QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Hessey-Tenny & Anor v Jones* [2020] QCATA 9
PARTIES:	**RICHARD HESSEY-TENNY** (first applicant/appellant) **and** **SADIE HESSEY-TENNY** (second applicant/appellant) **v** **HEATH JONES** (respondent)
APPLICATION NO/S:	APL094-18
ORIGINATING APPLICATION NO/S:	Maroochydore MCDT339/17
MATTER TYPE:	Appeals
DELIVERED ON:	31 January 2020
HEARING DATE:	23 August 2019
HEARD AT:	Brisbane
DECISION OF:	Justice Daubney, President
ORDERS:	**1. Leave to appeal is granted.** **2. The appeal is allowed in respect of Ground 1(b) so far as it relates to the laundry repair, cabinet rapid and water pump replacement.** **3. The appeal is allowed in respect of Ground 5(b) so far as it relates to the refilling of the water tank.** **4. The decision of the Tribunal dated 4 April 2018 is amended by deleting the sum of $6,615.50 and inserting in lieu thereof the sum of $3,208.00.** **5. The respondent must refund the sum of $3,407.50 to the appellants.** **6. The appeal is otherwise dismissed.**
CATCHWORDS:	LANDLORD AND TENANT – TERMINATION OF THE TENANCY – BY NOTICE TO QUIT – NOTICE BY TENANT TO LANDLORD – where the applicants were the tenants of a property – where the respondent was the landlord of the property – where the applicants issued a notice to remedy breach – where the property had

alleged unresolved sewage issues, non-functioning toilets and other ongoing faults – where the applicants issued a notice of intention to vacate the property – where the applicants and respondent sought to agree to terminate the tenancy and not make further claims – where the applicants applied to the Queensland Civil and Administrative Tribunal ('QCAT') seeking orders under ss 94, 185, 419 and 420 of the *Residential Tenancies and Rooming Accommodation Act* 2008 ('RTRAA') – where the respondent filed a counter-application – where the applicants' application was dismissed and the respondent's counter-application was partially allowed – where the applicants applied for leave to appeal the decision of the Tribunal to the Appeal Tribunal of QCAT – whether the Tribunal erred in holding that s 416 of the RTRAA was satisfied – whether the respondent's claims were out of time – whether the Tribunal erred in fact regarding the applicants' liability for a pump failure and septic tank misuse – whether the Tribunal erred in fact regarding the existence of a mutual termination agreement

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – DENIAL OF NATURAL JUSTICE – where the applicants allege they were not given a proper opportunity to understand or respond to a maintenance report prior to the commencement of the tenancy – where the maintenance report was subsequently provided to the Tribunal and the applicants at the hearing – whether the lack of opportunity to understand or respond to the report prior to the commencement of the tenancy constitutes a denial of natural justice and procedural fairness

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – DENIAL OF NATURAL JUSTICE – where one of the applicants and the respondent had a phone conversation shortly before the applicants vacated the property – where a transcript of the conversation and copies of subsequent emails were provided by the respondent to the Tribunal – where the applicants were not provided with copies of the documents despite requesting to see them – where the Tribunal Member read to the applicants relevant parts of the transcript and requested their comments – whether non-receipt of copies of the documents and the placing of weight on the transcript by the Tribunal Member constitutes a denial of natural justice and procedural fairness

APPEAL AND NEW TRIAL – APPEAL – GENERAL

PRINCIPLES – WHEN APPEAL LIES – FOR BIAS IN JUDICIAL PROCEEDINGS – where the applicants allege the Tribunal Member was combative towards them – where the applicants allege the Tribunal Member referred to them as 'male and female tenant' while referring to the respondent by name – where the applicants allege the Tribunal Member commented that he had been a landlord and had had claims against him – whether the Tribunal Member's alleged conduct gives rise to an apprehension of bias

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 142(3)(a)(i)
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), ss 173, 416, 419

Evans v Saarman [2013] QCATA 58, considered

APPEARANCES & REPRESENTATION:	
Applicants:	Self-represented
Respondent:	Self-represented by phone

REASONS FOR DECISION

[1] The dispute in this matter relates broadly to a residential tenancy agreement entered into between the applicants, Mr and Mrs Hessey-Tenny ("the tenants"), as tenants and the respondent, Mr Jones ("the landlord"), as lessor of a property located at 37 Liana Place, Forest Glen. The agreement began on 31 March 2017 and was due to end on 30 March 2018. On 1 September 2017, the tenants issued a notice of intention to vacate the property on 8 September 2017 and ultimately vacated on 7 September 2017. The notice referred to a previous notice to remedy breach which had been issued in respect of an alleged unresolved sewage issue causing an odour and toilets not functioning properly, as well as ongoing faults with the house since moving in. The tenants did not apply to the Tribunal for an order terminating the tenancy on the basis of the notice of intention to leave.

