

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Galagher v O'Donnell* [2020] QCATA 4

PARTIES: **LOUISA GALAGHER**
(applicant)

v

STACEYANN O'DONNELL
(respondent)

APPLICATION NO: APL181-19

ORIGINATING APPLICATION NO: MCDT 3 OF 2019 Brisbane
MCDT 152 of 2019 Brisbane

MATTER TYPE: Appeals

DELIVERED ON: 16 January 2020

HEARD AT: Brisbane

DECISION OF: Dr J R Forbes, Member

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

CATCHWORDS: APPEAL – APPLICATION FOR LEAVE TO APPEAL – caretaker agreement – retirement village - where accommodation rights attached – where proprietor seeks to terminate caretaker’s right of occupation – where attempt to terminate is invalid –where caretaker subsequently ceases to perform duties because of ill health – where proprietor later terminates employment – where incapacitated caretaker’s occupancy continues to date of termination - whether right to remuneration continued until agreement terminated, incapacity notwithstanding – where claim for part remuneration allowed – whether award should be set aside – where no appellable error shown – where purpose and limitations of application for leave explained – where leave to appeal refused

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32, s 142
Residential Tenancies and Rooming Accommodation Act 2008 (Qld) s 288, s 329
Abalos v Australian Postal Commission (1990) 171 CLR 167
Davison v Vickery’s Motors Ltd (in liq) (1925) 37 CLR 1
Devries v Australian National Railways

Commission (1993) 177 CLR 472
Fox v Percy (2003) 214 CLR 118
Minister for Immigration and Citizenship v SZMDS & Another (2010) 240 CLR 611
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418
Water Board v Moustakas (1988) 180 CLR 491

APPEARANCES & REPRESENTATION: 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

- [1] At the relevant times the appellant Louisa Gallagher, trading as Park View Property Management ('Gallagher') was the proprietor of a retirement village known as Parkview Lodge ('the Lodge') at Bethania, Brisbane.
- [2] In March 2018 Gallagher employed the respondent Stacey O'Donnell ('O'Donnell') as a resident caretaker at the Lodge. After a probationary period that arrangement was confirmed or renewed in a written agreement ('the agreement') purportedly executed by O'Donnell on 12 October 2018, and by Gallagher's authorised officer on 12 November 2018.
- [3] Gallagher concedes that the agreement remained in force until 25 February 2019.¹
- [4] The agreement² provided for O'Donnell's remuneration *per annum* as follows:
- | | |
|---------------|----------|
| Total Package | \$62,900 |
| Base Salary | \$38,000 |
| Food | \$6,500 |
| Rent | \$15,600 |
| Electricity | \$2,800 |
- [5] By early November 2018 O'Donnell was complaining of a medical condition of stress, in consequence of unhappy differences with Gallagher and certain residents of the complex, which need not now be detailed. On 10 November 2018 O'Donnell ceased work as caretaker³, but remained in residence at the Lodge. Gallagher honoured her 'wage package' up to and including 26 November 2018,⁴ when O'Donnell's sick leave expired, and payments according to the agreement ceased.⁵

¹ Transcript of hearing 8 April 2019 ('T') page 24 lines 9-15.

² Schedule Item 8.

³ T page 7 lines 29-45.

⁴ T page 8 line 21.

⁵ T page 8 lines 39-46 (Gallagher).

- [6] After several unsuccessful attempts to end O'Donnell's occupancy Gallagher sent O'Donnell a letter dated 25 February 2019 which reads in part:

The purpose of this letter is to formally outline an instance of serious misconduct which recently occurred, and [to] confirm the appropriate outcome based on this misconduct ... In the circumstances ... we maintain the view that it is appropriate that your employment should be terminated with immediate effect and without notice.

- [7] It is clearly implicit in that letter, conceded by Gallagher⁶ and held by the Adjudicator⁷ that the agreement, and particularly O'Donnell's right of occupation, continued until (at least⁸) 25 February 2019, some four months after payments under the agreement ceased.
- [8] Accordingly O'Donnell claimed rent at the prescribed rate for 4 months – an amount of \$5,200 – but claimed nothing for other 'extras', namely food and electricity. As the Adjudicator remarked⁹, an obligation upon a property owner to pay rent to a tenant or occupier is a curious arrangement. However, it is a term of the present agreement.¹⁰
- [9] By way of defence Gallagher alleged that on 3 December 2018 she gave O'Donnell a Notice to Leave¹¹, effective on 3 January 2019. But the Adjudicator held that there was insufficient proof that the Form 12 was served on the date alleged, so as to allow the minimum one month for departure required by law.¹² Challenged by the tribunal to produce documentary evidence of the date of service of the notice, Gallagher signally failed to do so. Consequently the notice was invalid.¹³
- [10] Furthermore, as Gallagher was bound to concede, and the Adjudicator held¹⁴, the contract of employment did not end until several months after the notice was said to have been given.¹⁵
- [11] It was common ground that O'Donnell left her accommodation at the Lodge in early January 2019 after an 'altercation'¹⁶. However the Adjudicator was satisfied that the atmosphere at the Lodge was so distressing for O'Donnell that her leaving did not amount to a repudiation of the contract:

