or a question of mixed law and fact the appeal must be decided by way of rehearing with or without the hearing of additional evidence as decided by the Appeal Tribunal.[2] In deciding the appeal, the Appeal Tribunal may confirm or amend the decision or set aside the decision and substitute its own decision.[3]

[4] The relevant principles to be applied in determining whether to grant leave to appeal are: is there a reasonably arguable case of error in the primary decision?;[4] is there a reasonable prospect that the applicant will obtain substantive relief?;[5] is leave necessary to correct a substantial injustice to the applicant caused by some error?;[6] is

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1 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("QCAT Act"), s 142(3)(a)(i).
2 Ibid, s 147(1) - (2).
3 Ibid, s 147(3).
4 *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41.
5 *Cachia v Grech* [2009] NSWCA 232, [13].
6 Ibid.

there a question of general importance upon which further argument, and a decision of the appellate court or Tribunal, would be to the public advantage?[7]

[5] If an appeal involves a question of law, unless the determination of the error of law decides the matter in its entirety in the appellant's favour, the proceeding must be returned to the tribunal for reconsideration.[8]

The background to the appeals

[6] Mr Gautron and Mr Laboucarie (who will be referred to as the tenants) rented a property from Mr and Mr Husheer (who will be referred to as the landlords). Mr and Mrs Arthur (who will be referred to as the agents) managed the property for the landlords.

[7] The tenants entered into general tenancy agreement on 16 October 2017. The tenancy was for a term of 12 months ending on 29 October 2018. By Notice to leave dated 29 August 2018, the tenants were given notice to vacate the property by 29 October 2018. The tenants say that they were told by the agents that the landlords were selling the property.

[8] The tenants paid rent until 12 September 2018 and vacated the property on 13 September 2018, some 46 days prior to the date in the Notice to leave. The tenants moved into another property in the same complex on 13 September 2018. They say that they negotiated with the agents to facilitate the move to the new property. It is not disputed that when the tenants vacated they took with them a refrigerator and outdoor setting located at the property (the furniture). It is also not disputed that these items were owned by the landlords.

[9] The landlords say that they subsequently discovered that the tenants had vacated the property and not paid rent for the balance of the rental term.

[10] The landlords commenced proceedings in the tribunal against the agents claiming, essentially, damages for breach of contract[9] (the agent proceedings). The landlords then commenced further proceedings in the tribunal claiming from the tenants the arrears of rent, cleaning costs and the replacement of locks[10] (the tenant proceedings).

[11] The agent proceedings were heard and decided on 5 December 2018. The agents were ordered to pay the landlords $3,611.83. The tenant proceedings were heard and decided on 10 December 2018. It was ordered that the rental bond of $2,080.00 be paid out to the landlords and that the tenants pay to the landlords $2,021.00.

[12] It is common ground among all parties that the orders made in the proceedings has resulted in the landlords being double compensated for their loss.

The findings and orders made in the agent proceedings and in the tenant proceedings

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7 *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 578, 580.

8 *Ericson v Queensland Building Services Authority* [2013] QCA 391.

9 Application for minor civil dispute – residential tenancy, filed 5 November 2018

10 Application for minor civil dispute – residential tenancy, filed 16 November 2018

The agent proceedings

[13] The tribunal found:

(a) The tenants were obliged to pay rent until 29 October 2018;

(b) As a result of the tenants leaving the premises early, the landlords lost the benefit of the rent that would otherwise have been paid by the tenants from the date they left the premises until the tenancy ended;

(c) The period of the term of the tenancy during which the tenants did not pay rent was from the 28th August 2018 until the 29th October 2018;

(d) The amount of rent not paid during this period was $3,491.43;

(e) The landlords and the agents had entered into a contract for the agents to manage the property;

(f) The agents were required to provide the services under the contract with due care and skill;

(g) The agents breached the management contract by failing to provide the services with due care and skill;

(h) The agents permitted the tenants to leave the premises early resulting in the landlords losing the benefit of the rental payments that would otherwise have been made for the period from 28 August 2018 to 29 October 2018 in the amount of $3,491.43.

[14] The agents were ordered to pay the landlords damages of $3,491.43 and costs in the amount of $120.50.

The tenant proceedings

[15] The tribunal found:

(a) The landlords had not gifted the furniture to the tenants;

(b) The value of the furniture was $272.00;

(c) The landlords were entitled to recover the value of the furniture;

(d) The landlords were entitled to recover an amount for cleaning of the property, repairs and replacement of locks in the amount of $278.00;

(e) The tenants stopped paying rent from 12 September 2018 in breach of the tenancy agreement;

(f) The unpaid rent totalled $3,491.00.

