# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

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| CITATION: | *L J Hooker Stafford v Roberts* [2020] QCATA 94 |
| PARTIES: | **L J HOOKER STAFFOTD**<br>(Applicant)<br><br>**v**<br><br>**KATIE ROBERTS**<br>(Respondent) |
| APPLICATION NO: | APL348-19 |
| ORIGINATING APPLICATION NO: | MCDT 450 of 2019 Brisbane |
| MATTER TYPE: | Appeals |
| DELIVERED ON: | 26 June 2020 |
| HEARING DATE: | 1 June 2020 |
| HEARD AT: | Brisbane |
| DECISION OF: | Dr J R Forbes, Member |
| ORDERS: | **1 Leave to appeal is granted.**<br><br>**2 The orders made on 1 November 2019 are set aside.**<br><br>**3 In lieu thereof it is ordered that the Residential Tenancies Authority pay $430.70 of the Respondent Roberts' bond to the Appellant LJ Hooker Stafford and the balance of same, namely $1,109.30 to the Respondent Roberts.**<br><br>**4 No order as to costs.** |
| CATCHWORDS: | APPEAL – APPLICATION FOR LEAVE TO APPEAL – COUNTER APPLICATION – where residential tendency - where tenant seeks compensation or reduction of rent – where lessor seeks compensation for damage to property - where tenant's application brought after expiry of lease – where tenant's application not brought within time limit prescribed by section 491 of *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) – whether tenant's application competent either as claim |

for compensation for breach of contract or for loss of amenity under section 94 of Act – where tenant's claim characterised as rent reduction – where section 491 defence not raised at trial – where ineligibility for section 94 claim not raised at trial – where appeal tribunal raises absence of jurisdiction *ex mero motu* – where award for loss of amenity set aside

*Queensland Civil and Administrative Tribunal Act 2009 (Qld)* s 32, s 142
*Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 94, s 106, s 491
*Baxter v NSW Clickers' Association* (1909) 10 CLR 114
*Bourke v Kendall Rentals* [2019] QCATA 233
*Christ Church Grammar School v Bosnich & Anor* [2010] VSC 476
*Cleak v Hirt* [2013] QCATA 321
*Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1
*DMW v CGW* (1982) 151 CLR 491; [1982] HCA 73
*Gould v Mazheiko & Gill* [2020] QCATA 10
*Grey v Manitoba and North Western Railway Co of Canada* [1897] AC 254
*McGarry v Coates* [2013] QCATA 32
*Marine Coatings of Alabama Inc v United States of America* (1986) 792 F 2d 1565
*Masinello v Parker & Anor* [2013] QCATA 3
*Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611
*Mond v Lipshut* [1999] VSC 103.
*Nunn v Baker* (1987) 518 So 2d 711
*Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369
*R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113
*R v Watson; Ex parte Armstrong* (1976) 136 CLR 248
*Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6
*Realgo Investments Pty Ltd v Daley* [2013] QCATA 81
*Stanford v Stanford* (2012) 247 CLR 108
*Suttor v Gundowa Pty Ltd* (1950) 81 CLR 418
*Thin Thin Cho v Minister for Immigration & Multicultural Affairs* (1998) 55 ALD 487; [1998] FCA 1663
*Thorpe v Charles Sturt City Corporation* (1999) 103 LGERA 395; [1999] SASC 10
*W (an infant), In Re* [1971] AC 682, 700.
*Wall v the Queen; Ex parte King Won (No 1)* (1927) 39

CLR 245
*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 (QCAT Act).

**REASONS FOR DECISION**

**The Lease**

[1] From 16 February to 21 December 2018 the Respondent Katie Roberts (`Roberts') leased residential premises at Everton Park. The Appellant L J Hooker Stafford (`Hooker') was the managing agent for the lessor Stevens.

[2] Hooker's locus standi in these proceedings is derived from a standard term of the tenancy agreement.[1]

**Claim and counterclaim**

[3] These proceedings were initiated by Roberts on 28 February 2019[2] claiming an order for repayment of her bond ($1,540) and compensation of $600.[3]

[4] By way of counterclaim[4] Hooker asks the tribunal (a) to dismiss the compensation claim; and (b) to order the Residential Tenancies Authority (RTA) to pay out of the bond $825.70 to Hooker and $714.30 to Roberts. Hooker's claim ($825.70) is for repairs to walls and courtyard door, and the cost of tidying the courtyard.

**Primary decision**

[5] The matter was tried by a panel of two Justices of the Peace on 1 November 2019. The Tribunal's orders are (a) that Hooker pay $1,602.10 to Roberts as damages for loss of amenity[5] and (b) that the RTA repay the bond in full to Roberts.