There is good reason for that though. I do not accept that the handing back of the keys and records of the business amounted to repudiatory conduct. The fact is that it appears that Ms O'Donnell was suffering acute stress as a result of difficulties in managing, amongst others, a particular resident who was verbally aggressive, if not violent, and because it appears that others were ganging up against [her] and making it difficult for her to carry out her caretaking duties.¹⁷

⁶ T 24 lines 9-15.

⁷ T page 35 lines 32-33.

⁸ T page 27 lines 30-32 (Adjudicator).

⁹ T page 37 line 21.

¹⁰ T page 6 line 11, page 7 line 5, page 8 lines 18-22, 31, 36, page 11 lines 4-7 (Gallagher), page 25 line 8 (Adjudicator)

¹¹ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ('RTA') Form 12.

¹² T page 18 lines 16-27.

¹³ T page 30 lines 21-30.

¹⁴ T page 27 lines 19-29.

¹⁵ RTA s 288, s 329(2)(g).

¹⁶ T page 27 line 18 (Adjudicator).

¹⁷ T page 37 lines 3-9 (Adjudicator).

- [12] There is considerable evidence upon which that conclusion could reasonably be reached.¹⁸
- [13] On 8 April 2019 the Tribunal awarded O'Donnell the sum of \$5,226.35 including the filing fee. Against that decision Gallagher now seeks leave to appeal.¹⁹
- [14] The adjudicator invited Gallagher to show cause why that judgment should not be entered against her. The answer was unresponsive:

ADJUDICATOR WALSH: I'm giving you a final opportunity to tell me why I shouldn't order that she be paid that rent as part of her package, given that her tenancy did not terminate ... and could not be terminated until 24 March 2019 because you failed to give her another Form 12 on 25 February '19, when you issued this further letter.²⁰

MS GALAGHER: I just explained before. I says [*sic*] when you have entitlement, you've got to be give something [*sic*] you get something. You understand? That – like if you work here as a judge, what about – you be long-term, whatever is, you says [*sic*] 'That desk is still mine. Nobody can sit on the desk', doesn't make any sense. So I don't know.²¹

Proposed grounds of appeal²²

- [15] If granted leave, Gallagher would appeal on these grounds:

Staceyann's last day of work for us at Parkview Lodge was 10 November 2018. But she has been paid up to 24 November 2018. From 10 November 2018 up to and including 7 January 2019 Staceyann resided free of charge (rent and power) at 49/3 Snedden St Bethania. During this period Staceyann did not perform any duties for Parkview Lodge. Staceyann's entitlements were cancelled as at close of business 4 November 2018.

Staceyann was issued a notice to leave on 3 December 2018. We issued Form 12 on 3 December 2018, due to her interference with the daily operations of Parkview Lodge. As we are a retirement village we need a caretaker onsite 24/7 for the residents safety and security.

Staceyann has no grounds to request payment from Parkview Lodge as she refused to comply with any reasonable instruction and heavily interfered with the business operation of Parkview Lodge.

- [16] No attempt is made to come to grips with the Adjudicator's legal interpretations, findings of fact, or reasons for his decision. There are no particulars of the alleged 'interference with the daily operations of Parkview Lodge', or the alleged 'refus[al] to comply with any reasonable instruction'. There is simply a reiteration or reframing of the appellant's case at first instance. No appellable error is identified.
- [17] With respect to the Orders Sought: (i) the request for acceptance of the 3 December 2018 notice as valid simply ignores the Adjudicator's finding of insufficient proof of

¹⁸ See affidavit of Julie Lorraine Brown sworn 20 March 2019, statement of Mark Matthews dated 14 March 2019, statement of James Horrigan dated 15 March 2019, statement of Gavin Leslie Amos (copy undated), affidavit of Barry John Boyd sworn 15 March 2019, affidavit of O'Donnell sworn 19 March 2019, medical certificate of Dr Fernando 27 November 2018, statement to Police by Barry Boyd 11 January 2019, email O'Donnell to Tracey Young 10 December 2018.

