Perring v Nicholson [2023] QCATA 118 (22 September 2023)

Last Updated: 22 September 2023

QUEENSLAND CIVIL AND

ADMINISTRATIVE TRIBUNAL

CITATION:	*Perring v Nicholson* [2023] QCATA 118
PARTIES:	**ANYA PERRING**
	(applicant/appellant)
	v
	LACHLAN JAMES NICHOLSON
	(respondent)
APPLICATION NO/S:	APL271-21
ORIGINATING APPLICATION NO/S:	MCDT1149-21 (Soutl
MATTER TYPE:	Appeals
DELIVERED ON:	14 September 2023
HEARD AT:	Brisbane
DECISION OF:	Member Lember
ORDERS:	**IT IS THE DECISIC THE APPEAL TRIBUNAL THAT:**

1. **Leave to appe granted.**

2. **The appeal is allowed.**

3. **The decision o September 20 (including the termination o and warrant i is set aside.**

4. **The applicatio residential ten dispute filed 2 August 2021 (MCDT1149-2 Southport) is dismissed.**

CATCHWORDS:

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPL RIGHT OF APPEAL WHEN APPEAL LIE ERROR OF LAW – w application for termina of a residential tenanc dispute relied upon a n to leave – where hand day fell on a Saturday whether application fo termination filed prematurely – whether Tribunal could waive compliance with sectio of the *Residential Ten and Rooming Accomo Act* 2008 (Qld) *Acts Interpretation Act* 1954 (Qld) s 38

Queensland Civil and Administrative Tribun Act 2009 (Qld) s 3, s 3 61, s 143, s 145, s 146 *Residential Tenancies Act* 1997 (Vic) s 322 *Residential Tenancies Rooming Accomodatio*

Act 2008 (Qld) s 291, s 329, s 349, s 429

Baldry v Jackson [197 NSWLR 415

Betts v Department of Housing and Public Works [2019] QCATA

Bundy v Alberts (2007 ConvR 54-735; [2007 90

Cachia v Grech [2009 NSWCA 232

Day v Humphrey [201 QCA 104

Elphick v MMI Gener Insurance Ltd & Anor [2002] QCA 347

Emanuele & Ors v He Ors [1997] ACTSC 1

Ericson v Queensland Building Services Authority [2013] QCA

Face 2 Face Foundati Ltd & Ors v Brisbane Council [2013] QCAT

Gelmini v Moriggia [1 UKLawRpKQB 80; [1 2 KB 549

Glenwood Properties Ltd v Delmoss Pty Ltd [1986] 2 Qd R 388

Lowe v Aspley [2010] QCATA 59

McIver Bulk Liquid H Pty Ltd v Fruehauf Au Pty Ltd [1989] 2 Qd R

McPherson v Lawless [1960] VicRp 59; [1960] VR 363

QUYD Pty Ltd v Marv Pty Ltd [2008] QCA 257; [2009] 1 Qd R 41

Sendall v Howe and Anor [2012] QCATA

Symes v Kahler [2022 QCATA 35

Varawa v Howard Sm Company Ltd [1911] I 46; (1911) 13 CLR 35

Veitch v Director of Housing [2008] VSC
Wigan v Edwards (19
ALJR 586
Wren v Mahony [1972
HCA 5; (1972) 126 C
212

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).

REASONS FOR DECISION

What is this application about?

- [1] The applicant tenant, Ms Perring is resisting a termination order and warrant issued by the Tribunal below on 23 August 2021 (MCDT1149-21) ('the decision') on grounds that the handover day in a Form 12 Notice to Leave (issued without grounds) had not expired when the application to terminate the tenancy was filed by the respondent lessor, Mr Nicholson.

- [2] Ms Perring requires leave to appeal the decision,[1] which has been stayed by an order of the Appeal Tribunal pending the outcome of Ms Perring's application for leave to appeal or appeal.

- [3] It is not known, given the unfortunate and lengthy delay in the matter coming before me whether Ms Perring is in fact still residing in the tenancy. The Appeal Tribunal's decision may, therefore, be lacking in utility. Nonetheless, it is before me to be decided and my decision and the reasons for it follow.

The purported termination of Ms Perring's tenancy

- [4] Ms Perring has lived in her tenancy since 2017. It is located on a large acreage property on which Mr Nicholson also resides in his own home.

- [5] The most recent fixed term tenancy agreement expired on 23 October 2020, from which time Ms Perring occupied her tenancy on a periodic basis.

- [6] As the law stood prior to 1 October 2022, periodic tenancies could be ended on the giving of two months' notice to leave without grounds. On 21 June 2021 Mr Nicholson gave such a notice, with the handover date falling on 21 August 2021, which happened to be a Saturday.