[6] The sum of $1,602.10 payable to Roberts was arrived at by deducting $437.70 allowed for Hooker's repairs from $2,032.80 awarded to Roberts for loss of amenity.[6]

[7] Hooker now seeks leave[7] to appeal that decision.

**Proposed grounds of appeal**

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1 REIQ Form 18a, General Tenancy Agreement Cl 43(2): `Unless a special term otherwise provides the agent may – (a) stand in the lessor's place in any application to a tribunal by the lessor or the tenant; or (b) do any thing else the lessor may do, or is required to do, under this agreement.'

2 Application for minor civil dispute MCDT 950-19, Brisbane.

3 QCAT Form 2 Part C.

4 Filed 24 October 2019.

5 *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (`the Act') s 94(2)(b).

6 Transcript of hearing 1 November 2019 (`T') page 41 lines 11-15.

7 As required by QCAT Act s 142(3)(a)(i).

[8] Hooker submits that –

(a) The tribunal's interpretation and application of section 94(4) of the Act is in error;

(b) The tribunal failed to apply section 419 when on the evidence it should have done so.

**First proposed[8] ground**

[9] Hooker contends that `an issue with the remote control and 2 window blinds' do not amount to a substantial loss of amenity within the meaning of the Act.

[10] The expression `amenity' is not defined in the Act, so its meaning is a question of common parlance. A modern dictionary offers this definition:

> The equipment or services of a house, area etc which make life comfortable and pleasant.[9]

[11] The garage is as much part of the demised premises as the kitchen or the back yard. Where there is provision for an electrically operated garage door, the lack of an efficient remote control is a significant inconvenience. Manual operation of the door entails leaving and re-entering the car[10]; it may be physically testing, especially for an elderly or female tenant. Malfunctioning blinds may affect light, air or privacy.[11] Also mentioned were a weed infestation and a recalcitrant towel rail.[12]

[12] Interference with `services ... which make life comfortable and pleasant' need not be total or even predominant to be substantial, or considerable, real or actual.[13] Ultimately a decision in relation to section 94 is a matter of judgment and decree for the primary tribunal. A view is not unreasonable merely because another reasonable view is possible.[14]

**Points not raised below**

[13] And there is more to be said. Generally the courts discountenance attempts to raise points on appeal that were not canvassed at the trial. An application for leave to appeal is not an opportunity to re-run the trial. That error is, as it were, a forensic relocation of the goal posts:

> 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.[15]

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8 Prosecution of each ground is contingent upon a grant of leave.
9 Macquarie Dictionary (1998 edition).
10 T page 30 lines 34-41.
11 T page 33 line 45: `front bedroom where my daughter was in'.
12 T page 36 line 39.
13 Macquarie Dictionary (1998 edition).
14 *Minister for Immigration and Citizenship v SZMDS & Another* (2010) 240 CLR 611 at [131]; *In Re W (an infant)* [1971] AC 682, 700.
15 *Water Board v Moustakas* (1988) 180 CLR 491 at [13].

> The conduct of the trial is governed by the questions [then] asked ... a part is, and ought to be bound by the course of the trial.[16]

[14] Neither Ms Smith nor Mr Armstrong, who appeared in tandem for Hooker, put it to Roberts or to the tribunal that the defective blinds and garage did not constitute a substantial loss of amenity.

[15] The first ground discloses no appellable error, and is dismissed.

**Second proposed ground – s 419**

[16] Section 419 of the Act materially provides:

> This section applies if the any of the following claim there has been a breach of a term of a residential tenancy agreement ... a lessor or tenant ... The lessor or tenant ... may apply to a tribunal for an order about the breach. The application must be made within 6 months after the lessor or tenant ... becomes aware of the breach.

[17] This argument is expounded in the application for leave as follows:

> When making the decision we believe that the tribunal failed to acknowledge that section 419(3) specifically states that an application for breach of a tenancy must be made within six months of the breach. We note that the tenant's application states that she did not have access to the garage to park her car, and that 2 blinds did not operate fully and the decision was made for compensation by the tribunal for the entire 44 weeks of her tenancy. The tribunal decision was made outside of Act [*sic*] being that the tenant should have made her application for her compensation claim within 6 months of becoming aware of the breach. The tenancy commenced on 16 February 2018 and concluded on 27 December 2018. The application was lodged on 13 September 2019.

[18] The transcript reveals no mention of section 419, either in name or in substance. As indicated above, courts generally discountenance points taken on appeal that were not taken at the trial. Exceptions are sometimes made for points that are pure questions of law but that is not the case here. The factual basis of Hooker's section 419 point is merely a set of *ex parte* allegations. The alleged facts do not have the status of judicial findings, simply because they were not mentioned at the trial. The acceptability of this defence is doubtful, but in view of what follows, a concluded opinion is unnecessary.

