

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Grey & Anor v Australian Rental Management* [2020]
QCATA 177

PARTIES: **LISA GREY**
CASSANDRA GREY
(applicants/appellants)

v

AUSTRALIAN RENTAL MANAGEMENT
(respondent)

APPLICATION NO/S: APL082-19

ORIGINATING APPLICATION NO/S: MCDT 581 of 2018

MATTER TYPE: Appeals

DELIVERED ON: 16 November 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Ann Fitzpatrick

ORDERS: **1. The application by Lisa Grey and Cassandra Grey to put fresh evidence before the Appeal Tribunal in this appeal is refused.**
2. Leave to appeal is refused.

CATCHWORDS: APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN NO APPEAL LIES – where Adjudicator alleged to have made errors of fact and law – application to put fresh evidence – whether any reasonably arguable grounds of appeal

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

Cachia v Grech [2009] NSWCA 232

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337

McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd [1989] 2 Qd R 577

QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41

REPRESENTATION:

Applicant: Self-represented

Respondent: No appearance

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] The applicants filed an application for minor civil dispute – residential tenancy dispute in the Caboolture registry of the Tribunal on 21 December 2018. The applicants sought the sum of \$14,390.97 being compensation for costs associated with moving from a rental unit at Deception Bay. The unit was leased to the applicants pursuant to a written tenancy agreement dated 20 April 2018. The term of the lease was from 23 April 2018 to 22 April 2019.
- [2] The compensation sum is comprised of claims for the cost of furniture removal, emergency accommodation, emergency belongings, living costs, mould men invoice, rental overpayment, items purchased solely for the rental property, internet contract, storage fees overpayment, costs related to finding a home and lost interest.
- [3] The applicants assert that the unit was uninhabitable because of mould and that on the advice of their doctor they vacated as a matter of urgency on 5 July 2018.
- [4] The applicants terminated the lease on 17 July 2018.
- [5] The matter was heard on 8 February 2019. The application was refused.
- [6] The Adjudicator made these findings:
 - (a) Mould was present in the unit during the period of the applicants' occupation and was the cause of medical symptoms suffered by them.
 - (b) Mould was reported to the property manager on 29 June 2018.
 - (c) The first tenants in the unit and the tenants who took up occupation after the applicants, reported no evidence of mould.
 - (d) There was no evidence of any water leak or water penetration from an exterior source which caused or contributed to the mould.
 - (e) The property manager's evidence as to the likely cause of the mould was accepted. The property manager's evidence was preferred.
 - (f) Based on the property manager's observations, the likely cause of the mould was the result of the actions of the applicants in failing to open windows, open blinds and the like so as to ensure proper ventilation and air to penetrate the unit, so as to prevent the formation of mould.
 - (g) In circumstances where mould has formed as a result of the actions of the tenants in failing to take reasonable steps, that is not a matter for which the lessor can be held responsible. The mould is likely to have grown due to an excess build up of condensation from a neglect to open windows, blinds and doors.
 - (h) That is consistent with the mould having been found by the cleaner in the area near the window and windowsills.
 - (i) In the circumstances, there has not been any breach by the respondent.

Leave to appeal

- [7] By s 142(3)(a)(i) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) an appeal against a decision made in the minor civil disputes jurisdiction of the Tribunal may only be made with the leave of the Appeal Tribunal.
- [8] Leave to appeal will generally only be granted where there is a reasonably arguable case of error in the primary decision; there are reasonable prospects the appellant will obtain substantive relief; and it is necessary to correct a substantial injustice¹ or there is a question of general importance to be considered.²

Fresh Evidence

- [9] The applicants seek leave to rely on fresh evidence, namely:
- (a) A laboratory analysis prepared by Viridis Australasia Pty Ltd, dated 16 July 2018, confirming a high mould spore concentration “probably due to water damage or an external source”.
 - (b) Email from Viridis dated 17 January 2019 confirming the sample.
 - (c) Email from Moreton Bay Regional Council, dated 4 July 2018 confirming damp and mould in the unit, noting the cause and origin of the damp and mould is unknown, however it would be unhealthy to occupants.
 - (d) Entry Condition report dated 23 April 2018 making no reference to mould.
 - (e) Email from property manager to the applicants seeking advice on a move date and clean, dated 17 July 2018. Email from the applicants to the property manager in relation to a leak beneath the kitchen sink dated 17 July 2018.
 - (f) Personal calendar April to June 2018.
 - (g) Photographs of external mould near car parking and parts of the building.
- [10] It is said the evidence was orally referred to, but the Tribunal below would not accept it during the hearing. It is asserted the evidence demonstrates the cause of the mould.
- [11] None of the material referred to by the applicants as fresh evidence is in fact fresh evidence. I note that the Viridis report was tendered below and marked Exhibit 3. The photographs were shown to the Adjudicator in the course of the proceedings. The Adjudicator also had before him on the Tribunal file the email from the Moreton Bay Regional Council. Ms Grey also referred in her evidence to the calendar recording medical appointments and email communications with the property manager. Finally, the entry condition report was in evidence and was the subject of questioning by the Adjudicator.
- [12] The transcript of the proceeding below records reference to the documents the applicants say were not accepted by the Tribunal. I have assumed the applicants are suggesting the documents were not accepted as evidence in the proceeding. The documents were in fact in evidence in the proceeding. It occurs to me that the applicants may be suggesting the Adjudicator did not accept the contents of the

¹ *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41; *Cachia v Grech* [2009] NSWCA 232.