- [7] When Ms Perring had not vacated over that weekend, Mr Nicholson filed his application to terminate Ms Perring's tenancy on Monday 23 August 2021.

- [8] At the hearing of the application on 8 September 2021 Ms Perring was still residing at the property, and said that she was having difficulty finding alternate

accommodation within her budget. For his part, Mr Nicholson was seeking possession of the tenancy so that his son could move in.

- [9] When asked by the learned Adjudicator: "are you seeking to stay on or just looking for some time to relocate?", Ms Perring replied, "I am just asking for more time" and when asked how much time she was seeking, she replied "at least a month" but also asserted that "I want to get out of there as soon as possible".

- [10] An order was made terminating the tenancy four weeks from the hearing date and a warrant issued to take effect on 7 October 2021.

- [11] Contrary to her expressed desire to leave the tenancy as soon as possible, Ms Perring then filed an application for leave to appeal or appeal the decision on 13 October 2021, together with an application for an interim order seeking to stay the decision until the application for leave to appeal or appeal was determined. As mentioned, the interim order was made.

The legislative framework

- [12] At the relevant time:

(a) A notice to leave without grounds must have provided a period of two months' notice to leave for a periodic tenancy (section 329(2)(j)).
(b) Section 293 of the *Residential Tenancies and Rooming Accomodation Act* 2008 (Qld) ('*RTRAA*')) then provided as follows:

293 Application for termination for failure to leave

(1) The lessor may apply to [QCAT] for a termination order because –

(a) the lessor gave a notice to leave the premises to the tenant; and

(b) the tenant failed to hand over vacant possession of the premises to the lessor on the handover day.

(2) An application under this section must be made within 2 weeks after the handover day.

(3) An application made under this section is called an application made because of a failure to leave.

- [13] The day when the notice is given should not be counted in calculating whether the correct period of notice has been given (*Betts v Department of Housing and Public Works* [2019] QCATA 180, [18]), applying section 38(1) of the *Acts Interpretation Act* 1954 (Qld) ('*AIA*').

- [14] Section 38 of the AIA also provides that if the last day of a period falls on an excluded day (a day that is not a business day), then the last day is taken to fall on the next day that is not an excluded day.

- [15] Section 61 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') empowers the Tribunal to give relief from complying with procedural requirements, and may by order:

(a) extend a time limit fixed for the start of a proceeding by the QCAT Act or an enabling Act; or
(b) extend or shorten a time limit fixed by the QCAT Act, an enabling Act or the QCAT rules; or

(c) waive compliance with another procedural requirement under the QCAT Act, an enabling Act or the QCAT rules.

- [16] In *Sendall v Howe and Anor* [2012] QCATA 41, in a dispute regarding compensation under section 419(3) of the RTRAA, and the six-month time limitation imposed therein, the Appeal Tribunal said:

[10] ...Although the Tribunal has a general power to extend time under section 61 of the QCAT Act, that provision must be read in conjunction with the provisions of the RTRA Act, the enabling Act, which confers jurisdiction on QCAT to deal with tenancy matters. Here, subsection 3 prescribes the period within which a compensation claim can be made. The language used is mandatory in that any application "must" be made within the 6 months. The RTRA Act is prescriptive about the requirements for timeframes in which Notices under the Act can be issued and when proceedings can be commenced.[2]

- [17] In *Face 2 Face Foundation Pty Ltd & Ors v Brisbane City Council* [2013] QCATA 252 the issue of whether a termination application brought before the expiry of the handover day was premature was considered. The Appeal Tribunal said, in response to a submission by the lessor that a premature application is not prohibited by section 293(2) – what is prohibited is the bringing of an application 2 weeks after the handover day:

[18] In my view, this submission pays insufficient attention to the fact that the giving of notice and a failure to comply with the notice are cumulative conditions precedent to the right to apply for an eviction order. There must be a notice given, and then a failure to leave. It also glosses over the imperative "must" and the phrase "after the handover day" in subsection (2), and the words of subsection (3): "An application made under this section is called an application because of a failure to leave". Significantly it is not called "an application in case there is a failure to leave". A past non-compliance is clearly contemplated.

[19] It would be strange if the legislature intended to set a strict outer limit to a landlord's right to seek termination, as it does,[3] but left the time for commencement open-ended. If that were the case, a landlord, so disposed, might wield a section 293 application as a Damoclean sword over a tenant's head, and divert the resources of the Tribunal to the recording of a claim that might never be capable of pursuit. The better view, as I see it, is to treat section 293 as creating a 14-day window of opportunity immediately following the expiration of a notice to leave. That interpretation seems more consonant with the object

of stating clearly the rights and obligations of tenants,[4] particularly in residential tenancies.

