

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Wells & Ors v Curtis* [2020] QCATA 32

PARTIES: **JANET WELLS**
EMILY WELLS
DOROTHY WELLS
(appellants)

v

AMANDA CURTIS
(respondent)

APPLICATION NO/S: APL039-19

ORIGINATING APPLICATION NO/S: MCDT 142/18 (Beaudesert)

MATTER TYPE: Appeals

DELIVERED ON: 11 March 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Gordon

ORDERS: **1. The applications by Amanda Curtis to put fresh evidence before the Appeal Tribunal in this appeal is refused.**

2. Leave to appeal is refused. This means that the appeal fails.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN NO APPEAL LIES – where Adjudicator is alleged to have made inconsistent and erroneous findings of fact and to have misunderstood photographs – where appellants seek to pursue claims which are clearly out of time – where respondent to appeal seeks to put fresh evidence before the tribunal – whether any reasonably arguable grounds of appeal

Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 94, s 188(4), s 417(2), s 419(3)

Bourke v Kenjad Rentals [2019] QCATA 81

Caruana v Harcourts Proactive Results Pty Ltd [2012] QCATA 55

Champion & Anor v Laterma Pty Ltd & Ors [2018] QCAT 392

Gould v Mazheiko & Gill [2020] QCATA 10
Hurst v Pyatt [2017] QCATA 101

REPRESENTATION:

Appellant: Self-represented

Respondent: Self-represented

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 decisions made by an Adjudicator in a residential tenancy dispute. The Adjudicator allowed a claim brought by the lessor Amanda Curtis¹ against the tenants Dorothy Wells, Emily Wells and Janet Wells, and made no order on the tenants' counter application. The tenants now appeal.
- [2] In her application, the lessor claimed that the tenants should pay to her the sum of \$4,999 as compensation for damage to the water tank at the premises. The amount directly relating to the replacement of the water tank was \$4,099. The remainder was for experts costs incurred in the claim and filing fees. The points of claim submitted with the application also said that the tenants had damaged a rainwater pipe leading to the tank when they installed electric fencing at the premises.
- [3] A decision was made on the lessor's application on 4 October 2018 but the proceedings were reopened and had to be relisted.
- [4] Meanwhile on 4 December 2018, the tenants lodged a counter application for reduction of rent [under section 94 of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ('RTRAA')], for breach of covenant of quiet enjoyment (section 183) and for breach of lessor's obligations (section 185).²
- [5] The next day, on 5 December 2018 the lessor filed a number of documents in reply.
- [6] The application and counter application were finally heard and determined by an Adjudicator on 13 December 2018. The Appeal Tribunal has obtained a transcript of the hearing which shows what happened.
- [7] The lessor and the tenants attended the hearing. Early in the hearing, the Adjudicator sought to clarify exactly what the counter application was about. This was necessary because it made a number of complaints covering a long period, and because it referred to previous proceedings where some matters had been resolved.

¹ Application MCDT 142/18 (Beaudesert).

² The tribunal had directed that any counter application had to be lodged by 29 November 2018 and so the tenants applied for more time to submit it. However, there is a note on the file that on 4 December 2018 the lessor agreed to it being filed late, subject to final decision of the tribunal, when speaking on the telephone with the court Registrar.

- [8] Some parts of the counter application were clear: it was alleged that the premises were not fit to reside in at the start of the tenancy,³ and that the lessor failed to ensure that there was a working toilet to use for 27 days, which period started 35 days from the start of the tenancy.⁴ On that basis a rent reduction of 50% of the rent was sought over the whole period of the tenancy, with a rent reduction of 75% for the period over which there was no working toilet. This claim for reduction of rent amounted to \$14,209.90. There was also a further claim totalling \$12,000 for various heads of general damage, a claim for \$2,403.50 special damage and a claim for \$10,000 exemplary damages and interest. The notice of unresolved dispute showed that a request was made by the tenant to the Residential Tenancies Authority ('RTA') for dispute resolution on 25 July 2018.
- [9] On hearing about the claims, the Adjudicator decided that the lessor's claim about the damaged rainwater pipe was out of time and that all the tenants' claims in the counter application were out of time.⁵ On that basis the only claim to be heard and determined was the lessor's claim that the tenants had damaged the water tank close to the end of the tenancy.
- [10] In this appeal, it is relevant to know the dates of the tenancy and the dates of occupation at the premises. The residential tenancy started on 30 June 2017 and was for a one year fixed term which ended on 29 June 2018. The tenancy was terminated as from midnight on 29 June 2018 by an order of the tribunal made on 17 May 2018.⁶ The tenants commenced occupation on 6 July 2017⁷ and may have ceased to occupy on about 1 August 2018.⁸
- [11] On the issue about the damage to the water tank, the Adjudicator received evidence from the tenants, read the available paperwork, and then gave the decision. The tenants' case was that the water tank had leaked throughout the tenancy, and that near the end of their tenancy they excavated at the base of the water tank and found that the tank had a hole in it. The lessor's case supported by a plumber in attendance at the hearing, was that there had been no leak in the water tank during the tenancy but a hole was found after the tenants left and this must have been made by the tenants; also the lessor said that the tenants' claim that there had always been a leak was just an attempt to avoid paying for water.⁹
- [12] The Adjudicator decided that the water tank probably was leaking at the commencement of the tenancy but that this was hidden and not obvious and was not detected by the plumber; the tenants had exacerbated that leak by excavating at the base of the water tank and therefore should pay half the cost of the new tank.¹⁰ Accordingly the Adjudicator ordered that the tenants should pay to the lessor the sum of \$1,340.

