SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Halcombe v Hitchman**
Citation:	**[2018] ACTSC 56**
Hearing Date:	5 March 2018
Decision Date:	8 March 2018
Before:	Elkaim J
Decision:	The application for leave to appeal filed 13 December 2017 is refused. The applicant is to pay the respondent's costs of the application.
Catchwords:	**APPEAL AND NEW TRIAL – APPEAL-GENERAL PRINCIPLES –** In General and Right of Appeal – Application for leave to appeal
Legislation Cited:	*ACT Civil and Administrative Tribunal Act 2008* (ACT) ss 60 and 86 *Residential Tenancies Act 1997* (ACT) Schedule 1 *Supreme Court Act 1933* (ACT) s 37J
Cases Cited:	*Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 40 *Clarkson v St Vincent De Paul Samaritan Services* [2016] ACTSC 235 *Eastman v Commissioner for Social Housing* [2011] ACTCA 12; 252 FLR 278 *House v King* (1936) 55 CLR 499
Parties:	Thomas Halcombe (Applicant) Darren Hitchman (Respondent)
Representation:	**Counsel** Self-represented (Applicant) Ms A Taylor (Respondent) **Solicitors** Self-represented (Applicant) Meyer Vandenberg (Respondent)
File Number:	SCA 88 of 2017

Decision under appeal:	Tribunal:	ACT Civil and Administrative Tribunal
	Before:	President Symons
	Date of Decision:	16 November 2017
	Case Title:	Halcombe v Hitchman

ELKAIM J:

1. There are two matters before me: SCA 88 of 2017 and ACTCA 67 of 2017. The former is an application for leave to appeal from orders made in the ACT Civil and Administrative Tribunal ('ACAT').

2. ACTCA 67 of 2017 concerns an application for leave to appeal from orders made by Mossop J on 15 December 2017. I am sitting in this matter as a single judge of the Court of Appeal pursuant to s 37J of the *Supreme Court Act 1933* (ACT).

3. It became apparent, and the parties agreed, that the Court of Appeal matter has ceased to be of practical relevance and is bound to be dismissed. I deal with this matter formally in a separate judgment (*Halcombe v Hitchman* [2018] ACTCA 5).

4. The perils of self-representation arose in the applicant's pursuit of proceedings SCA 88 of 2017. The applicant, a self-represented litigant, was disadvantaged by his lack of familiarity with legal technicalities and procedures. The case he came to court to present was markedly different to the case that was actually before the court. This was despite the fact the proceedings had been commenced by the applicant. The represented respondent was prejudiced as a consequence.

5. It is necessary to provide some background. For convenience, I will refer to the parties as the applicant and the respondent, notwithstanding that their respective titles may have been reversed in some of the ACAT proceedings.

6. The applicant was a tenant at the respondent's premises in Cook. He had been a tenant for about 10 years. During 2017 issues arose between the parties which led to four separate proceedings being filed in ACAT.

7. The first proceeding was RT 300 of 2017, which was commenced by the respondent seeking an order allowing his managing agent access to the premises for the purposes of carrying out an inspection. The matter was resolved in favour of the respondent. An appeal (AA 23 of 2017) was unsuccessful.

8. The second proceeding, RT 636 of 2017, was commenced by the applicant and concerned a rent review notice that had been issued by the managing agent for the respondent. The matter was resolved by an order of ACAT disallowing $35 of the proposed $40 per week increase. On appeal (AA 31 of 2017), the entire proposed rental increase was disallowed.

9. The third proceeding, RT 749 of 2017, was commenced by the applicant. He sought compensation for damage to his computer caused by a leaking spa within the premises and also sought a rent reduction. The matter was resolved by an order of ACAT ordering the respondent to pay the applicant compensation in the sum of $433.50.

10. The fourth proceeding, RT 786 of 2017, was commenced by the respondent. The respondent sought an order for termination of the lease and repossession of the premises.

11. The third and fourth proceedings were heard together on 16 November 2017. At the conclusion of the hearing, an order was made in favour of the respondent in the termination proceedings. The compensation proceedings were stood over (see the Termination and Possession Order, dated 16 November 2017).

