QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*De Bruyne v Ray White Waterford* [2020] QCATA 113
PARTIES:	**BRIGETTE DE BRUYNE** (Applicant) **v** **RAY WHITE WATERFORD** (Respondent)
APPLICATION NO:	APL251-19
ORIGINATING APPLICATION NO:	MCDT 109 of 2019 Beaudesert
MATTER TYPE:	Appeals
DELIVERED ON:	11 August 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Dr J R Forbes, Member
ORDERS:	**The application for leave to appeal is dismissed.**
CATCHWORDS:	APPEAL – APPLICATION FOR LEAVE TO APPEAL – residential tenancy dispute – whether landlord engaged in retaliatory action – where statutory meaning of `retaliation' considered – where tests prescribed by authority not satisfied - where re-trial attempted – limits of applications for leave to appeal considered – where application for leave dismissed *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 32 *Residential Tenancies Act 2010* (NSW) s 115 *Residential Tenancies Act 1997* (Vic) s 261, s 263 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 291 *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 *Bamfield v Zanfan Pty Ltd* [2010] QCATA 1 *Cook v Southern Cross Consultancy Pty Ltd (t/a*

	Beechmont Mountain Sales [2018] QCATA 20 *Donovan v Inkster* [2015] QCATA 147 *Du Preez v Linda's Homes Pty Ltd* [2010] QCATA 2 *Fox v Percy* (2003) 214 CLR 118 *Howard v B Miles Womens Foundation Inc* [2012] NSWSC 1173 *Landau v Smith* [2018] VCAT 1577 *Maksimiuk v Savage* [2015] QCA 177 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 *Mullen, Re* [1995] 2 Qd R 608 *Robbins v Harness Racing Board* [1984] 1 VR 641 *W (an infant) In re* [1971] AC 682
APPEARANCES & REPRESENTATION:	This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (QCAT Act).

REASONS FOR DECISION

[1] The proposed appellant[1] Brigette de Bruyne (`Bruyne'), an equine enthusiast, chose to reside on a semi-rural property on the Waterford-Tamborine Road at Buccan near Beenleigh. She leased the property from the respondent Ray White Waterford (`White") under a general tenancy agreement executed on 21 September 2018.

[2] White's *locus standi* depends on a common clause in the agreement entitling it to sue and be sued on behalf of the property owner.[2]

Relief originally sought

[3] Bruyne began these proceedings on 19 July 2019 as a residential tenancy dispute, seeking the following relief: (a) the setting aside of a Notice to Leave dated 21 June 2019 under section 291 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (`the Act'); (b) an order that White restore fences and a dam on the subject property to a serviceable and safe condition; and (c) compensation in the amount of $1,048.72. White denies liability.

[4] The matter came before the primary tribunal on 22 August 2019, when Bruyne's application was dismissed.

Only live issue retaliation

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1 Leave to appeal is required: QCAT Act s 142(3).

2 REIQ Form 18a Clause 43(2)(a).

[5] In consequence of procedural rulings by the tribunal[3] the ambit of the appeal is limited to a single ultimate issue, namely whether a notice to leave without ground issued by White to Bruyne on 21 June 2019, two days after Bruyne's filing of a notice of dispute should be set aside as retaliatory.[4]

[6] Subsection 291(2) of the Act materially provides that a notice to leave must not be given because the tenant has applied to a tribunal for an order under the Act. Subsection 291(3) complements that provision, thus:

> Also, the lessor may not give a notice to leave under this section if the giving of the notice constitutes taking retaliatory action against the tenant.

Grounds of appeal

[7] **1.1. to 1.3** are described as `Background'. However, paragraph 1.3 complains that there is no, or no sufficient evidence `for the dismissal of [Bruyne] by running a business from home'. No question of dismissal arises. The notice to leave is without ground. It is not based on an allegation of breach of the lease. It simply requires Bruyne to leave on 19 September 2019, namely the date on which, according to the tenancy agreement, the tenancy expires.[5]

[8] **2.1** alleges that the tribunal failed to act fairly and according to the substantial merits of the case. Allegations of unfairness or denial of natural justice are serious imputations, and they must be supported by carefully framed particulars so as to enable proper consideration.[6] As the present allegation is entirely devoid of particulars it cannot be entertained.

[9] **2.2** claims that the tribunal relied on evidence `which could readily have been contradicted and corrected'. No such evidence is specified. Furthermore, if any such material was available it should have been adduced at the trial. There is no suggestion that the contrary evidence, if any, was unavailable at the time of the trial.