[16] The tribunal ordered that the rental bond of $2,080.00 be paid out to the landlords and that the tenants pay to the landlords $2,021.00.

The grounds of appeal

[17] The agents appeal the decision in the agent proceedings. The sole ground of appeal relied upon by the agents is that, in light of the decision in the tenant proceedings, they should not have to pay any money to the landlords. They say that if the appeal is not allowed and the decision in the agent proceedings set aside the landlords will effectively be double compensated.

[18] The tenants appeal the decision in the tenant proceedings. The ground of appeal relied upon by the tenants is that they were denied procedural fairness in not being permitted to present evidence which they say would have had an important impact upon the outcome of the proceedings. The tenants say that the agents gave them permission to vacate the property early and that they acted in reliance thereon. It is this evidence that is the subject of the tenants' sole ground of appeal and which is the subject of their application to adduce fresh evidence.

The application for fresh evidence

[19] The evidence sought to be adduced by the tenants is:

(a) An undated letter from the agents to the tenants accepting the tenants notice of their intention to vacate the premises on 30 August 2018;

(b) An email from the agents to the tenants dated 21 August 2018 in which the agents advised the tenants, inter alia, that the tenants would 'not be charged a break lease due to having to move soon' and inviting the tenants to consider moving to another property in the scheme;

(c) An email from the tenants to the agents dated 22 August 2018 advising that, subject to there being no fees for breaking the lease, they were prepared to move to the new property;

(d) Entry condition report dated 30 October 2017;

(e) Exit condition report dated 14 September 2018.

[20] Fresh evidence will not usually be permitted in an appeal unless the person seeking to rely upon the evidence can establish each of the following:

(a) The evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence, if allowed, would probably have an important impact on the result of the case (although it need not be demonstrated that it would be decisive); and

(c) That the evidence is credible though it need not be incontrovertible.[11]

[21] In the Application for minor civil dispute filed in the tenant proceedings the landlords sought 'compensation for abandonment of a property'. The claims by the landlords set out in the Application included bond cleaning and lock replacement. It should have been readily apparent to the tenants that if they intended to resist the

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11 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404.

claims made by the landlords on the basis of an agreement they had reached with the agents to leave the property early, and relying upon the property condition reports, it would be necessary for them to adduce evidence to that effect at the hearing.

[22] In the course of the hearing the following exchange took place:

> MR LABOUCARIE: So what happened is we agreed with the manager that we had to leave because we had notice to leave. And the manager offer us a different unit within a good timeframe to leave a notice to the tenant that we were leaving and we left two weeks after.
>
> …
>
> MEMBER: Okay. So do you have any evidence of this agreement between you and the manager that the owner - - -
>
> MR LABOUCARIE: Yeah, we've got emails.
>
> MEMBER: - - - of the unit - - -
>
> MR LABOUCARIE: We've got emails.
>
> MEMBER: Pardon?
>
> MR LABOUCARIE: Can I show it to you. We've got emails from the manager.
>
> MEMBER: Well, do you want me to receive the that phone in the evidence and keep it here at the tribunal or do you have some printouts of that?
>
> MR LABOUCARIE: No, we haven't got it on any printouts.
>
> MEMBER: Okay. Well, when you come to a tribunal, matters rise or fall sometimes on the evidence. I'm sure you understand that.
>
> MR GAUTRON: Yeah, we do.
>
> MEMBER: So I'm asking for you to corroborate what you say of the agreement between you and the manager about the owner – which is Richard here – consenting to you not paying any more rent there but rather that you pay rent at the new unit.

[23] Clearly the fresh evidence sought to be adduced by the tenants was available at the time of the hearing. Accordingly, it is unnecessary for us to address the other considerations for fresh evidence. The application for fresh evidence is refused.

Consideration

[24] For the reasons that follow we conclude that there was no error by the tribunal in deciding the agent proceedings. The tribunal however erred in deciding the tenant proceedings.

[25] In each of the proceedings below, damages were awarded to the landlords for the loss of rent for the period from when the tenants vacated the property until the date the tenancy agreement ended. In each of the proceedings below, the same amount was awarded calculated in the same manner.

[26] The first issue to address is whether *res judicata* or issue estoppel arise in considering the present appeals.

[27] In *Blair v Curran* the distinction between *res judicata* and issue estoppel was explained:[12]

> … in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.

[28] The doctrine of *res judicata* applies where a right or cause of action passes into judgment with the consequence that the right or cause of action "merges" with the judgment and no longer continues to have any independent existence.[13] There can be no *res judicata* unless the cause of action in earlier proceedings is the same as the cause of action being advanced in later proceedings.

