

CITATION: *Turnbull v State of Queensland through the Department of Housing and Public Works* [2014] QCAT 281

PARTIES: Robert Turnbull
(Appellant)
v
State of Queensland through the Department of Housing and Public Works
(Respondent)

APPLICATION NUMBER: APL385-14

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Acting Senior Member Paratz**

DELIVERED ON: 12 September 2014

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Robert Turnbull’s application to stay the decision delivered on 28 August 2014 for Southport claim number 1191/14 is refused.**
- 2. Robert Turnbull must inform the Tribunal as to whether he wishes to proceed with the application for leave to appeal or appeal, by: 4.00pm on 22 September 2014.**
- 3. If Robert Turnbull does not comply with direction 2 above, the application for leave to appeal or appeal is dismissed without further order.**

CATCHWORDS: APPLICATION TO STAY DECISION UNDER APPEAL – TERMINATION OF RESIDENTIAL TENANCY – whether grounds for stay established – where a tenant was issued with a notice to leave for serious breach – where the premises were a seniors complex – where equipment and hazardous chemicals used for the manufacture of dangerous drugs were stored on the premises – where the effect of the

termination order was likely to make the tenant homeless – where the premises were required to be vacated for testing and possible decontamination - where no specific error was raised on grounds of appeal -

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 145(2)
Residential Tenancies and Rooming Accommodation Act 2008 (Qld), s 290A

Commissioner of Taxation (Cth) v The Myer Emporium Ltd (No 1) (1986) 160 CLR 220
JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2) [1983] 2 Qd R 255
Alexander v Cambridge Credit Corporation Ltd (1985) 2 NSWLR 685
Jennings v Design and Procure Pty Ltd [2010] QCATA 36
Ramage v Freeman [2012] QCATA 56
Culos v McKillop [2014] QCATA 167

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act).

REASONS FOR DECISION

- [1] Mr Turnbull was a tenant of a one bedroom ground floor unit in a seniors complex of 32 one bedroom units at Southport operated by the Department of Housing and Public Works (the Department).
- [2] The State Drug Squad and Drug and Serious Crime Group located and removed hazardous chemicals, namely acids, carcinogenic, toxic and respiratory and systematic, and contaminated equipment believed to be used in the manufacture of dangerous drugs from the unit on 10 June 2014. Their examination of the property identified contamination in the “bathroom and kitchen areas which are believed to have been used for the manufacture of a dangerous drug”.¹
- [3] Mr Turnbull was issued with a Notice to Leave on 11 July 2014 by the Department for a serious breach of the lease agreement by using the premises for an illegal activity, and a serious breach for endangering another person in the premises or person occupying or allowed on

¹ Reasons for Decision 28 August 2014 para 10.

premises nearby, pursuant to s 290A of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) .

- [4] The Notice to Leave required Mr Turnbull to vacate the property by 22 July 2014. He did not do so. The Department filed an urgent Application in the Tribunal on 28 July 2014 seeking an order to terminate Mr Turnbull's tenancy on the grounds of failure to leave.
- [5] The Application for a termination order was heard by an oral hearing in the Tribunal at Southport by an Adjudicator on 26 August 2014. Mr Turnbull was represented by a Solicitor.
- [6] The Tribunal delivered written Reasons for Decision on 28 August 2014. The Tribunal ordered that a termination order was made in respect of the premises as and from 28 August 2014; and directed that a warrant of possession issue to the Principal Officer of Police at the Southport Police Station.
- [7] The warrant of possession had terms that it take effect on 1 September 2014; and that Police were authorised for a period of 28 days from 1 September 2014 expiring on 29 September 2014 to enter the premises and give possession to the Department; and to exercise such powers under the warrant with necessary and reasonable help and force; entry to be made between the hours of 8.00am and 6.00pm.
- [8] Mr Turnbull filed an Application for leave to appeal or appeal, and also filed an Application to stay the decision, on 12 September 2014.
- [9] The Tribunal may make an order staying the operation of a decision being appealed against until the appeal is finally decided.² As the period for exercise of the Warrant is already running, I will treat the circumstances of the application for a stay as urgent,³ and consider that application on the material currently before the Appeal Tribunal. The parties will have the opportunity to make full submissions on the application for leave to appeal or appeal itself, if it proceeds.
- [10] This is the decision on the application for a stay.
- [11] The normal rule is that a litigant is entitled to the 'fruits' of the litigation, a phrase which typically includes a judgment.⁴ While it has been suggested that an applicant for a stay must establish 'special circumstances'⁵ before an order will be made, it has also been said that the discretion is unfettered and that the applicant must demonstrate a basis for a stay, with