[20] In effect, section 293 creates a statutory cause of action. The general principle is that a cause of action must be complete before it can support a valid writ or equivalent initiating process. Thus, in an action for moneys due –

[U]ntil the expiration of [the due date] an action cannot be brought because there is no complete cause of action.[5]

[21] Therefore:

It is not possible by amendment to add a cause of action not in existence at the date of a writ.[6]

[22] The BCC's submission does not closely analyse section 293 or cite any authority for the BCC's interpretation of it. In fairness, it does appear that there is no authority directly in point, but assistance is offered by a decision of the Supreme Court of Victoria in *Bundy v Alberts*[7]. The Victorian legislation[8] applied in Bundy differed in detail from our section 293, in that it required the application to be made after the service of a notice but did not stipulate that the application must follow a failure to comply with the notice. (In this respect, the Queensland legislation may be seen as more sensible and economical.) In fact, the landlord in Bundy served the notice and the application simultaneously. Brushing aside an argument that this procedure was a common "industry practice", the Court held that the application was premature, that the prior service of a notice was a mandatory precondition for jurisdiction, and that the tribunal below had no jurisdiction to proceed. In my view the same considerations apply, mutatis mutandis, to the premature application in this case.

- [18] In *Lowe v Aspley* [2010] QCATA 59, the Appeal Tribunal said:

[10] The RTRA is prescriptive about the requirements for issuing Notices and commencing proceedings. The consequences that can flow from a tenant's failure to comply with Notices issued under the RTRA explains the degree of prescription. If the tenant fails to comply with validly issued notices, the agent is entitled to commence urgent proceedings, without the need to enter into discussions with the tenant in an effort to resolve the dispute. The end point of that process is an order to terminate the tenancy.

[11] The requirements are not merely a matter of form; they are preconditions to QCAT's jurisdiction to grant relief under the RTRA. The path that the agent took to proceedings in QCAT in this case required a series of steps to be taken in order. Each stood like one in a line of dominos. If one fell it brought the others down with it.

Application for leave to appeal

- [19] In determining whether to grant leave, the Appeal Tribunal must be satisfied that:

(a) there is a reasonably arguable case of error in the primary decision;[9]
(b) there is a reasonable prospect that the appellant will obtain substantive relief;[10]

(c) leave is need to correct a substantial injustice caused by some error;[11] or

(d) there is a question of general importance upon which further argument, and a decision of the Appeal Tribunal, would be to the public advantage.[12]

- [20] Ms Perring submits that:

(a) The time limits in the RTRA Act are prescriptive and the Tribunal's power in the QCAT to vary time limits does not apply to these time limits: *Sendall v Howe* [2012] QCATA 41.
(b) The application of the AIA to extend the handover date appears to be well accepted in tenancy law. For example, in the case of *Betts v Department of Housing and Public Works* [2019] QCATA 180, the AIA extended the handover date from a Saturday to midnight on Monday, with the effect of repairing a notice to leave that had otherwise provided a notice period that was one day short.

(c) In the case of a Notice to Leave without grounds, a premature application for termination must be defective because the obligation on the tenant to leave remains in place until midnight on the proper handover day and there is no default and therefore no grounds for termination until after that time: *Face 2 Face Foundation Pty Ltd & Ors v Brisbane City Council* [2013] QCATA 252.

- [21] Ms Perring had in fact made similar submissions in the 8 September 2021 hearing, which, according to the transcript, were dealt with as follows:

ADJUDICATOR: ...I accept what you're saying, that if the end date on the Acts Interpretation Act of – if the end date for a timeframe set by statute falls on a Saturday -

MS PERRING: Yes.

ADJUDICATOR: ...the next business day would be the time for compliance. So the time for compliance with the statutory timeframe set out for vacating the premises, that's conflating the statutory timeframe with the date

MS PERRING: That we should have left.

ADJUDICATOR: ...for filing the application. The date for filing the application doesn't necessarily also be extended by the date for compliance, so I'm not satisfied that that argument's correct. But I understand completely what you're saying and that's a reference to, from recollection, the Acts Interpretation Act, section 38, reckoning of time.

MS PERRING: Yep.

ADJUDICATOR: But the reckoning of time, the filing of the application within two or 14 days after the expiry of the date on the form 12, I'm not satisfied that the time for compliance or time for departure, yes, would – goes to the Monday. I'm satisfied that may be the case, but I'm not satisfied that there has to be a delay in filing the application to the tribunal if the date on the form is the 21st. So, I'm not with – I'm not satisfied that's

grounds to end this. And, anyway, that would be a technicality for which I'd be satisfied I should rely upon section 62 (sic) of the QCAT Act to waive strict compliance because it's just a – that's a complete technicality that doesn't go -

MS PERRING: I agree with you.

ADJUDICATOR: ...to the fairness of this, so – yes.