[2] There was discussion between the parties in relation to an agreement to terminate the tenancy and with respect to both parties walking away and not making further claims. The terms of that agreement, and indeed its very existence, were in dispute in the hearing below. The tenants ultimately filed an application *for minor civil dispute – residential tenancy dispute* on 10 November 2017. In that application, the tenants sought orders under ss 94, 185, 419 and 420 of the *Residential Tenancies and Rooming Accommodation Act* 2008 ('RTRAA'). They claimed the following sums for a total of $11,115.30:

(a) Removal costs: $1,150.00;

(b) Packing materials: $78.50;

(c) Bond clean: $1,200.00;

(d) Refund of 50 per cent of rent paid: $8,360.00; and

(e) Court costs: $326.80.

[3] On 2 March 2018, the landlord filed a counter-application. He sought break lease costs, a 'management preparation fee' and repairs costs in a total amount of $9,065. Specifically, the landlord sought:

(a) Loss of rent: $2,280;

(b) Reletting fee: $760.00;

(c) Management preparation fee: $1,650 being $55 an hour for 30 hours;

(d) Laundry leak repair: $815.00;

(e) Laundry cabinet repair: $1,130.00;

(f) Reinstatement of clothesline $168.00;

(g) Reinstatement of shelves removed from loungeroom: $87.00;

(h) Filling of water tank: $1,425.00; and

(i) Water pump replacement: $1,425.

[4] The matter was heard before Magistrate Madsen sitting as a member of the Tribunal at Maroochydore on 7 March 2018. The learned Magistrate reserved his decision and written reasons were delivered on 4 April 2018. The learned Magistrate summarised his findings on the various claims and counterclaims at the conclusion of those written reasons:

> 120. Summary of claims of the tenants and my decision:
>
> a. I have refused the rent reduction claim to the extent claimed by the tenant.
>
> b. the bond clean is refused;
>
> c. the materials to pack is[sic] refused;
>
> d. the removal costs are refused
>
> e. the court costs I refuse.
>
> 121. Summary of claims of the landlord and my decision:
>
> 122. I find the tenant is liable to pay compensation for unpaid rent between 8th September and 29 September 2018 - $2280.
>
> 123. I find the tenant is liable to pay break lease fee $760.
>
> 124. The management preparation fee is refused;
>
> 125. The "Taps R US" invoice for investigation and repair due to the washing machine not being connected properly is allowed in the

sum of $815 together with the repair to the laundry cabinets in the amount of $1310 is allowed.

126. The costs for the reinstatement of the clothes line is allowed in the sum of $168.

127. The reinstatement of shells [sic] removed in the lounge room is not allowed.

128. Filling of the water tank which was left empty is allowed in the sum of $570.

129. The water pump replacement is allowed in the sum of $712.50.

130. Total: $6615.50

131. I order that the applicant pay to the respondent the sum of $6615.50 forthwith.

Application for leave to appeal

[5] On 19 April 2018, the tenants filed an *application for leave to appeal or appeal* against that decision. It is that application with which this Appeal Tribunal is presently concerned.

[6] The grounds of appeal summarised in the tenants' submissions[1] are as follows:

(a) Ground 1: Preliminary issues regarding (a) the requirement of a conciliation before commencing proceedings; and (b) whether the respondent's claims were out of time;

(b) Ground 2: The water supply issue in relation to question of fact regarding liability for the pump failure;

(c) Ground 3: The septic tank issue in relation to (a) question of fact regarding liability for the septic tank misuse; and (b) denial of natural justice and procedural fairness

(d) Ground 4: The termination issue in relation to (a) a question of fact regarding the mutual termination agreement; (b) question of law regarding s 173; and (c) denial of natural justice and procedural fairness;

(e) Ground 5: The lessor's claims in relation to (a) a question of law regarding s 419(3); (b) question of fact regarding liability for damages; and (c) denial of natural justice and procedural fairness;

(f) Ground 6: Apprehended bias by the ordinary member.

[7] Directions were issued for submissions from each party and the matter came on for hearing before the Appeal Tribunal on 23 August 2019. The *Queensland Civil and Administrative Tribunal Act* 2009 ('QCAT Act') specifically requires that parties obtain leave to bring an appeal such as this one against a decision in the Tribunal's

---

[1] Respondent submissions filed 6 December 2018 at para 2.1.

minor civil dispute jurisdiction.[2] It is well established that leave to appeal will usually only be granted where it is necessary to correct a substantial injustice to the applicant and where there is a reasonable argument that there is an error to be corrected.[3]

[8] At the outset of the hearing, the Appeal Tribunal explained that the question of leave to appeal would be considered alongside the substantive appeal given that the substantive grounds of appeal need to be considered in order to determine whether leave to appeal ought be granted. For the reasons that follow in respect of each ground, the Appeal Tribunal considers that this is an appropriate case for the granting of leave to appeal.