[29] The cause of action advanced by the landlords in the agent proceedings was one for breach of the management contract. The cause of action advanced by the landlords in the tenant proceedings was one for breach of the tenancy agreement. The causes of action were different. *Res judicata* does not arise.

[30] Does issue estoppel arise?

[31] Issue estoppel does not arise in respect of a final decision in a proceeding for a minor civil dispute. Section 126 of the QCAT Act provides:

> **126 Effect of decision**
>
> (1) A decision of the tribunal in a proceeding is binding on all parties to the proceeding.
>
> (2) The making, by the tribunal, of a final decision in a proceeding for a minor civil dispute does not prevent a court or another tribunal making a decision about an issue considered (whether or not decided) by the tribunal in the proceeding if the issue is relevant to a proceeding for another matter before the court or other tribunal.

[32] In our view, the clear intent of s 126(2) is to prevent the operation of the doctrine of issue estoppel arising out of decisions by the tribunal in the minor civil dispute jurisdiction. The reference to 'other tribunal' includes, in our view, a reference to a differently constituted QCAT tribunal.

[33] Accordingly, issue estoppel does not arise in respect of the decisions under appeal.

[34] In the tenant proceedings the following exchange took place:

> MEMBER: … Now, what's the name of the agent in this matter?
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> MR HUSHEER: Craig and Renee Arthur.

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12 (1939) 62 CLR 464, 532.

13 *LPD Holdings (Aust) Pty Ltd v Russells* [2017] QSC 45.

MEMBER: And are they involved in any kind of dispute - - -

MR HUSHEER: Yes.

MEMBER: - - - with you?

MR HUSHEER: Last week we actually had a hearing with them.

MEMBER: How did that go?

MR HUSHEER: Well, we were claiming for the 12 months commission they were charging us.

MEMBER: Yes.

MR HUSHEER: And we were in favour of them passing us amount of three thousand, six hundred and – I can't quite the last part in it – just over $3600.

MEMBER: Okay. So where was that decided?

MR HUSHEER: That was here.

MEMBER: Okay. All right. So that was for the dispute between landlord and agent.

MR HUSHEER: That's right, yeah.

MEMBER: Okay. So this is just the dispute between landlord and tenants.

MR HUSHEER: Yes.

MEMBER: I wasn't too sure about what was going on there. There was some material in here indicating that there was a dispute between you and the agent, but that's resolved by order now, is it?

MR HUSHEER: That's been resolved now.

MEMBER: Okay. So – sorry – is any of this claim compromised by what was in dispute in that matter decided last week? So was it just the commission that was in dispute there or was it other things being decided as well?

MR HUSHEER: it was just the commission we were here for.

MEMBER: Okay. All right. So there was nothing to do with procedure or anything like that, about giving form 11, form 12, that sort of thing.

MR HUSHEER: What were the forms? Sorry.

MEMBER: Those are the notices of breach and notices to leave.

MR HUSHEER: Yeah, that was – that did come up. Yeah.

MEMBER: What was said there?

MR HUSHEER: As we were selling our property, we – by law we're advised to give the tenants four weeks – wasn't it – two months notice to leave.

MEMBER: Yes.

> MR HUSHEER: And they were issued that form. And after that, the tenants gave our manager at the time a intention to leave form, wanting to break lease basically.
>
> MEMBER: Okay.
>
> MR HUSHEER: Which we never saw or never given or times when the tenants wanted to move out.

[35] While the landlord disclosed to the learned member that the agent proceeding had been heard and decided, he misled the learned member by failing to inform him that the decision in the earlier proceeding (some five days prior) also encompassed the loss of rent the landlords had suffered as a result of the tenants vacating the premises early. The learned member asked the landlord whether any part of the claim had been compromised by the earlier decision to which the landlord responded that the earlier decision was confined to a claim for commission. This did not, as the landlord well knew, accurately reflect the earlier decision.

[36] As we have observed, no issue of *res judicata* or issue estoppel arose out of the decision in the agent proceedings. However the issue arises as to whether the tenant proceedings were, at least insofar as the claim for rent was concerned, an abuse of process.

[37] Abuses of process generally fall into one of the following categories:

(a) the court's procedures are invoked for an illegitimate purpose;

(b) the use of the court's procedures is unjustifiably oppressive to one of the parties;

(c) the use of the court's procedures would bring the administration of justice into disrepute.[14]

[38] The High Court considered abuse of process in *Tomlinson v Ramsey Food Processing Pty Ltd*[15] where it was held:

> Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.
>
> Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel. Similarly, it has been

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[14] *Rogers v The Queen* (1994) 181 CLR 251.