MS PERRING: I agree with you there. It is a technicality.

ADJUDICATOR: Yes. So I'm going to allow the four weeks...

MS PERRING: Thank you.

- [22] I find that:

(a) On a proper reading of section 293, a lessor may not apply for a termination order unless a notice to leave has been given and the tenant has failed to hand over vacant possession of the premises to the lessor on the handover day.
(b) By operation of the AIA, the two-month period for Mr Nicholson's notice to Ms Perring commenced on 22 June 2021 and ended at midnight on Monday 23 August 2021, being the next business day after Saturday 21 June 2021 (the handover date expressed in the notice).

(c) Mr Nicholson could not bring his application under section 293 – he did not have a cause of action to ground it – before Ms Perring had failed to vacate the tenancy by midnight on Monday 23 August 2021.

(d) Accordingly, an error of law appears to have been made in the Tribunal below in granting the termination order applied for and issuing the warrant grounded upon a premature application. The requirements of section 293 were not procedural, but rather went to the heart of establishing the Tribunal's jurisdiction: time cannot not be extended or abridged in a proceeding the Tribunal has no jurisdiction to conduct.

- [23] Leave to appeal is granted to Ms Perring because:

(a) For the reasons given, there is a clear case of error in the primary decision of the Tribunal below, whereby a termination order was made grounded upon an incurably premature application for a termination order.
(b) It is inevitable that Ms Perring will obtain substantive relief in the proceedings.

(c) The termination of the tenancy in circumstances where the Tribunal had no power to do so is a matter of substantial injustice to Ms Perring, particularly in circumstances where she had been unable to source alternative accommodation putting her family at risk of homelessness.

Appeal

- [24] The Tribunal fell into an error of law in deciding the MCDT application in circumstances where it did not have the jurisdiction to do so. Accordingly, the appeal should be and is allowed and the decision set aside.

- [25] In deciding the appeal on a question of law, the next step for the Appeal Tribunal is to:[13]

(a) return the matter to the MCD jurisdiction to determine; or
(b) set aside the decision and substitute its own decision.[14]

- [26] In my view, the evidence before the Appeal Tribunal is more than sufficient to conclude that the MCDT application for termination is incurably defective. If I return the matter to the tribunal below in its MCDT jurisdiction, the only decision available to it is to dismiss the application for termination. Consistent with the objects of the QCAT Act which include to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal, and quick,[15] in the interests of expediency, I elect to substitute the decision with a decision to dismiss the application in MCD1149-21.

Orders

- [27] The decision of the Appeal Tribunal is therefore that:

(a) Leave to appeal is granted.
(b) The appeal is allowed.

(c) The decision of 8 September 2021 (including the termination order and warrant issued) is set aside.

(d) The application in a residential tenancy dispute filed 23 August 2021 (MCDT1149-21 - Southport) is dismissed.

[1] *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 143(3) ('QCAT Act').

[2] *Lowe v Aspley* [2010] QCATA 59.

[3] *Bergin v Department of Housing and Public Works* [2013] QCATA 190.

[4] RTRAA s 5.

[5] *Gelmini v Moriggia* [1913] UKLawRpKQB 80; [1913] 2 KB 549 at 552 per Channell J. See also *Baldry v Jackson* [1976] 2 NSWLR 415 at 417; *McPherson v Lawless* [1960] VicRp 59; [1960] VR 363 at 366; *Wigan v Edwards* (1973) 47 ALJR 586, at 592, 596; *Varawa v Howard Smith Company Ltd* [1911] HCA 46; (1911) 13 CLR 35; *Wren v Mahony* [1972] HCA 5; (1972) 126 CLR 212..

[6] *Emanuele & Ors v Hedley & Ors* [1997] ACTSC 136 at [76].

[7] (2007) V ConvR 54-735; [2007] VSC 90. See also *Veitch v Director of Housing* [2008] VSC 442.

[8] *Residential Tenancies Act* 1997 (Vic) s 322.

[9] *QUYD Pty Ltd v Marvass Pty Ltd* [2008] QCA 257; [2009] 1 Qd R 41 ('*QUYD*').

[10] *Cachia v Grech* [2009] NSWCA 232, 2.

[11] *QUYD* (n 9).

[12] *Glenwood Properties Pty Ltd v Delmoss Pty Ltd* [1986] 2 Qd R 388, 389; *McIver Bulk Liquid Haulage Pty Ltd v Fruehauf Australia Pty Ltd* [1989] 2 Qd R 577, 577, 580.

[13] QCAT Act (n 1) s146(c).

[14] Provided that in doing so, the substituted decision can resolve the matter and does not entail any rehearing of the evidence: See *Ericson v Queensland Building Services Authority* [2013] QCA 391 at [25].

[15] QCAT Act (n 1) s3.