² QCAT Act s 145(2).

³ Ref *Ramage v Freeman* [2012] QCATA 56 para 13.

⁴ *Commissioner of Taxation (Cth) v The Myer Emporium Ltd (No 1)* (1986) 160 CLR 220 at 222-3 per Dawson J.

⁵ *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd (No 2)* [1983] 2 Qd R 255 at 258.

particular emphasis upon such matters as the balance of convenience, and the competing rights of the parties.⁶

- [12] The President of the Tribunal expressed the principles in the urgent circumstances of a stay application of a termination order of a residential tenancy as follows⁷:

A stay order may be granted if an applicant can show that she has a good arguable case on appeal; that she will be disadvantaged if the stay is not granted; that the competing disadvantage to the successful party does not outweigh the disadvantage that would be suffered by the applicant if the stay is not granted; and, success in the appeal would be rendered meaningless if the stay was not granted in the interim.

- [13] Mr Turnbull has stated his reasons on the application for wanting a stay as follows:

- (1) As a consequence of the decision the applicant will be evicted from the premises he resides at being the premises to which the termination order relates. The Applicant says the termination order is flawed.
- (2) The Applicant has no alternative accommodation and will be rendered homeless if the stay is not granted, particularly given he is on Centrelink benefits and has very limited financial capacity to obtain other accommodation.
- (3) The applicant suffers significant medical and mental health issues and these issues were accepted in the decision to grant the termination order which is to be appealed. If rendered homeless these conditions will be exacerbated.
- (4) If the stay is not granted the appeal itself will amount to nought for the reason that if the termination order proceeds (i.e. if the stay is not granted) the Applicant will no longer be residing in the premises in question and, as such, an appeal (of the termination order) would become superfluous.

- [14] Mr Turnbull has specified his Grounds of Appeal in his application for leave to appeal as follows:

- (1) The tribunal erred in making a termination order in respect of the premises at 8/10-12 Lenneburg Street, Southport, on the grounds of Failure to Leave as and from 28 August 2014.
- (2) The tribunal erred in finding that there had been a serious breach of the tenancy by using the premises for an illegal activity, namely, storage of hazardous chemicals and contaminated equipment.
- (3) The tribunal erred in finding that there had been a serious breach of the tenancy by endangering another person in the premises or persons occupying or allowed on premise nearby, namely storage of alleged chemicals and equipment posing a potential or real threat to neighbours and other tenants living in the complex.

⁶ *Alexander v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694-5.

⁷ *Ramage v Freeman* [2012] QCATA 56 para 12.

- (4) The tribunal erred in finding that any behaviour of the applicant was or had been dangerous or severe. The tribunal erred in finding that the respondent should have vacant possession of the property

- [15] The Grounds of Appeal do not identify any error of law or fact made by the learned Adjudicator. There are general allegations that she “erred” in respect of the components of her decision, but they lack any particularity or specificity.
- [16] The reasons given for the stay application relate to the consequences of the order made on 28 August 2014.
- [17] The submission that the effect of refusal of a stay of a termination of tenancy order would be that the appeal would amount to nought if the termination order proceeds, is one that could be made in relation to virtually every termination order that is sought to be appealed. If it was intended by the legislature that the effect of lodging an Appeal against a termination order should be that the termination order is automatically stayed, then the legislation would provide for that. However, the discretion of the Tribunal is unfettered to grant a stay, and the usual principles apply.
- [18] If the Tribunal considers that the failure to grant a stay may render the appeal nugatory, but the surrounding circumstances are such that a stay would be ineffective in any event, it may still refuse a stay in its discretion. For example, in *Culos v McKillop*,⁸ the learned member noted that in the circumstances the lessor could issue fresh notices to leave even if the Appeal was successful, and refused an application for a stay noting that:-

It is true that a refusal of a stay will render the appeal nugatory, as Ms Culos will already have vacated the tenancy.

