

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Hornsby & Anor v Gray & Anor* [2021] QCATA 41

PARTIES: **ANGELIQUE HORNSBY**
(first applicant/appellant)

CRAIG HORNSBY
(second applicant/appellant)

v

KERRIE GRAY
(first respondent)

ASHLEE GRAY
(second respondent)

APPLICATION NO/S: APL197-20

ORIGINATING APPLICATION NO/S: MCDT39-20 Maroochydore

MATTER TYPE: Appeals

DELIVERED ON: 23 March 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Howe

ORDERS:

- 1. Leave to appeal granted.**
- 2. The appeal is allowed.**
- 3. The decision made 10 June 2020 is set aside.**
- 4. Ashlee Gray must pay Angelique Hornsby and Craig Hornsby the sum of \$1,634.29 for claim and allowable costs of \$469 within 14 days of judgment.**

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – where two proposed tenants applied to become tenants of a residential property – where one signed – where the other proposed tenant did not – where the lessors’ agent signed the residential tenancy agreement for the lessors – where the tenants subsequently resiled from the agreement – where an Adjudicator found no tenancy had been created – where the Adjudicator failed to consider the claim by the lessors against the tenant who had signed

Queensland Civil and Administrative Tribunal Rules 2009
(Qld) r 83, r 84

Residential Tenancies and Rooming Accommodation Act
2008 (Qld) s 12(3)

Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd
(1985) 2 NSWLR 309

Maszlik v Lorraine Palmer t/as Bundaberg Park Lodge
[2016] QCATA 94

Sommers v Bycroft [2020] QCATA 55

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA
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APPEARANCES & REPRESENTATION:

Applicant: V Fenwick, Prime Property Sunshine Coast

Respondent: Self-represented

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] The first respondent, Kerrie Gray, is the mother of the second respondent, Ashlee Gray. Kerrie Gray lived in Sydney and Ashlee Gray in Queensland at the Sunshine Coast.
- [2] On 4 November 2019 they both submitted an application to lease a property at Buderim owned by the appellant lessors. Their application was accepted and the lessors' agent prepared a written residential tenancy agreement in standard form.
- [3] Kerrie Gray advised the agents on 4 November 2019 that she intended to stay in Sydney but would help Ashlee Gray with the rental payments of the property at Buderim until Ashlee Gray found someone suitable to share the house with her, at which time she would have the new tenant added to the lease.
- [4] Ashlee Gray signed a written tenancy agreement on 12 November 2019.
- [5] The agents signed the agreement on 13 November 2019 on behalf of the lessors. The date of commencement was dated as 22 November 2019.
- [6] On that same day, 13 November 2019, the agents forwarded the tenancy agreement to Kerrie Gray for signature.
- [7] The property was removed from the rental market by the agents.
- [8] On 15 November 2019, in response to an enquiry from the agents the previous day about the lease, Kerrie Gray advised she was making enquiries to find a Justice of the Peace and said "... will be good to go. Apologies for the hold-up."
- [9] The agents heard nothing more and tried telephoning the respondents on 21 and 22 November 2019 to ask about collecting the keys and left messages which were not returned.

- [10] On 22 November 2019 Kerrie Gray was eventually contacted by the agents and she said it was only Ashlee Gray moving into the property and Ashlee Gray no longer wanted the house because she was no longer moving to Buderim.
- [11] On 24 November 2019 Ashlee Gray advised by email that there had been a miscommunication between Kerrie Gray and Ashlee Gray as to who was to contact the agents to say the house was no longer wanted.
- [12] The agents relet the property from 14 December 2019 and claimed rent of \$1,634.29 calculated from 22 November 2019 to the date of commencement of the new lease from the respondents. The respondents refused to pay and the appellants commenced minor civil dispute residential tenancy proceedings in the Tribunal claiming that amount.
- [13] The matter was heard by an Adjudicator on 10 June 2020 who dismissed the claim.
- [14] The appellants now seek leave to appeal that decision. Given this is an appeal from a decision made in the Tribunal's minor civil dispute jurisdiction, leave to appeal must first be obtained before any appeal proceeds.¹
- [15] Leave to appeal will usually only be granted where an appeal is necessary to correct a substantial injustice to the appellant and where there is a reasonable argument that there is an error to be corrected.²
- [16] In the application for leave to appeal the following errors are cited as grounds of appeal:
- (a) The Adjudicator erred in failing to consider that the tenancy agreement was executed by Ashlee Gray;
 - (b) The Adjudicator erred in failing to consider that Ashlee Gray failed to advise the lessors or agents that she intended to terminate the tenancy agreement after the tenancy agreement had commenced;
 - (c) The Adjudicator erred in failing to consider that there was a valid and executed tenancy agreement signed by Ashlee Gray.
- [17] The complaints may be conveniently addressed together.

Leave to appeal

- [18] Ashlee Gray signed a written residential tenancy agreement as a tenant. The residential tenancy agreement was also executed by the agent on behalf of the appellants. The Adjudicator noted that in his reasons for decision.
- [19] He noted that it was then forwarded to Kerrie Gray for signature, but she did not sign it. The Adjudicator said that was done to ensure Kerrie Gray was bound by the lease. The Adjudicator said the appellants could have "terminated or withdrawn the offer" because of the failure of Kerrie Gray to sign.
- [20] The Adjudicator went on to address the matter only so far as it concerned Kerrie Gray however. He concluded she was not bound by the agreement given she terminated the agreement before signing.

¹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 142(3)(a)(i).

² *Pickering v McArthur* [2005] QCA 294.