[9] Earlier in the proceedings, the Appeal Tribunal had granted the tenants leave to apply for leave to adduce further evidence. The tenants did not ultimately make any such application. At the outset of the oral hearing, the Appeal Tribunal made clear to the tenants that in making its decision as to both leave to appeal and the substantive appeal, it would not be having regard to anything that was not before the Magistrate in the proceeding below. Both Mr and Mrs Hessey-Tenny confirmed that they understood this. They also resiled from an earlier argument that the tenancy agreement was not valid as a corporate entity, rather than Mr Jones, was the registered owner of the property.

[10] The Appeal Tribunal will now consider each ground of appeal in turn. The Appeal Tribunal has had regard to all of the submissions, both written and oral, made by the parties, with the obvious exception of any matters of evidence or any factual assertions that were not before the Magistrate.

Ground 1 – Jurisdictional issues

[11] The first ground of appeal raises two issues of jurisdiction by which the tenants contend that the Tribunal below had no power to hear the landlord's counterclaim. The Appeal Tribunal is satisfied that leave ought be granted in respect of this ground of appeal. The tenants' argument in respect of s 416 of the RTRAA is arguable. The interpretation of that provision arises periodically before the Tribunal and further clarity on its application in circumstances in which one party has applied to the Residential Tenancies Authority ('RTA') for dispute resolution and one has not is clearly appropriate. As to the argument that the landlord's claims were out of time by virtue of the 6 month time limit under s 419(3) of the RTRAA, on its face there appears to be some merit to this argument. It goes without saying that if the tenants are correct in respect of either of these claims, they would suffer a substantial injustice in being held liable in respect of counterclaims the Tribunal below had no jurisdiction to hear.

Conciliation requirement under s 416

[12] Under this ground, the tenants allege that the Magistrate erred in determining that he was able to hear the lessor's counter-application.

[13] The tenants submit that the Tribunal had no jurisdiction to hear that counter-application because the landlord had not submitted it to the RTA for dispute

---

2 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 142(3)(a)(i).
3 *Pickering v McArthur* [2010] QCA 341; *Burke v Commissioner of Police* [2016] QCA 184.

resolution as required by s 416 of the RTRAA. They assert that the error lay in the Magistrate considering that the respective claims of the parties were of the same character. The Magistrate's assessment of the claims as being of the same character is evident in the following extract from the reasons:

> 13. It is hard to reach a conclusion that the matters raised were not substantially of the same character. In that sense what the applicant has sought from the tribunal is reduction of rent arising from a tenancy property which the applicant has vacated without an order of the tribunal. What the respondent seeks is compensation because of the applicant's failure to comply with their obligations under the tenancy.

[14] In reaching this conclusion, the Magistrate relied on the Appeal Tribunal's decision in *Evans v Saarman*.[4] In that case, both the tenant and landlord had brought applications for compensation which were heard together. The adjudicator hearing the matter at first instance dismissed Evans' claim but accepted part of the Saarmans' claim. Evans then applied to appeal the decision, on the relevant basis that the Saarmans had not lodged a dispute resolution request as required by s 416.

[15] On that point, Senior Member Stilgoe held as follows:

> [5] It is an artificial reading of s 416 to require both parties to make a dispute resolution request. The purpose of the section is to ensure the parties have first accessed the dispute resolution process offered by the Residential Tenancies Authority. If one party has made a dispute resolution request, the RTA will refuse another party's request to conciliate about the same issue. By default, therefore, a second dispute resolution request will end automatically within the meaning of s416(1)(a)(i). The purpose of the section is achieved through conciliation on the first request and there is simply no utility in a second request.
>
> [6] If a party makes a dispute resolution request, and then an application to the tribunal, as Mr Evans did, then the tribunal has jurisdiction. The tribunal can decide different applications at the same time.[5] It can make any order it considers appropriate to resolve the dispute[6] including an order for compensation if the parties have reasonable notice of the claim.
>
> [7] These applications were heard together. Mr Evans' own material shows that that the RTA conciliation included a discussion about both parties' claims. It follows, therefore, that the learned Adjudicator could have made exactly the same order in Mr Evans' application as she did in Mr and Mrs Saarman's application. Mr Evans' appeal against the learned Adjudicator's decision to give Mr and Mrs Saarman compensation for breach of agreement must fail.

[16] The tenants sought to distinguish this decision on the basis that in *Evans* the RTA conciliation included a discussion about both parties' claims which did not occur here. I do not consider this a persuasive argument. In this case, the RTA deemed the dispute unsuitable for conciliation and no conciliation ever took place. Had a conciliation occurred under which the tenants claimed a rent reduction and compensation from the landlord due to an alleged breach, it is inconceivable in the

---

4 [2013] QCATA 58.

5 *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld), s 431.

6 *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld), s 429.

circumstances that he would not have raised his claims about the breaches he alleged on their part.

[17] The tenants further rely on the decision in *Raymond v Doidge*,[7] in which the Tribunal held that the lessor's claim was defective because, while he had been to the RTA about a claim for return of the bond, he had not submitted a request about rent arrears. This is a completely different situation from that presently before the Appeal Tribunal. The present case more closely resembles *Evans* in that one party's claims were submitted to the RTA while the other's was not, rather than a case of one party having submitted parts of its claim but not others.