**Or section 94?**

[19] However, that is not an end of the matter. While no specific reference to section 94 of the Act was made at the trial, it is apparent that the tribunal had that provision in mind. The transcript contains repeated references to a loss of `amenity',[17] and the tribunal's award in favour of Roberts is made under that rubric.[18] Loss of amenity is the subject of section 94, and so far as leases are concerned[19] it appears nowhere else in the Act.

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16 *Grey v Manitoba and North Western Railway Co of Canada* [1897] AC 254 at 267; *Davison v Vickery's Motors Ltd (in liq)* (1925) 37 CLR 1 at 35 per Starke J; *Suttor v Gundowa Pty Ltd* (1950) 81 CLR 418 at 438; *Mond v Lipshut* [1999] VSC 103.

17 T page 9 line 9, page 13 line 25, page 14 line 26, page 29 line 6, page 36 line 39, page 40 line 24.

18 T page 41 line 7.

19 A provision regarding rooming accommodation (s 106) is immaterial.

[20] Applications under section 94 are not subject to the time limit in section 419.[20] It is, however, essential that the application be brought while the tenancy is still current.[21] Here the application was made some 9 months after Robert's lease ended, so it inevitably follows that her application for loss of amenity was a nullity and the tribunal had no jurisdiction to entertain it.

**Amenities claim invalid – no jurisdiction**

[21] No submission to the effect was made at the trial, but the objection is fundamental, going to jurisdiction. The tribunal simply had no power to make the order in question. Where a court or tribunal is asked to make an order that is plainly *ultra vires* it may and should take the jurisdictional point itself, even if no party does so.[22] Agreement, silence or acquiescence of parties cannot confer jurisdiction over a dispute that a tribunal is not empowered to decide.[23] Technically, the court acts *ex mero motu* – on a motion of its own. The present point is a pure point of law; the end date of the lease is established by an undisputed document in evidence, and the date of filing the initial application is on the tribunal's record.

[22] Courts are bound to take judicial notice of the limits of their powers. It would be undesirable, and a waste of time and resources, to go through the motions of reaching a void decision[24], which a judgment debtor is simply free to ignore.[25] Whether the want of jurisdiction appears immediately, or at a later stage[26] the tribunal must `hold its hand'.[27]

**Conclusion – orders revised**

[23] The consequences are unfortunate for Ms Roberts; whether she seeks compensation or reduction of rent she meets formidable difficulties. But sympathy is no substitute for the tribunal's duty to apply the law. It does not enjoy the luxury of administering palm tree justice.[28]

[24] There is no application on Roberts' part against the modest award of $430.70 for property damage.

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20 *Masinello v Parker & Anor* [2013] QCATA 325; *Gould v Mazheiko & Gill* [2020] QCATA 10 at [13] per Daubney P; *Bourke v Kendall Rentals* [2019] QCATA 233; *Cleak v Hirt* [2013] QCATA 321 at [6]; *Realgo Investments Pty Ltd v Daley* [2013] QCATA 81 at [4].

21 *Gould v Mazheiko & Gill* [2020] QCATA 10 at [18]; *Bourke v Kendall Rentals* [2019] QCATA 233 at [16].

22 *Thorpe v Charles Sturt City Corporation* (1999) 103 LGERA 395; [1999] SASC 10 at [6]; *Marine Coatings of Alabama Inc v United States of America* (1986) 792 F 2d 1565; *Nunn v Baker* (1987) 518 So 2d 711 at 712; *McGarry v Coates* [2013] QCATA 32 at [6].

23 *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 at [35].

24 *Baxter v NSW Clickers; Association* (1909) 10 CLR 114 at 126 per Griffith CJ; *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 375; *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 126.

25 *DMW v CGW* ; (1982) 151 CLR 491; [1982] HCA 73 at [8].

26 *Wall v the Queen; Ex parte King Won (No 1)* (1927) 39 CLR 245 at 257.

27 Ibid.

28 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 257; *Stanford v Stanford* (2012) 247 CLR 108 at [38]; *Thin Thin Cho v Minister for Immigration & Multicultural Affairs* (1998) 55 ALD 487 at 501; [1998] FCA 1663; *Christ Church Grammar School v Bosnich & Anor* [2010] VSC 476 at [25].

[25] The order that Hooker pay Roberts $1,602.10 must be set aside. Of the $1,540 bond the RTA will be ordered to pay $430.70 to Hooker and the balance, $1,109.30, to Roberts. There will be no order for costs.

**ORDERS**

1 Leave to appeal is granted.

2 The orders made on 1 November 2019 are set aside.

3 In lieu thereof it is ordered that the Residential Tenancies Authority pay $430.70 of the Respondent Roberts' bond to the Appellant LJ Hooker Stafford and the balance of same, namely $1,109.30 to the Respondent Roberts.

4 No order as to costs.