- [21] The Adjudicator did not address the circumstance that Ashlee Gray had signed the tenancy agreement. The appellants also claimed relief from Ashlee Gray.
- [22] The failure to address the claim against Ashlee Gray was clearly an error of law on the part of the Adjudicator.
- [23] Leave to appeal must be granted.

The appeal

- [24] I therefore turn to consider the appeal.
- [25] In *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*³ the High Court had this to say about signatures on contracts:

It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents....⁴

- [26] The written residential tenancy agreement provided in clause 3 of its terms:
- (1) This clause applies if more than one person is named in this agreement for item 1 or 2.
 - (2) Each lessor named in this agreement for item 1 must perform all of the lessor's obligations under this agreement.
 - (3) Each tenant named in this agreement for item 2 –
 - (a) holds their interest in the tenancy as a tenant in common unless a special term states the tenants are joint tenants; and
 - (b) must perform all the tenant's obligations under this agreement.

- [27] Ashlee Gray was a tenant named in item 2 to the tenancy agreement.
- [28] Given Ashlee Gray signed the tenancy agreement, a prima facie case was established that there was a tenancy agreement in place between Ashlee Gray and the appellant lessors when Kerrie Gray and Ashlee Gray resiled from the arrangement.
- [29] The express terms of the tenancy agreement support the liability of Ashlee Gray under the agreement.
- [30] It was incumbent on Ashlee Gray to therefore show why the tenancy agreement she had signed did not bind her in accordance with its terms. She failed to do that.
- [31] There was no appearance by her at the hearing before the Adjudicator. Kerrie Gray appeared but her submissions were limited to first, that she, Kerrie Gray, did not sign the tenancy agreement, and second, that there had been a "miscommunication" between herself and Ashlee Gray. That was not enough.
- [32] Kerrie Gray also said she had received information from the Residential Tenancies Authority "indicating" that all parties must sign a lease for it to be valid. She provided no authority however to support that contention.

³ [2004] HCA 52.

⁴ Ibid [45].

- [33] By s 12(3) of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) a residential tenancy agreement may be created by writing, wholly orally or wholly implied. A signed written agreement is therefore not necessary to make a residential tenancy agreement effective.
- [34] Evidence of the intention of parties to create legal relations by reference to sources extrinsic to the terms of a written agreement (evidence of surrounding circumstances) has been accepted by the courts.⁵
- [35] By her email of 5 November 2019 Kerrie Gray told the agents she would not be residing at the premises, only Ashlee Gray. Ashlee Gray signed the tenancy agreement after that. Then after they were advised by Kerrie Gray that only Ashlee Gray would be residing at the premises, the agents signed the agreement on behalf of the lessors. These matters were not in dispute below.
- [36] The email of 5 November 2019 serves to clarify that the primary tenant was always intended to be Ashlee Gray, not Ashlee Gray and Kerrie Gray.
- [37] There is no evidence to suggest that legal relations were not intended to be created on execution of the tenancy agreement by the lessors and Ashlee Gray.
- [38] The appeal must be allowed.

Disposition

- [39] It is unnecessary to return the matter to the Tribunal for further determination.
- [40] The appropriate order is to set aside the decision of 10 June 2020 and substitute it with an order that Ashlee Gray pay the lessors the sum of \$1,634.29 for claim and pay the lessors the filing fee for the minor civil dispute residential tenancy claim of \$123.20.

Costs

- [41] The appellants also ask for the cost of the filing fee of the appeal. They have been successful as against Ashlee Gray.
- [42] In *Maszlik v Lorraine Palmer t/as Bundaberg Park Lodge* [2016] QCATA 94, Carmody J refused to allow costs of an appeal from a minor civil dispute residential tenancy dispute decision on the basis that the only cost award possible in minor civil dispute proceedings is the prescribed fee for filing the initial application in the Tribunal.
- [43] In *McCracken v Nespoli* [2020] QCATA 107 I similarly refused a claim for the filing fee of an appeal. *McCracken v Nespoli* however involved an appeal on a minor debt claim and in my opinion the legislation denies costs of appeal to such.
- [44] The limitation on recovery of costs in minor debt appeals does not in my opinion apply to appeals in other minor civil disputes such as the present.
- [45] I note the analysis and observations by Member Gordon in *Sommers v Bycroft* [2020] QCATA 55 on the point. I note however that r 84(1)(a) *Queensland Civil and Administrative Tribunal Rules 2009* (Qld) permits the Tribunal to award costs against a party to a proceeding for a minor debt claim limited to the “prescribed fee for filing the application for the claim.”

⁵ *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309.

- [46] By contrast, r 83(b) dealing with all other minor civil disputes, and permits the Tribunal to award costs of any prescribed fee paid by the applicant on filing the “application for the proceeding.”
- [47] The term “proceeding” found in r 84(1)(a) is far more expansive than the expression “claim” used in r 83(b).
- [48] Proceeding is defined in Schedule 3 to the QCAT Act as:
- (a) generally – means a proceeding before the tribunal, including an appeal before the appeal tribunal and a proceeding relating to an application for leave to appeal to the appeal tribunal;
- [49] The word “claim” is of far more limited scope however and is confined to the initiating proceeding.
- [50] Given this appeal concerns a minor civil dispute other than a minor debt claim, the cost of the filing fee for the application for leave to appeal may be recoverable together with the initial application fee for minor civil dispute.
- [51] It is appropriate that the appellants be granted the cost of the filing fee for the appeal proceeding in the matter at hand. Ashlee Gray must therefore also pay the filing fee for the appeal proceedings of \$345.80.