[18] On that basis, the Appeal Tribunal is not persuaded that the Magistrate erred in holding that s 416 of the RTRAA was satisfied. It should further be noted that during the hearing below, the Magistrate explained that were the tenants to insist upon the landlord having first submitted his claim to the RTA then he would adjourn the 7 March 2018 hearing and ultimately join those two claims. Such an approach would have been permitted under s 54 of the QCAT Act which allows for the consolidation of two or more proceedings concerning the same or related facts and circumstance. That approach would also have been consistent with the objects of the QCAT Act[8] and the Tribunal's functions relating to the objects.[9]

[19] The Magistrate concluded:

> So I can say in relation to it, if you were going to insist that the RTA process is complied with in relation to aspects of what the response says, that's fine with me. That means I'm not going to deal with your dispute today at all because I'm not going to do them separately because it would be a waste of time; it'd be a waste of court resources, and might end up with a fictional outcome, that is, an outcome based on only half the knowledge of the situation, not the complete knowledge. Up to you.

[20] In response to this, Mr Hessey-Tenny replied: 'I'm more than happy for you to move forward'.[10] A short time later, Mr Hessey-Tenny then agreed with the Magistrate's characterisation of Mr Jones' counter-application as responsive to their claim, as his side of the story.[11]

[21] For those reasons, the Appeal Tribunal is not persuaded that the Magistrate's decision in regard to s 416 was attended by error. First, his approach is consistent with that provision and previous Tribunal authority and, secondly, the tenants expressly agreed to his proceeding on the basis that s 416 was satisfied.

[22] Accordingly, this ground of appeal cannot be maintained.

---

7 [2012] QCAT 163.

8 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 3. Particularly, 3(b) 'to have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick'.

9 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 4, in particular 4(c) to ensure proceedings are conducted in an informal way that minimises costs to parties, and is as quick as is consistent with achieving justice; and 4(d) to ensure like cases are treated alike.

10 Transcript at 1-10 L 22.

11 Transcript at 1-10 ll 45 to 47, continued 1-11 ll 1-7.

Were the claims time-barred under s 419(3)?

[23] Section 419(3) of the RTRAA provides that an application by a tenant or landlord about a breach by the other party must be made within 6 months of becoming aware of that breach. The Magistrate was satisfied that all of this landlord's compensation claims satisfied this requirement:

> 18. The effect of this is that the limitation date, or "clock stops" six months prior to the giving of the form 16 to the RTA on 29 September 2017.
>
> 19. Each of the components of the compensation sought by the Respondent did arise in the six-month period prior to that date.
>
> 20. In that sense the compensation claims are within time.

[24] The tenants contend that this amounted to an error as they lodged the Form 16 with the RTA and it should not be considered to amount to an application by the landlord. This raises a clearly arguable legal error and if their argument is correct the tenants would be subject to a substantial injustice in being held liable to compensate the lessor for an application made outside the time limit. Accordingly, leave to appeal should be granted in respect of this ground.

[25] As noted, s 419 allows a party to apply to the Tribunal for an order about a breach of the tenancy agreement, but requires that the application be made within 6 months of becoming aware of that breach. There is no basis in that provision to equate the tenants' application to the RTA for dispute resolution as an application by the landlord. That was clearly an error on the part of the Magistrate.

[26] Rather, as the tenants contend, the landlord's application was made on 2 March 2018 with the filing of his counter-application. The effect of that is that the latest date at which the landlord could have become aware of the claims would be 2 September 2017.

[27] In the proceeding below, the landlord was awarded compensation for the leak in the laundry and associated damage due to improper connection of the washing machine, for the reinstatement of the clothesline, for the filling of the water tank and the water pump replacement. Accordingly, for that compensation to be awardable, he would have to have become aware of the relevant breaches on 2 September 2017 at the latest.

[28] It is not clear from the counter-application and supporting materials precisely which obligation the landlord said had been breached by the tenants. The learned Magistrate, however, clearly considered it to be the obligation under s 188(4) and held that the landlord needed to show that the tenants had failed to return the premises to the condition that they were in at the time the tenancy commenced, excepting fair wear and tear.[12] The Magistrate also considered that the landlord needed to show that the tenants had failed to comply with the obligation to fill the water tank due to the specific condition in the tenancy agreement that they were liable for water usage charge and to pay for water supply to the premises.[13]

---

12 Reasons at 109.

13 See reasons at 110 and items 12.2 and 14 of the Tenancy Agreement.

[29] As to the former obligation, the time at which the landlord would become aware of that breach would be when the tenants vacated the property, in this case, 7 September 2017. 2 March 2018 is within six months from that date. Indeed, the tenants themselves seem to have acknowledged this in their submissions:

> 4.10 It would appear that the Lessor's claims are purely retaliatory as they have been made just within 6 months (5 days within the time limit) after the tenancy has ended and 3 months after the matter was first set down for hearing.