³ Counter application, [53].

⁴ Counter application, [55].

⁵ Transcript 1-8 to 1-13.

⁶ In application MDCT 70/18 (Beaudesert).

⁷ Appeal submissions filed on 28 March 2019, 2.

⁸ This appears from what was said at the hearing before the Adjudicator.

⁹ Transcript 1-23.

¹⁰ Transcript 1-69 lines 10 and 30; also during argument at transcript 1-49 line 40, 1-51 line 42.

[13] The grounds of appeal appear in the application for leave to appeal or appeal and in submissions in the appeal provided in response to directions made by the Appeal Tribunal.

[14] The grounds in a suitable form for consideration in this appeal, are:

Ground of appeal 1

- (a) The Adjudicator having found that the water tank was leaking throughout the tenancy, and that the tenants had not caused the damage to the water tank and had not maliciously damaged it,¹¹ then made an inconsistent finding that the tenants had exacerbated the leak. In any case that finding was in error.¹² The tenants should not have to pay anything for the replacement of a water tank which had a hole in it at the commencement of the tenancy.¹³

Ground of appeal 2

- (b) The Adjudicator misunderstood the photographic evidence,¹⁴ by assuming that the photographs were only taken after the soil at the base of the tank was been removed, when in fact the photographs were taken both before and after the moving of the soil and they showed no difference in the amount of water.¹⁵

Ground of appeal 3

- (c) The Adjudicator should not have dismissed the compensation claim in the counter application as being out of time because there was nothing on which to base a compensation claim until the last day of the residential tenancy agreement.¹⁶

Ground of appeal 4

- (d) The Adjudicator should have allowed the tenants' claim for a rent decrease.¹⁷

Ground of appeal 5

- (e) The Appeal Tribunal should extend the time available to bring the counter application.¹⁸

[15] I shall deal with each of these grounds of appeal in turn.

Ground of appeal 1

[16] Having decided that the water tank probably was leaking at the commencement of the tenancy albeit the leak was hidden and not obvious and not detected by the plumber, the Adjudicator then had to decide whether or not the leak had been

¹¹ Application for appeal, [22], [4] and [16] and [46] (respectively).

¹² [27].

¹³ [44].

¹⁴ [30] – [36].

¹⁵ Appeal submissions filed on 28 March 2019, [5] and [8].

¹⁶ [6], [48] – [53], [60].

¹⁷ [47]. There are details of this claim in the “counter application” submissions on appeal filed on 28 March 2019.

¹⁸ This submission forms part of the appeal submissions filed on 28 March 2019.

worsened by the tenants' actions in excavating the very hard ground around the base of the tank. The tenants submitted that they had not enlarged the hole at all during their excavation. But the difficulty was that it was agreed by all parties that the hole had not arisen naturally – someone had caused a gash one way or another.¹⁹ And as was said at the hearing, by the time of the inspection on 29 June 2018 and the subsequent inspection on 4 July 2018, the gash in the side of the tank was so large that the tank could not hold any water at all,²⁰ although the plumber agreed that if the soil had then been replaced the amount of water escaping would have been slowed.²¹ The lessor submitted however, that if during the tenancy the hole had been as large as it appeared on 29 June 2018 then even with soil replaced around it the water would have quickly have run out of the tank,²² and this had not been happening, demonstrating the hole had increased in size.

