

DISTRICT COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 1339 of 2006

First Applicant:

SUZAN DELAHOY

and

Second Applicant:

CHARLES LIND GREVELL

and

First Respondent:

COLIN WUISKE

and

Second Respondent:

DOROTHY WUISKE

REASONS FOR JUDGMENT

Delivered the eleventh day of August, 2006.

1. The applicants seek leave to appeal against the whole of a decision handed down in the Brisbane Magistrates Court on 10th April, 2006.
2. In the action the applicants were the defendants. The respondents sued them for \$6,777.00 being "monies due and owing by the Defendants to the Plaintiff under and by a virtue of a General Tenancy Agreement between the parties dated 13/02/00"¹
3. The action was commenced by Claim filed in June, 2005. The breaches alleged in the Statement of Claim are alleged to have occurred in 2000 and 2001.
4. In their amended defence the applicants pleaded that they vacated the relevant premises in October, 2000.
5. In the amended defence the applicants also pleaded that the Small Claims Tribunal

1. See the Claim and Statement of Claim.

had exclusive jurisdiction to deal with the matter.

6. On 10th April, 2006 the Magistrates Court heard an application by the applicants to dismiss the action. It was argued before the learned magistrate that as the action had been commenced in the Magistrates Court more than six months after the breaches complained of must have been known to the plaintiffs the action should be dismissed. The learned magistrate dismissed the application, holding, essentially, that the plaintiffs' action arose independently of the provisions of the *Residential Tenancies Act 1994* ("the Act.")
7. On 18th April, 2006 the same court gave judgement in the respondents' favour in the sum of \$4,701.77 plus interest in the sum of \$2,221.59. Costs orders against the applicants were also made.
8. It is clear that leave to appeal is necessary, and that such leave should only be granted if there is "some important principle of law or justice" to be determined.² Both counsel agreed that the matter should proceed by my hearing the substantive argument, notwithstanding the fact that the respondent urged that this is not a case in which leave should be granted.
9. It was common ground that the "General Tenancy Agreement" was a residential tenancy agreement as defined in section 8 of the *Act* and that the provisions of that Act applied.³
10. Section 249 of the *Act* provides:

Applications about breach of agreements

- (1) *If a lessor or tenant claims there has been a breach of a term of an agreement, the lessor or tenant may apply to a tribunal for an order about the breach.*
- (2) *The application must be made within 6 months after the lessor or tenant becomes aware of the breach.*

11. The reference to "a tribunal" should be understood, at least initially, as a reference to a small claims tribunal under the *Small Claims Tribunals Act 1973*.⁴
12. However section 318 deals with situations in which the amount claimed exceeds the monetary jurisdiction of the Small Claims Tribunal. It provides:

2. The *Magistrates' Courts Act, 1921*, section 45(2)(a).

3. "General tenancy agreement" is defined in Regulation 6 of the *Residential Tenancies Regulation 2005*.

4. See the definition of "tribunal" in Schedule 3 of the *Act*.

Applications for more than prescribed amount

(1) *In this section -*

prescribed amount has the meaning given by the *Small Claims Tribunals Act 1973*.

(2) *This section applies to an application if -*

(a) *a provision of this Act provides that it may be made to a tribunal; and*

(b) *the application seeks the payment of an amount (the **application amount**) greater than the prescribed amount.*

(3) *In a provision of this Act about the application -*

(a) *a reference to a tribunal or registrar is taken to be a reference to a court having jurisdiction for the application amount; and*

(b) *the provision applies with all necessary changes, and with any changes prescribed under the regulations, as if the tribunal or registrar were the court.*

13. In this case the amount claimed exceeded the prescribed amount.

14. In the circumstance of this case, section 249 of the *Act*, read with section 318, authorised the application to be made to the Magistrates' Court. Such an application could, however, only be brought within six months of the applicants' becoming aware of the breach of the agreement.

15. The respondents submitted that the *Act* does not "cut down the common law." It was submitted that the statement of claim does not allege a cause of action under the *Act*, but merely alleges that monies are payable "under and by virtue of a General Tenancy Agreement."

16. It was further submitted that section 249 confers an additional, statutory, cause of action with its own remedies, but subject to a short limitation period. It was argued that these statutory provisions leave untouched the common law right to sue. Aid for these propositions was found, it was argued, in section 18 of the *Act*.

17. Section 18 of the *Act* provides:

Rights and remedies of persons

(1) *A right or a remedy given to a person under this Act is in addition to,*

and not in substitution for, a right or remedy the person would have apart from this Act.

(2) *Without limiting subsection (1), this Act does not operate to reduce the effect of a right or remedy a person would have apart from this Act.*

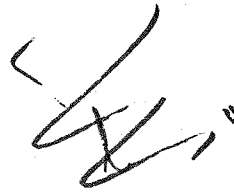
(3) *In subsections (1) and (2), a reference to a right or remedy a person would have apart from this Act is a reference to a right or remedy that is not inconsistent with this Act.*

18. In my view, the provisions of section 18 do not assist the respondents. The suggested unfettered right to sue for an alleged breach of a residential tenancy agreement independently of the provisions of the *Act* is a right which would be inconsistent with the provisions of section 249. If the respondent's contentions are correct, a landlord or tenant alleging a breach of a term of a residential tenancy agreement could simply defeat the temporal limitation contained in subsection (2) of section 249 by alleging that, notwithstanding that the agreement sued on was a residential tenancy agreement, he was not relying on the provisions of the *Act*.
19. Matters were complicated before her honour because of the pleading that the Small Claims Tribunal had exclusive jurisdiction, and a failure to plead expressly that the action was incompetent having been commenced outside the time limited by subsection (2) of section 249 of the *Act*. However it seems clear that the matters I have touched upon were fully canvassed before her honour as, of course, they were before me.
20. It follows that I take the view that the learned magistrate was in error in holding that the application should be dismissed, and in giving judgment for the respondents. She should have allowed the application and dismissed the respondents' action.
21. That leaves for consideration the question of whether leave to appeal should be granted.
22. The appeal has raised questions of the proper construction of the *Act*, which is legislation of considerable relevance to many people in our society. Whether or not a landlord or tenant may sue to recover damages for breach of a residential tenancy agreement after more than six months has elapsed since the fact of the breach became known is, I think, a matter of some considerable public importance, and involves an "important principle of law." This is a case in which, notwithstanding the comparatively small sum of money for which judgment was ultimately given, it is appropriate to grant leave.
23. My orders are:
 - (a) grant leave to appeal;

- (b) allow the appeal;
- (c) set aside the decisions below, and order in lieu thereof that there be judgement for the defendants (the applicants before me) with costs.

24. I have formed the tentative view that the applicants' should have their costs of this appeal, but I will hear further argument on this aspect if the respondents wish. If they wish to make such further submissions they should contact the solicitors for the applicants and my associate within three working days to make the arrangements for the further hearing. Otherwise I will order -

that the respondents pay the applicants' cost of and incidental to the appeal.

A handwritten signature in black ink, appearing to be 'H. W. H. Botting', written in a cursive style.

H. W. H. Botting, D.C.J.