² *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 578.

documents as contended by them. If that is the case the documents are not properly the subject of a fresh evidence application.

[13] On either view of it, the application to rely upon fresh evidence is refused on the basis that it is misconceived.

[14] As to the grounds of appeal the applicants contend that the Adjudicator made the following errors:

- (a) **Reference to s 127 of the *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)* (RTRA Act) in making the decision.** The transcript records that the Adjudicator referred to s 217 of the RTRA Act, whereby the tenant is obliged to notify the lessor as soon as practicable of any damage to premises. The applicants are mistaken in relation to the Adjudicator's reference.
- (b) **Not considering that the respondent had breached s 138 of the RTRA Act** by conducting surveillance of the unit and not allowing the tenants quiet enjoyment. I do not consider this to be a relevant consideration in a claim for compensation arising out of the presence of mould in a rental property. In any event the evidence of the property manager related to observations made whilst he was lawfully present on the property.
- (c) **Relying on the character of the property manager.** An adjudicator is entitled to form a view in relation to the reliability of evidence from a witness. The adjudicator has done so and given unobjectionable reasons for doing so. An appeal tribunal would rarely overturn a finding of credibility of a witness. There are no grounds to do so in this case.
- (d) **The adjudicator relied on notations on the cleaner's tax invoice rather than expert evidence from Viridis.** This issue goes to the cause of the mould. The Viridis report refers to the cause as probably related to water damage or an external cause. The report does not express a conclusive view as to the cause of the mould. The cleaners referred to mould on windowsills. The Adjudicator concluded that the likely cause of the mould was from condensation and failure to open windows and blinds. Mould caused by condensation is not inconsistent with the "probable" cause referred to by Viridis. The Adjudicator formed his view based on the evidence of the property manager, the cleaner's note, the entry report and evidence that the previous and subsequent tenants have had no issue with mould. The Adjudicator said that he was not satisfied on the evidence that it has been established on the balance of probabilities that the mould has been caused as a result of any inherent defect in the building. He was satisfied on the balance of probabilities that the actions of the applicants in failing to ensure ventilation was the cause of the mould. That was a conclusion reasonably open to the Adjudicator on the evidence.
- (e) **The Adjudicator did not refer to evidence from the applicants, demonstrating clear bias.** The Adjudicator found that there was mould in the property. The applicants' evidence was accepted. There was no dispute that the applicants were entitled to leave the property. The area of dispute related to the cause of the mould. The Adjudicator referred to all the evidence he relied upon. His conclusion was reasonably available on that evidence. The Adjudicator did not accept that it was the condition of the building which caused the mould as contended for by the applicants. The Adjudicator gave his reasons for not

making such a finding. I do not think that the Adjudicator failed to consider the whole of the evidence. The Adjudicator said that he did so and his reasoning demonstrates that he turned his mind to the applicants' evidence. I do not consider there is any evidence in the transcript of proceedings and in the decision that the Adjudicator demonstrated bias such that the Adjudicator failed to bring an impartial mind to determination of the issues.³

- (f) **The Adjudicator was wrong to rely on the entry condition report.** The report was a relevant document. It was signed by the applicants. The fact that the applicants now assert the report was inaccurate does not establish any error on the part of the Adjudicator, given the evidence before him.
- (g) **The Adjudicator failed to consider location of the unit block, flaws in design of the building and layout of the unit and other factors in the unit which contributed to the growth of mould.** The Adjudicator referred to the applicants' evidence in this regard but preferred an alternative explanation for growth of the mould. The findings made by the Adjudicator were reasonably available to him on the evidence.
- (h) **The Adjudicator did not take into account the personal circumstances of the applicants.** The Adjudicator found that there was mould present in the premises and that it contributed to or caused the symptoms experienced by the applicants. The Adjudicator was not however able to find that the lessor was responsible for the losses suffered by the applicants, because of his finding that the likely cause of the mould was condensation and lack of ventilation.
- (i) **There was no evidence to support the Adjudicator's conclusion as to the cause of the mould.** The Adjudicator's decision sets out the evidence relied upon by him in reaching his conclusion. As previously described, he relied upon the property manager's evidence as to observations of closed windows and blinds, the cleaner's note as to the location of mould, the entry report and the evidence of other tenants. That evidence is capable of supporting the conclusion reached by the Adjudicator.

Leave to appeal or appeal

- [15] For the reasons set out upon analysis of the applicants' grounds of appeal there is no reasonably arguable case of error and there are no reasonable prospects that the applicants will obtain substantive relief. There is no substantial injustice to be corrected and there is no question of general importance to be considered. Accordingly leave to appeal is refused.

³ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.