[30] Although it is true that the application was made within 6 months of the end of the tenancy, and that appears to have been acknowledged by the tenants, the Appeal Tribunal has some misgivings about the Magistrate's finding in this regard. It is clear from his reasons that he considered this to be a breach of the obligation to leave the premises in the condition they were at the beginning of the lease. Such a breach, and the lessor's awareness of it, could only have arisen at the end of the tenancy. The difficulty, however, lies in the fact that the landlord became aware before this time of many of the issues for which he ultimately claimed compensation.

[31] In respect of the laundry repair, the investigation and repair work were invoiced for by Taps 'R' Us on 21 August 2017. Similarly, Taps 'R' Us invoiced for the replacement of the water pump on 3 August 2017. Although the quote for the repair of the laundry cabinets was not issued until 12 January 2018, the damage to those cabinets was identified in the Taps 'R' Us investigation in August 2017. In respect of those items, it would be contrary to the intention of the RTRAA to allow the landlord to claim for them. Accordingly, the Magistrate has erred in awarding these amounts.

[32] As to the clothesline, however, there is nothing on the materials before the Magistrate to suggest that the landlord had become aware of that problem prior to the end of the tenancy. In any event, had the tenants reinstated or fixed the clothesline themselves before the end of the tenancy, then the breach would not have arisen. As to the filling of the water tank, there is some indication that the landlord was aware of issues with refilling the water tank, due to the maintenance done on the pump and multiple conversations with the tenants about the importance of keeping the tank filled. While it could be said that the tenants had breached the obligation to keep the tank filled throughout the tenancy, it was also open to the Magistrate to consider that the true breach was the ultimate failure to refill at the end of tenancy and hence return it to the condition it was in at the beginning. It should be noted that here I am only addressing the issue of whether such a claim was within time. Liability for filling the tank will be addressed under Ground 5 below.

[33] Accordingly, the appeal should be allowed so far as the laundry repair, laundry cabinet replacement and water replacement pump are concerned. The amounts allowed by the Magistrate under these heads were $815, $1,310 and $712.50.

Ground 2 – the water supply issue and liability for the water pump replacement

[34] The tenants contend that the Tribunal erred in fact in finding them liable for the replacement of the water pump. The Tribunal's finding was that the only logical conclusion to be drawn was that they had failed to keep an adequate level of water in

the tank. The Magistrate found that it was this misuse which had cause the water pump to fail and that the tenants were accordingly liable to replace it. The Magistrate concluded that it was more probable than not that the water pump was not new and, on that basis, allowed 50 per cent of the cost of pump replacement.

[35] In light of the Appeal Tribunal's finding that the claim for the water pump replacement is barred by s 419(3), it is not necessary to further consider liability for its failure. Accordingly, this ground of appeal cannot be maintained.

Ground 3 – the septic tank issue

Question of fact regard liability for septic tank misuse

[36] The tenants argued that the Magistrate erred in finding them liable for misuse of the septic tank on the balance of probabilities and in consideration of all the evidence. It is not clear from the submissions what the tenants seek in this regard. They were not ordered to pay any amounts in respect of the septic tank which was ultimately replaced shortly after the termination of the tenancy. In this sense, the Appeal Tribunal considers that it is ultimately of little relevance who was responsible for the issues with septic tank.

[37] The issues with the septic tank were raised by the tenants in support of their application for a rent reduction. In this appeal, however, the tenants have not sought to challenge the Magistrate's conclusion that there was no substantial reduction in the amenity of the premises. There is no utility in this ground and it cannot be maintained.

Denial of natural justice and procedural fairness

[38] The claim regarding a denial of natural justice and procedural fairness in respect of the septic tank issue will also be dismissed. The injustice of which the tenants complain is that they were not given a proper opportunity to understand or respond to a maintenance report prepared by Allied Maintenance on 6 March 2017. That report was completed prior to the commencement of the tenancy and handed up to the Magistrate at the hearing on 7 March 2018.

[39] Again, the relevance of this in the tenants' appeal is not clear. The learned Magistrate relied upon the maintenance as establishing the condition of the septic tank at the commencement of the tenancy on 31 March 2017. However, as the landlord did not claim compensation in respect of the misuse of the tank and as the tenants have not sought to challenge the finding that the amenity of the premises was not substantially reduced, no question of breach of natural justice arises.

[40] In the interests of completeness, however, the Appeal Tribunal notes that it does not consider that the tenants were denied procedural fairness. The Magistrate directed that the tenants be given the document before it was handed up. They did not ask for an adjournment or indicate that they required further time to consider its contents. The Magistrate indicated that he saw the relevance of the document as showing that the tank had been cleaned at the beginning of March and there was no one else there until the tenants arrived at the end of March. The tenants had a full opportunity to respond to the inference they had caused the issues with the septic tank and did so through the vehement denials noted by the Magistrate in his reasons.