¹⁹ QCAT Act s 142(3)(a)(i).

²⁰ As quoted in paragraph [6] above.

²¹ T page 32 lines 1-15.

²² Application for leave to appeal filed 17 April 2019.

service of notice on that date; (ii) the same applies to the second order sought; and (iii) as to the third order proposed, no error to warrant setting aside the primary decision is identified.

Appellant's submissions 9 September 2019

- [18] Submissions 1 to 9 are common ground.
- [19] As to submission 10, the factual content is common ground. The comment, 'which was beyond her entitlement' contradicts the subject decision without seeking to justify the contradiction.
- [20] Submissions 11 to 13, concerning worker's compensation, were not mentioned, let alone argued at the hearing. It is not appropriate to canvass for the first time, upon an application for leave, an issue not mentioned, let alone contested at the trial. The general rule against such an attempt is a strict rule of law – a rule based on fairness and economy of litigation:

More than once it has been held by this [High] Court that a point cannot be raised for the first time on appeal when it could possibly have been met by calling evidence below ... the rule is strictly applied.²³

Where a point is not taken in the court below, and evidence [to support it] could have been given there ... it cannot be taken afterwards.²⁴

The conduct of the cause at the trial is governed by the questions [then] asked of the witnesses ... a party is, and ought to be bound by the course of the trial.²⁵

- [21] Submission 14 is uncontested, but irrelevant.
- [22] Submission 15 disregards (without reasons) the Adjudicator's finding that the right to accommodation did not end until 24 March 2019
- [23] Submissions 16 to 18 are common ground.
- [24] Submission 19(1) contradicts the primary judgment without seeking to justify the contradiction. The unnumbered sub-paragraphs of 19(1) pose two argumentative and rhetorical questions. They also rehearse the worker's compensation point, which is not properly raised on appeal. The penultimate sub-paragraph covers common ground, and the last sentence - '[Galagher] is claiming rent and electricity' might have been the subject of a counterclaim, but in fact was not. (A counterclaim may no more be raised for the first time on appeal than an allegation that would change the character of the defence at the trial.)
- [25] As to submissions 19(2) and 19(3), whatever be the precise technical classification of O'Donnell's right of occupancy, it was held that it survived until the agreement was terminated, at the earliest, on 25 February 2019. The final sentence in 19(3) simply ignores the reasons given for finding that the agreement subsisted until 25 February 2019.

²³ *Water Board v Moustakas* (1988) 180 CLR 491 at [13].

²⁴ *Sutton v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

²⁵ *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1 at 35 per Starke J.

- [26] Submission 19(4) ignores the Adjudicator's calculation of quantum.²⁶ The costs allowed are \$26.35, not \$926.35. The worker's compensation afterthought has already been considered.

Purpose and Limitations of leave to appeal

- [27] An application for leave to appeal is not an opportunity to re-run the trial, or to reiterate evidence that was tried and found wanting at first instance. It is not an opportunity to raise pleas or defences that could have been raised at the trial, but were not. Primary decisions of the Tribunal are normally expected to be final – hence the preliminary hurdle of leave before the substantive appeal is considered. Primary findings of fact are seldom disturbed on appeal. Before that is done, it must be shown that the decision in question is 'glaringly improbable' or contrary to compelling evidence.²⁷ That cannot reasonably be said in this case. It is not appellable error to prefer one version of the facts to another, or to give less weight to a party's case than he or she thinks it deserves. Even if there are two reasonable views, a preference for one view over the other is not an appellable error.²⁸

[N]o error of law occurs simply because the judge prefers one version of evidence to another or one set of inferences to another. This is his function. ... Even if the evidence is strongly one way the Appeal Court may not intervene simply because it reaches a different conclusion and this [is so] even if it regards the conclusion of the trial judge as against the weight of evidence.²⁹

Conclusion

- [28] I can discern no appellable error resulting in a substantial injustice.³⁰ Therefore this application for leave to appeal must be refused.

ORDER

- [29] The application for leave to appeal is refused.

²⁶ T page 9 lines 1-4, page 28 lines 1-5.

²⁷ *Fox v Percy* (2003) 214 CLR 118 at [28]-[29]; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479; *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178-179.

²⁸ *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131].

²⁹ *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151 per Kirby P.

³⁰ *Pickering v McArthur* [2005] QCA 294 at [3] per Keane JA; *Secretary to the Department of Premier and Cabinet v Hulls* (1999) 3 VR 331.