- [19] The representative of the Department told the Tribunal at the hearing⁹ that although the contamination levels were low, that the department wanted the property vacant so they could undertake more testing and “decontamination if it was deemed necessary”.
- [20] There is therefore an imperative for the Department to obtain possession of the premises as a matter of safety. That evidence also indicates that it is not in Mr Turnbull’s interest to remain in the unit as it is potentially unhealthy, but that cannot be established until he vacates. The consequence is that Mr Turnbull may well be required to vacate the unit to enable the testing and possible decontamination to be conducted, in any event.
- [21] The learned adjudicator carefully considered the effect of the termination order, and was well aware that the effect of her order was likely to make Mr Turnbull homeless:¹⁰

⁸ *Culos v McKillop* [2014] QCATA 167.

⁹ Reasons for Decision 28 August 2014 para 10.

¹⁰ Reasons for Decision 28 August 2014 para 38.

I find that the evidence presented by the tenant would not persuade me to exercise my discretion and allow the periodic tenancy to continue. In balancing the competing interests of the parties I find that the interest of the Department and the neighbours living next to Mr Turnbull to be more compelling to protect than the interest of Mr Turnbull. I find that unfortunately the order I propose to make will mean Mr Turnbull is likely to be homeless, but I find that he has engaged in an illegal activity by storing hazardous chemicals and equipment in his unit, and used his premise for an illegal purpose, and that his actions could have had life threatening consequences for both him and his neighbours.

- [22] The reasons for decision given by the learned Adjudicator are comprehensive and well reasoned. There is no obvious error on the face of them.
- [23] A stay will not be granted unless the applicant has an arguable case on appeal and the balance of convenience favours the grant of a stay.¹¹
- [24] Mr Turnbull has been charged by police and is pleading not guilty to those charges.¹² The standard of proof on those criminal charges however will be on the basis of “beyond reasonable doubt”. The termination proceedings are not criminal proceedings, and do not require that standard of proof. It is conceivable that a serious breach of the tenancy may be made out, whilst criminal charges may not.
- [25] Mr Turnbull has not raised any matters which would disclose an arguable case on appeal as to the termination order.
- [26] Mr Turnbull has demonstrated obvious and serious disadvantage by the likelihood of his being made homeless by the termination order. The Department however have demonstrated disadvantage to the health and safety of the other, mostly elderly, occupants of the complex, as well as to Mr Turnbull himself by his continued residence. The Department has a duty of care for all the residents and staff of the complex. The balance of convenience falls in this matter with the Department.
- [27] The result is that:
- a) Mr Turnbull has not shown that he has a good arguable case on appeal;
 - b) The disadvantage to the Department by Mr Turnbull remaining in possession of the premises outweighs the disadvantage to Mr Turnbull by his having to vacate;
 - c) Mr Turnbull should not remain in the premises as a matter of health and safety, until further investigations and possible decontamination is conducted, so the refusal of the stay is not solely nugatory in that he may well be required to vacate the premises to enable the testing and decontamination in any event.

¹¹ *Jennings v Design and Procure Pty Ltd* [2010] QCATA 36 at para 4.

¹² Reasons for Decision 28 August 2014 para 17.

- [28] The bases for a stay therefore are not made out, and the application for a stay should be, and is, refused.
- [29] I will make Directions as to notification to the Tribunal by Mr Turnbull that he wishes to proceed with the Appeal; and for a “guillotine order” providing that if he does not advise the Tribunal that he wishes to proceed with the appeal within a short time period, that the Application for leave to appeal or appeal be dismissed without further order (as is usual practice in the Tribunal on applications for leave to appeal or appeal, of this nature).