Ground 4 – the termination issue

Question of fact regarding the mutual termination agreement

[41] The tenants submit that the Magistrate erred significantly in fact in finding there to be no mutual termination agreement. The landlord submitted that the parties had initially entered an agreement to end the tenancy and that both sides would walk away without making further claims. On that condition, the landlord instructed the agent to release the bond to the tenants and not to charge a break lease fee. He explained at the hearing that he had made this as a commercial decision, judging it better to simply end the tenancy and start again with new tenants.

[42] The tenants' argument seems to be that there was an agreement to terminate which included that the bond would be released to them but did not include any condition that they not bring any claims. The Appeal Tribunal does not consider that they have provided a persuasive explanation for their proposed agreement, particularly as to why the landlord would refrain from charging a break lease fee or retaining the bond without inspecting the premises to see if any of those funds should be retained in respect of damage.

[43] Although the landlord gave clear instruction to his agent on this point, it seems that the agent did not properly convey those instructions, with the result that the tenants received the impression that they were simply being released from the tenancy but would remain able to pursue any claims they might wish. The Magistrate's analysis of the situation was as follows:

> 101. Notwithstanding the unequivocal instructions given to the landlord's agent about the basis on which termination was to occur unfortunately the agent did not secure an agreement with the tenant on the same terms.
>
> 102. The only conclusion that I can reach based on the email exchanges and what I have been told about the conversation that occurred is that though they [sic] might well have been an agreement made to terminate the tenancy, clearly that agreement was not put into effect and the tenant on 15 September, accepted the release from the tenancy, but contemporaneously indicated that any conditions were a side issue in which they were reserving their position and submitting a claim for the bond.

[44] It appears to the Appeal Tribunal that the Magistrate's conclusion about the alleged agreement was that there was no 'meeting of the minds' sufficient to create an enforceable agreement. Moreover, the tenants' conception of the agreement, where the undertaking not to pursue further claims is removed, seems to lack consideration, with the effect that the agreement would be unenforceable in any event.

[45] On the evidence before the Magistrate, it was open to him to conclude that no agreement to terminate had properly been reached. The Appeal Tribunal also considers that it was reasonable for the Magistrate to rely upon the supporting evidence which he did. The specific question of whether there was a breach of procedural fairness in relying upon the transcript of the telephone conversation between the landlord and the mail tenant is addressed in more detail below.

[46] Finally, the Appeal Tribunal also notes that the tenants' account of the alleged agreement has been inconsistent. In the hearing at first instance, the tenants initially argued that there had been no agreement. They now seek to rely upon it, after the Magistrate explained to them the difficulties with contending it did not exist.

Questions of law regarding s 173

[47] Section 173 provides that a term of an agreement is void to the extent that it provides for a penalty upon breach of the agreement by the tenant. Section 173(2) provides, however, that a term of an agreement is not void if it provides that a tenant is liable to pay the reasonable costs incurred by the lessor in reletting the premises. The tenants' argument under this head depends entirely upon the previous argument that the Magistrate had erred in fact in finding that there was no agreement to terminate the tenancy. In circumstances where the Appeal Tribunal has not been persuaded by that argument, this one must also fail. Had the Appeal Tribunal reached the conclusion that there was an agreement as to termination, this argument would have been entirely superfluous. In any event, it is not necessary for the Tribunal to have any further regard to this ground.

Denial of natural justice and procedural fairness

[48] The tenants claim that the Magistrate placed undue weight on a phone conversation between Mr Jones and Mr Hessey-Tenny on 4 September 2017. The transcript of the conversation and subsequent emails sent to a third party containing extracts thereof were handed up by the landlord at the hearing and were not provided to the tenants despite their request to see the documents. The tenants allege that this constituted a significant denial of procedural fairness and natural justice.

[49] The tenants are correct that they should have been provided with a copy of the transcript and emails or at least granted the opportunity to review them before they were handed up to the Tribunal. That notwithstanding, having regard to the totality of the circumstances, including the other material relied on by the Magistrate in accepting that the agreement between the parties was never put into effect, the Appeal Tribunal is not satisfied that the failure to show the transcript to the tenants amounts to a significant denial of procedural fairness and natural justice as contended.

[50] First, the transcript demonstrates that while the tenants were not shown the transcript, the Magistrate read to them and requested their comments on relevant parts contained in it. Second, Mr Hessey-Tenny did agree that the conversation had taken place and recalled that the conversation had taken place while the landlord was waiting for a flight. The Magistrate also noted that parts of the conversation that were relied upon were agreed to.

[51] The tenants also take issue with an adverse finding of credit by the Magistrate in relation to Mr Hessey-Tenny being vague and unable to be drawn on the content of the telephone discussion. On the Appeal Tribunal's reading of the transcript and the reasons, the adverse finding was not based on the fact that Mr Hessey-Tenny could not remember the conversation in detail, but that Mr Hessey-Tenny was evasive in relation to questions about whether an agreement had been reached. This is clear in the Magistrate's comments during the hearing:

> I'm not expecting you to remember every single world [sic], but you should remember whether or not you'd made an agreement, and the document that he says is an email in which he has transcribed a recorded conversation with you suggests that there was an agreement.