[10] This ground, and others, proceeds on the basis that White was seeking to evict Bruyne for a breach of the lease, namely by using the premises for business purposes. If that had been the case, White could and should have issued a Form 11 (notice to remedy breach) followed – in the absence of remediation – by a notice to leave early, specifying the default relied on. In fact no issue of fault was raised, and the tenant was simply directed to leave at the end of a fixed term agreement. Certainly the question of conducting a business was raised at the hearing,[7] and the tribunal shared that view.[8] But a decision on that point was not strictly necessary to sustain a notice to leave without ground, effective from the expiry date of the lease. The `business issue' might have been raised on a landlord's application for early termination, but no such application was made. The real point was retaliation or

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3 (a) Estoppel– see transcript of hearing 22 August 2019 (`T') page 24 lines 8-20; (b) failure to lodge a dispute resolution request with the Residential Tenancies Authority – T page 24 lines 34-47.

4 T page 25 lines 8-17; Application for leave to appeal filed 16 September 2019, Ground 1.2.

5 General tenancy agreement White to Bruyn executed 21 September 2018, Item 6.

6 *Re Mullen* [1995] 2 Qd R 608 at 614; *Robbins v Harness Racing Board* [1984] 1 VR 641 at 645.

7 T page 42 lines 40-43.

8 T page 51 line 38.

no retaliation? The onus of proof was upon Bruyne[9] and, as the judge of fact found, that onus was not discharged.[10]

[11] **2.3:** For the reasons given in the preceding paragraph, the `business issue' did not determine the retaliation issue, upon which, in fact, Bruyne failed.

[12] **2.4:** In the absence of particulars, this ground cannot be determined.

[13] **2.5:** Once again, no particulars of `considerable credible and statutory evidence" appear. The meaning of `statutory evidence' is by no means clear.

[14] **2.6:** The notice to leave was not based on damage to fences, but simply upon the expiry of the lease.

[15] **2.8**: The lessor is not presently claiming any recompense for `loss and expense as a result of s 185. There is no such issue at this stage.

[16] **2.8:** No particulars are given; still less is there any indication of how the unspecified exhibits might affect the course of an appeal.

[17] **2.9:** The notice to leave without ground depends on expiry of the lease, not upon the `business issue' or the condition of the fences. Bruyne's claim for monetary compensation was dismissed.

`Retaliation'

[18] `Retaliate' is a potent expression. The Act does not define it; hence its meaning is to be derived from ordinary language, with such assistance as judicial decisions provide. According to the Macquarie Dictionary `retaliate' means `to return like for like (especially for harm done) [or to] take reprisals'. The Concise Oxford Dictionary agrees:

> Retaliate – Repay injury, insult etc in kind ... do as one is done by, esp. Return evil, make reprisals.

[19] A conclusion that reprisals are being practised for harm done, or that evil, injury or insult is being exchanged is not to be lightly reached. Observations of Wilson P in *Du Preez v Linda's Homes Pty Ltd*[11] are pertinent:

> Section 291(3) requires careful consideration of the particular circumstances in each case in which it is raised. If `retaliatory' is considered too broadly, almost any complaint by a tenant to an agent or landlord, or even a less than amicable exchange between them, might qualify ... It is improbable that the legislature intended that effect. Rather, the section appears to be designed to protect the tenant who has justifiably taken action ... and is then served with a Notice which is apparently responsive to the tenant's acts, but also ... unreasonable, excessive or vindictive.

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9 T page 55 lines 32-33; *Howard v B Miles Womens Foundation Inc* [2012] NSWSC 1173 at [9].

10 T page 35 lines 33-34.

11 [2010] QCATA 2.

> In each case the decision-maker is required to consider the particular facts and circumstances which arise, and determine whether or not they can fairly be categorised as falling within the section.[12]

[20] In an earlier decision the same judge stated:

> In its ordinary meaning, to `retaliate' is to return like for like, especially evil for evil ... It connotes a causal connection between the initial act, and the act said to be retaliatory, and looks to the nature of each act, and the motivation of the second actor.[13]

[21] The latter decision was approved by the Court of Appeal in *Maksimiuk v Savage*[14] by North J, with whom McMurdo P and Henry J agreed.

[22] *Du Preez* was followed by appeal tribunals in *Donovan v Inkster*[15] and in *Cook v Southern Cross Consultancy Pty Ltd (t/a Beechmont Mountain Sales*[16].

[23] Clearly a decision-maker must avoid the fallacy *post hoc ergo propter hoc.* In other words, the fact that `A' precedes `B' does not necessarily mean that `A' caused `B'. It is not suggested that the agent-tenant relations here were invariably sweetness and light. There were differences of opinion about fences, the condition of a dam and the use of the residential lease for business purposes. Further, on 19 June 2019, two days before White issued the Notice to Leave, Bruyne's solicitor sent a letter to White listing several complaints about the premises. It concluded: `Kindly obtain instructions from your client and respond to this office'. I respectfully agree with the decision-maker[17] that this letter contains nothing provocative of a vindictive response. It did not threaten litigation.