- [17] On this question, the Adjudicator found that on the balance of probabilities, the tenants' intervention had exacerbated the leak. This finding was clearly open to the Adjudicator on the evidence. This was particularly so, as the evidence from the tenants was that they had been digging down looking for the source of the leak since about February 2018. This had taken months because the soil was 'rock hard', but the hole wasn't found until the last day of the tenancy and it was then found 20 centimetres below ground level.²³
- [18] There was no inconsistency between that findings and the finding that there had probably been a latent leak in the tank.
- [19] Although not expressly stated, the Adjudicator must also have found that once the soil had been removed from around the base of the water tank the lessor had little choice but to replace the water tank. That was certainly a finding which was open to the Adjudicator on the evidence.
- [20] When considering whether the tenants should pay any part of this money, although not expressly stated, it would appear that the Adjudicator had in mind the tenants' obligation to leave the premises as far as possible in the same condition they were in at the start of the tenancy, fair wear and tear excepted.²⁴ By excavating around the base of the water tank in an attempt to find the source of the leak, which the tenants accepted was not their role,²⁵ this was a clear breach of that obligation.
- [21] The next issue therefore was to what extent the tenants should compensate the lessor because of that breach of obligation.
- [22] That was a difficult issue, and to be precise about it may have required a finding about the extent to which the tenants' actions had damaged the water tank and whether it would have remained serviceable at the end of the tenancy if the tenants had not carried out their excavation. The answer to the question probably centred on

¹⁹ The plumber said that it appeared to have been damaged from outside by someone because there was no way the tank would have had such damage by itself and there were plastic fragments 'right beside, underneath the hole. The tanks are that thick. You don't get holes in them like that' - transcript 1-30 lines 4 and 33.

²⁰ Transcript 1-30 line 35.

²¹ Transcript 1-33 line 2.

²² Transcript 1-44 line 15.

²³ Transcript 1-10 line 1, 1-45 line 37, 1-45 line 12.

²⁴ RTRAA, s 188(4), reflected in Clause 37 of the residential tenancy agreement.

²⁵ Transcript 1-53 line 32.

how quickly the water had previously run away prior to the excavation. There was considerable conflict of evidence about all these things. On the tenants' case, the water had been draining from the tank quickly throughout the tenancy so that it was never capable of holding water for more than 24 hours.²⁶ But this was flatly contradicted by the lessor's evidence, and in particular the evidence of the plumber who attended on 4 April 2018 and 10 May 2018 specifically to look for a leak in the water tank. The plumber found no evidence of any leak and found that there was water in the tank.²⁷

- [23] The Adjudicator tackled this question by deciding that the tenants needed to compensate the lessor to some extent, and settled upon the sum of \$1,340.50. Of the total cost to the lessor of \$4,099 of replacing the tank, this therefore represented 33%. In reaching that figure the Adjudicator explained that the tribunal had an obligation to deal with matters quickly and efficiently. Since on the above analysis the tenants were obliged to pay some compensation to the lessor, and since greater precision about the amount may well have required some more evidence and a longer hearing, and where both sides expressed the view that they would like the matter to be dealt with quickly, the approach was justified.
- [24] Contrary to this ground of appeal therefore, there was no inconsistency in the findings of the Adjudicator, and the approach taken by the Adjudicator to the assessment of compensation cannot be impugned.

Ground of appeal 2

- [25] As for the photographs, the Adjudicator was informed by the lessor that the photographs had been taken by the tenant at various times.²⁸ The tenants presented the photographs when the Adjudicator asked whether there was any photographic evidence of the water tank leaking through the tenancy as the tenants were saying.²⁹ And the Adjudicator was informed that one photograph showing damp ground was taken in February 2018.³⁰
- [26] It is clear therefore that the Adjudicator did not misunderstand the photographs as is alleged in this ground of appeal.

Ground of appeal 3

- [27] By section 419(3) of the RTRAA, applications about breaches of residential tenancy agreements must be made within six months after the applicant becomes aware of the breach.
- [28] For the purpose of the time limit, by section 417(2) making a dispute resolution request to the RTA) is taken to be the making of an application about the dispute issue. Hence applicants will be within the six month period in respect of any breaches of which they were aware in the period of six months prior to making a dispute resolution request to the RTA about the breach.

²⁶ Transcript 1-66 line 8.

²⁷ Lessor's material, Exhibit A-13i, Report.

²⁸ Transcript 1-37 line 25.