[52] Furthermore, the Magistrate's acceptance of Mr Jones' version of events in relation to the agreement was not based solely on those materials handed up at hearing. The Magistrate also had regard to contemporaneous text messages exchanged between Mr Jones and Mr Hessey-Tenny (which were produced at pages 25 and 26 of the supporting documents filed with the tenants' initial application). These messages which were exchanged on 4 September 2017, the date of the phone call, demonstrate that they were planning to speak about the lease breach situation. The text message from Mr Jones ends with, 'We will chat and I will see which way you would like to proceed before I provide further instruction to Ray White'. The Magistrate has inferred that the instruction to Ray White was regarding the bond and the tenants vacating the property. That was a reasonable inference open on the facts.

[53] The Magistrate also had regard to emails exchanged between the agent and the tenants which support the Mr Jones' account of the conversation on 4 September 2017 and also his ultimate conclusion that no agreement was reached. In an email on 1 September 2017, the tenants stated: 'Our intention is to lodge a claim for the full return of our bond. If this is not agreed to we will be seeking additional expenses for the cost of the move etc.'. The Magistrate considered that that statement of intent, or threat, was consistent with what Mr Jones understood he was being asked to agree to in the telephone conversation with Mr Hessey-Tenny on 4 September 2017.

[54] Further support for the Magistrate's conclusion is found in emails filed by the landlord. The Magistrate referred to an email from the agent on 14 September 2017 stating that the owner had agreed to release them from the tenancy 'with the following provisions'. In reply on 15 September 2017, Mr Hessey-Tenny stated:

> I am pleased to hear the owner has released us from our tenancy, the provisions are at this time a side issue (and can be dealt with) as we are currently considering our position regarding submitting a form 16 for a claim above the bond amount.

This again indicates that the tenants were considering claiming the bond and using this to negotiate the termination of the tenancy.

[55] In light of the evidence and the fact that the tenants were given an opportunity to respond to the content of the transcript, albeit not being provided with a copy as they should have been, the Appeal Tribunal is not persuaded that there was a denial of procedural fairness.

[56] Accordingly, Ground 4 is dismissed in its entirety.

Ground 5 – the lessor's claims

Question of law regarding s 419(3)

[57] This question was dealt with under Ground 1 above. Accordingly, the following arguments regarding liability and a denial of procedural fairness will only be dealt

with in respect of those claims found not to be time barred; the clothesline and the water refilling.

Question of fact regarding liability for damages

Clothesline

[58] The tenants made no submissions in relation to clothesline in the proceedings below, either in their written response to the landlord's counterclaims or at the hearing. As confirmed with the tenants at the present oral hearing, because they had not made an application to rely on fresh material, the Appeal Tribunal would not have regard to anything, whether evidence or factual assertions, that was not before the Magistrate. Insofar as the tenants purported in the present hearing to rely on further submissions and photos, the Appeal Tribunal can have no regard to these. Accordingly, there is no basis to question the Magistrate's finding that the tenants were liable to pay the cost of the clothesline reinstatement.

Refilling of water tank

[59] The tenants argue that the Magistrate erred in finding that they were liable to pay for the refilling of the water tank. In reaching this conclusion, the Magistrate found that the tenants had an obligation to keep the water tank filled. They do not dispute this, but dispute the finding that they were in breach of the obligation. The tenants point to the fact that there was no evidence of the level of the tank when they moved in or when they moved out and also to evidence within their materials filed in the proceedings below which demonstrate that they filled it regularly throughout the tenancy. This included text messages to the landlord mentioning water refills. The submissions in this appeal attach a further text message to the water suppliers to prove the most recent water refill date. The Appeal Tribunal, however, cannot have regard to this as it was not before the Magistrate and the tenants did not seek leave to rely upon it.

[60] Despite this, the Appeal Tribunal is inclined to agree with the tenants on this point. In circumstances where there is no proof as to the level of water in the tank at the beginning of the tenancy or on the day that the tenants vacated the premises, there is no reasonable basis to hold them liable for this expense. This is all the more so considering the invoice for the water refill shows that it was completed on 11 October 2017. The tenants vacated the property on 7 September 2017 and new tenants arrived from 29 September 2017. Without a means of determining how much water was used by the new occupants in the period between their arrival and the refilling of the tank, the Appeal Tribunal considers there is no reasonable basis to hold the tenants liable for the cost of refilling the tank.

[61] Accordingly, the Magistrate's finding in this regard must be set aside. The amount ordered to be paid under this head was $570.00.