[24] White's response[18] to that letter is similarly non-aggressive, as the tribunal found.[19]

Not all tension process retaliation

[25] Clearly, as the adjudicator observed, there was a history of tension between the parties,[20] but it does not necessarily follow that the landlord's action deserves to be described as retaliatory. It seems the landlord-tenant relationship in *Du Preez*, above, was somewhat more troubled than that between Bruyne and White, yet the learned President, in dismissing the appeal, did not consider that it rose (or descended) to the level of vindictiveness or retaliation:

> Here there was a long history of signs of discontent, on the part of the owner's agent, with the conduct of the tenants ... [and] the alleged misconduct may well have been material to the agent's decision to the agent's decision to give a notice to leave. On any view it [appears] that the agent did not wish the tenant to remain in occupation. That does not

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12 Ibid at [16-18].
13 *Bamfield v Zanfan Pty Ltd* [2010] QCATA 1 at [21].
14 [2015] QCA 177 at [30].
15 [2015] QCATA 147.
16 [2018] QCATA 20.
17 T page 56 line 30.
18 Letter White to Bruyn's solicitor 21 June 2019, Exhibit R 1.
19 T page 56 lines 31-33
20 T page 56 line 34.

> necessarily point, however, to the conclusion that the notice was retaliatory in the sense intended by s 291(3).[21]

[26] A similar view was taken by QCAT's Victorian counterpart in 2018:

> Whilst I am satisfied that the landlord was dissatisfied with the way in which Mr Smith was looking after the premises, and this may have played a part in the landlord's decision to send the notice, I am not satisfied that this was the underlying reason.[22]

[27] The Queensland legislation differs significantly from comparable provisions of the NSW Act, which vitiates a notice to leave if `the landlord was wholly *or partly* motivated by an intention to retaliate.[23] The words italicised do not appear in the Queensland Act.

[28] A degree of unhappiness with a tenant does not *ipso facto* prove retaliation. Here, for the price of a longer wait that may have attended a successful eviction for breach, White chose the path of peace:

> So we just decided that we would just end the tenancy at the end of the tenancy instead of going through the breaches and further disputes.[24]

[29] In the result Bruyne had 3 months to find other accommodation, instead of the requisite 2 months in cases of this kind.[25]

[30] The resolution of a retaliation issue involves a judgment of fact and degree:

> [T]he decision maker is required to consider the particular facts and circumstances which arise, and determine whether or not they can fairly be categorised as falling within the section.[26]

Limitations of appeal process

[31] It cannot fairly be said that the tribunal's decision is unreasonable. A party's disappointment or dissatisfaction does not amount to a viable ground of appeal. Findings of fact are not normally disturbed if they have rational support in the evidence, even if another reasonable view is available.[27] Where reasonable minds may differ, a decision cannot properly be called erroneous, simply because the judge of fact prefers one conclusion to another possible view.[28] It is not open to an appeal tribunal, in an application for leave to appeal, or in deciding an appeal, to `second guess' the primary judgment.

[32] It cannot seriously be argued that that the decision now in question is unreasonable or unsupported by authority. The learned Adjudicator's decision is entirely appropriate and I

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21 [2010] QCATA 2 at [19]. See also *Bamfield v Zanfan* [2010] QCATA 1 at [31]; *Cook v Southern Cross Consultancy Pty Ltd (t/a Beechmont Mountain Sales)* [2018] QCATA 20 at [30] (a `pretty strong link' is needed); *Donovan v Inkster* [2015] QCATA 147.

22 *Landau v Smith* [2018] VCAT 1577 at [52], applying ss 261 and 263 of the *Residential Tenancies Act 1997* (Vic).

23 *Residential Tenancies Act 2010* (NSW) s 115(2).

24 T page 29 lines 6-8 (Harmsworth).

25 T page 60 lines 7-9.

26 *Du Preez v Linda's Homes Pty Ltd* [2010] QCATA 2 at [18] per Wilson P.

27 *Fox v Percy* (2003) 214 CLR 118 at 125-126.

28 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131]; *In Re W (an infant)* [1971] AC 682 at 700.

can find no reason to come to a different view. No question of general importance is involved. There is no reasonably arguable case of legal error. There is no reasonable prospect of a successful appeal. The application for leave must be dismissed.

ORDER

The application for leave to appeal is dismissed.