²⁹ Transcript 1-46 line 30 to 1-48 line 16.

³⁰ Transcript 1-61 line 24.

- [29] Here, the tenants' dispute resolution request (Form 16) which seemed to be about the issues which later appeared in the counter application, was received by the RTA on 25 July 2018. Hence the tenants were in time with respect to breaches of which they were aware from 25 January 2018 onwards. The tenants were out of time for any breaches of which they were aware prior to that time.
- [30] Clearly all the complaints in the counter application were out of time under this yardstick. They were either known about from the start of the tenancy on 30 June 2017 as alleged, or concerned breaches soon afterwards.³¹ The point made in the appeal that there was nothing on which to base a compensation claim until the last day of the tenancy agreement is not a good one. It is based on the premise that until the tenants knew where the leak of water from the water tank was coming from, they were unable to bring a claim. Firstly, the counter application was largely in respect of other matters, and secondly in so far as the counter application may have been about loss of water, it would not have been necessary for the tenants to know the cause of the loss to bring that claim.³²
- [31] Accordingly, the Adjudicator was right not to hear and determine the counter application.

Ground of appeal 4

- [32] It has now been confirmed by Justice Daubney in *Gould v Mazheiko & Gill* [2020] QCATA 10, [18] that it is not possible to apply for a retrospective rent reduction. A rent reduction claim may only ask for rent to be reduced in the future. This was the view expressed in *Hurst v Pyatt* [2017] QCATA 101, [22] and *Champion & Anor v Laterma Pty Ltd & Ors* [2018] QCAT 392.
- [33] Allied to that issue is the question whether it is possible to bring a section 94 claim for reduction of rent after the tenancy has ended. This has also definitively been answered in the negative by Justice Daubney in *Gould*, [18], confirming the view of Justice Carmody in *Bourke v Kenjad Rentals* [2019] QCATA 81, [16].
- [34] It follows that the Adjudicator was right to refuse to hear the claim for a reduction of rent. Not only was the claim made well after the tenancy terminated on 29 June 2018, but it sought a retrospective rent reduction and not a prospective one.
- [35] This ground of appeal is bound to fail.

Ground of appeal 5

- [36] It is suggested that the Appeal Tribunal should extend the time available to bring the counter application. This may be intended as an appeal that the Adjudicator should have considered whether to enlarge time to bring the counter application.

³¹ Such as the failure to provide a working toilet for 27 days which was said to have started 35 days from the beginning of the tenancy.

³² On the tenants' case the issues with the water supply were known about from a very early stage and that complaints were made about that 'as early as days after moving in' and 'we strongly believed the leak was underground' (submissions in the appeal filed on 28 March 2019, [64], [65]; also [18] and 3).

- [37] That there is no jurisdiction of the tribunal, and hence the Appeal Tribunal, to enlarge the six month period in section 419(3) has been decided in a number of cases.³³
- [38] This ground of appeal is therefore bound to fail.

Applications to adduce fresh evidence

- [39] In applications made on 1 August 2019 and on 17 October 2019 the lessor asked the Appeal Tribunal to accept fresh evidence. The lessor's fresh evidence is geared at attempting to show that the tenants are disreputable in various ways. No attempt was made by the lessor to show why this evidence is relevant to the appeal. The evidence does not appear to be relevant. There was no explanation why, if it was relevant, it could not with reasonable diligence have been provided for the original hearing. On 18 February 2019 the Appeal Tribunal made a direction about any application to rely on fresh evidence. The direction was as follows:

If either party seeks leave to rely upon evidence or a document that was not before the Tribunal below ('fresh evidence'), they shall file in the Tribunal one (1) copy and serve on the other party one (1) copy of an application for leave to rely upon fresh evidence, together with a copy of the fresh evidence. The application shall include submissions about:

- i. why the fresh evidence was not available to the Tribunal below;
 - ii. why the fresh evidence is important; and
 - iii. why the fresh evidence should be accepted.
- [40] In the absence of those submissions I cannot admit it. In the circumstances I will not be considering it.

Conclusions in the appeal

- [41] In matters such as this, leave to appeal can only be given if there appears to be a reasonably arguable ground of appeal. In this appeal there is no reasonably arguable ground of appeal and so leave to appeal should not be given. This means that the appeal fails.

³³ For example, *Caruana v Harcourts Proactive Results Pty Ltd* [2012] QCATA 55, [14]; *Sendall v Howe* [2012] QCATA 41; *Brewer v Black* [2013] QCATA 264.