Denial of natural justice and procedural fairness

[62] The tenants contended that they were denied the opportunity to respond to the lessor's arguments at the hearing and that the Magistrate based his decision solely on the lessor's material. The Appeal Tribunal does not accept this. The tenants put on written submissions in response to the landlord's counter-application. They chose not to address the substance of his claims in those submissions, focussing

instead on the arguments that the claims were statute-barred by reason of s 416 or s 419 of the RTRAA. While it is true that the hearing focussed on the s 94 issue and the issue as to whether there was an agreement as to termination, the parties were expressly offered the opportunity to make any submissions they wished. Prior to concluding the hearing, the Magistrate stated:

> Is there anything else that you want to say to me now? Because once you say that, that's the end of it. No more emails, no more letters, nothing else. That's it. So I'll start with you Mr and Mrs Hessey-Tenny. Anything else you want to say?

[63] Mr Hessey-Tenny replied no and the Magistrate moved on to allow the respondent the same opportunity to make final submissions.

[64] There is no basis for the claim of procedural unfairness.

Ground 6 – apprehended bias by the member

[65] The tenants argued that the Magistrate was biased against them and continually sided with the landlord. They asserted that the Magistrate was combative, referred to them as 'male and female tenant' while referring to the landlord by his name, and intervened excessively, speaking over them and cutting them short. The tenants also referred to a comment by the Magistrate that he had been a landlord and had had claims made against him. They also pointed to his criticism of the RTA. The tenants argued that the Magistrate was affected by a number of biases and then tried to rationalise them by serving pages of incorrect information (this obviously being a reference to the Magistrate's written reasons).

[66] The landlord disagreed with this characterisation of the Magistrate's conduct at the hearing. He said that both parties were given an opportunity to speak and were both asked clearly whether there was anything further that they wished to add.

[67] The Appeal Tribunal has had extensive regard to the transcript of proceedings and is not persuaded that the Magistrate was biased or conducted the proceedings inappropriately. Both parties were given a full opportunity to speak and, as noted above, were directly offered the opportunity at the conclusion of the hearing to make any further submissions they wished. As noted above, the tenants did not avail themselves of this opportunity.

[68] As to the Magistrate's comments about his experience as a landlord, the tenants have failed to note that the Magistrate also referred to his experience as a tenant and sympathised with their concerns about bond cleans. These comments are consistent with the informal approach taken by QCAT, as set out under the objects of the QCAT Act, and are properly understood as an attempt to convey to both parties that the Magistrate understood their frustrations. The Magistrate's criticism of the RTA was in regard to the number of matters which are deemed to be unsuitable for dispute resolution. This is criticism which does not betray a bias in favour of landlords or tenants, but rather laments the fact that a useful opportunity for parties to attempt to resolve their dispute without a full contested hearing at the Tribunal, which is in fact a mandatory prerequisite to such a hearing, is so easily dismissed.

[69] Lastly, the transcript reveals that both parties were addressed by their names. At one point in the written reasons, the Magistrate refers to Mr Jones by his name. On all

other occasions, he is referred to as 'the landlord'. It is clear that the use of 'male tenant' and 'female tenant' was simply to distinguish between Mr and Mrs Hessey-Tenny where necessary. There is nothing objectionable in this.

[70] The tenants' characterisation of the Magistrate's reasons as several pages of incorrect information written in an attempt to rationalise his biases is unwarranted and unfair criticism. Although the Appeal Tribunal has found some error in the Magistrate's decision, the reasons were on the whole thorough and well-considered. The Magistrate is to be commended for the time and consideration applied to the dispute and for producing written reasons to fully explain his decision to the parties.

Conclusion

[71] In summary, the Appeal Tribunal has identified the following errors in the Magistrate's decision:

(a) Finding that the Tribunal was able to hear the application for compensation in respect of the laundry repair, the laundry cabinet replacement, and the replacement of the water pump; and

(b) Finding that the tenants were liable to pay for the refilling of the water tank.

[72] The decision below ordered the tenants to pay a total of $6,615.50 to the landlord. For the reasons given above, that amount needs to be adjusted down to $3,208.00 to take account of the following:

(a) $815 for the laundry investigation and repair;

(b) $1,310 for the laundry cabinet repair;

(c) $712.50 for the water pump replacement; and

(d) $570 for refilling the water tank.

[73] It was also not in issue between the parties that the tenants had already paid the whole of the $6,615.50 to the landlord. In the circumstances, and for the avoidance of doubt, it is therefore appropriate for this Appeal Tribunal to order that the landlord refund the amount of $3,307.50 to the tenants.

[74] Accordingly, there will be the following orders:

1. Leave to appeal is granted.

2. The appeal is allowed in respect of Ground 1(b) so far as it relates to the laundry repair, cabinet rapid and water pump replacement.

3. The appeal is allowed in respect of Ground 5(b) so far as it relates to the refilling of the water tank.

4. The decision of the Tribunal dated 4 April 2018 is amended by deleting the sum of $6,615.50 and inserting in lieu thereof the sum of $3,208.00.

5. The respondent must refund the sum of $3,407.50 to the appellants.

6. The appeal is otherwise dismissed.