[15] (2015) 256 CLR 507, 518-9.

> recognised that making such a claim or raising such an issue can constitute an abuse of process where the party seeking to make the claim or to raise the issue in the later proceeding was neither a party to that earlier proceeding, not the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel.

[39] In our view it was an abuse of process for the landlords, in the tenant proceedings, to persist in the claim to recover lost rent in circumstances where they had already been compensated for that loss in the agent proceeding. As a result of the landlords' failure to disclose to the learned member the details of the decision in the tenant proceedings, the learned member was led into error in determining the claim for loss of rent. The claim for loss of rent was an abuse of process in circumstances where that loss had already been awarded to the landlord in the agent proceedings. The landlords were not entitled to recover the same loss twice.

[40] In our view the error by the learned member was one of mixed law and fact. Accordingly, leave to appeal in APL355-18 is granted.

[41] In accordance with s 147(2) of the QCAT Act we now proceed to decide the appeal by way of rehearing. Appeals by way of rehearing involve a new determination of the rights and liabilities of the parties, rather than simply a correction of the errors in the determination of the Tribunal below.[16]

[42] An appeal by way of rehearing under s 147 of the QCAT Act is not a rehearing de novo. The Appeal Tribunal must make its own determination on the material before the Tribunal below (supplemented, if necessary by additional evidence if permitted under s 147(2)) with due respect for the findings of fact of the primary Tribunal, and due consideration of the advantages enjoyed by it.[17]

[43] We adopt the primary findings of fact made at first instance other than where those findings have been challenged in the appeal or where there is some doubt as to the findings made. We have otherwise formed our own views on the evidence consistently with the principles applicable in appeals by way of rehearing on the record of proceedings before a primary Tribunal.[18]

[44] The tenants seek to set aside the decision of the tribunal below and to have substituted a determination of the matter entirely in their favour. They must succeed on their claim to recover the rent overpaid in the sum of $3,491.43. The tenants also dispute the amounts awarded to the landlords in respect of the landlords' claims for cleaning and repair costs and the ownership and value of the furniture. The learned member made a number of factual findings about these claims.

[45] In relation to the furniture there was a dispute between the parties about whether the landlords had gifted the items to the tenants. The learned member found it 'unlikely' that the items had been gifted to the tenants as they submitted. The learned member determined the issue in favour of the landlords.

[46] There is no evidence to support the tenants' assertion that they were gifted the furniture. The landlords say that the furniture was not given to the tenants. We

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16 *Moose Plastering Pty Ltd v Habul* [2014] QCATA 354, [72].

17 *WJ v Chief Executive Officer, Public Safety Business Agency* [2015] QCATA 190.

18 *Cairns Regional Council v Carey* [2012] QCATA 150.

consider, on balance, that it is unlikely the landlords gifted the furniture to the tenants. There is no evidence to support the tenants' assertion. The tenants are required to establish their claim on the balance of probabilities. They have not done so. As to the value of the furniture, the evidence such as it is consists of photographs of the furniture with accompanying estimates of value presumably provided by the landlords. The learned member adopted a pragmatic approach to the issue, awarding one third of the amount of the claimed, or $272.00. We see no reason to depart from that approach.

[47] In relation to the claims by the landlords for cleaning and repairs, the evidence comprises: an invoice for cleaning from an independent contractor in the amount of $88.00; an invoice for $188.10 rendered by the landlords for the replacement of a lock and the replacement of magnetic door stops; an invoice for $280.00 for cleaning rendered by the landlords. The landlords say those costs were necessary to return the unit to condition.

[48] We accept that the cleaning costs of $88.00 are reasonable and allow the claim.

[49] The actual out of pocket component of the other various amounts claimed (that is, excluding amounts claimed for labour performed by the landlords) we calculate at $58.10. We accept the landlords claim in respect of these amounts too and allow the claim.

[50] We therefore allow a total amount of $418.10 in respect of the landlords claim against the tenants.

Determination

[51] The sole ground of appeal relied upon by the agents in APL017-19 is that the landlords had been effectively double compensated. We have addressed this issue in the determination of the appeal in APL355-18. There was no error by the tribunal in determining the agent proceedings. Leave to appeal in APL017-19 is refused.

[52] In APL355-18 leave to appeal is granted and the decision of the tribunal made 10 December 2018 is set aside. The tenants must pay to the landlords $418.10 in respect of the cleaning and repair costs.

[53] We note that the rental bond of $2,080.00 has been paid to the landlords. Accordingly, taking into consideration the amount of $418.10 the tenants must pay to the landlords, and in order to give effect to our decision, the landlords must pay to the tenants $1,661.90 within fourteen days of the date of this decision.