12. The applicant filed an internal appeal (AA 43 of 2017) against the orders of 16 November 2017. The appeal was heard on 1 December 2017. Other than a change to the date of repossession, the appeal was dismissed.

13. On 13 December 2017, the applicant filed an application for leave to appeal to the ACT Supreme Court from the orders made in RT 786 of 2017 (the termination proceedings). He also sought a stay of ACAT's orders. The matter came before Mossop J on 15 December 2017. His Honour dismissed the application for a stay. The application for leave to appeal from his Honour's decision was filed on 4 January 2018.

14. On 17 January 2018, orders were made, and reasons published, in the compensation proceedings (RT 749 of 2017). An award was made in the applicant's favour in the sum of $433.50.

15. When the matter came before me for hearing, it quickly became apparent that the bulk of the applicant's complaints concerned the refusal to award him compensation in excess of $433.50. The main attack was therefore against the orders made in RT 749 of 2017.

16. Three problems were immediately identified. Firstly, the application for leave to appeal from the decision of ACAT refers only to the order made in RT 786 of 2017 and not to RT 749 of 2017. Secondly, the application for leave to appeal predates the decision of ACAT regarding the compensation payable to the applicant, handed down on 17 January 2018. Thirdly, no internal appeal was filed from the decision of ACAT on 17 January 2018. Accordingly, there is no entitlement to seek leave to appeal pursuant to s 86 of the *ACT Civil and Administrative Tribunal Act 2008* (ACT).

17. These matters were pointed out to the applicant and he was given an opportunity, over the luncheon adjournment, to consider his position. He returned with documents effectively seeking to expand his application for leave to appeal to include RT 749 of 2017. This, of course, ignored the third issue identified in the previous paragraph. I told him that I would not deal with any such application and that it was a matter for him whether he pursued any further proceedings at a later time. The applicant would also need to seek leave to appeal out of time.

18. The applicant filed a document on 2 March 2018 setting out his complaints about the decision made in respect of RT 749 of 2017. The document addresses the issue of compensation and rent reduction but does not deal with the termination proceedings. The applicant's limited familiarity with legal matters clearly put him at a disadvantage, rendering him unable to pursue his primary cause for complaint.

19. As the applicant is no longer a tenant at the premises, the termination issue assumes a lesser importance. Nevertheless, the applicant wished to press his application arising from the termination, which I allowed because it clearly fell within the application he had filed in this Court.

20. However, when the applicant was asked to outline his complaints, he substantially expanded his case beyond the draft Notice of Appeal. The draft Notice, which is annexed to the application, lists only one ground of appeal, namely that:

> ...there was a fundamental error of law that has resulted in a miscarriage of justice due to a misapplication of the Residential Tenancies Act 1977.

21. The draft Notice of Appeal also provides that the applicant will seek to put further evidence before the Court. This is not, however, reflected in the single ground of appeal.

22. The applicant listed ten complaints additional to that outlined in the draft Notice of Appeal, occasioning prejudice to the respondent. Before the luncheon adjournment, I asked the respondent's legal representative to consider whether she could address the list of complaints. After the break, she informed me that, in the interests of reaching a resolution without an adjournment, and no doubt to save costs, the respondent was able to respond to the additional matters raised. The respondent should not, in my view, have been placed in this position.

23. It is always appropriate to afford considerable leniency, and assistance, to an unrepresented litigant. A person is entitled to run their own proceedings. However, the caveat to this general proposition is that a represented party should not be unfairly prejudiced by the leniency shown by the court to an unrepresented person.

24. As noted above, the applicant added a substantial number of additional complaints to the single ground stated in the draft Notice of Appeal. He made the following complaints:

    (a) ACAT failed to consider the financial difficulties that the applicant had faced, which were relevant and beyond his control.

    (b) ACAT did not consider the validity of receipts and tax invoices issued by the respondent. The applicant referred to Schedule 1 of the *Residential Tenancies Act 1997* (ACT), which sets out the Standard Residential Tenancy Terms. In addition, the applicant pointed to the Australian Competition and Consumer Commission's website, which sets out a consumer's right for a receipt or proof of purchase (Exhibit C).

    (c) ACAT did not consider the retaliatory nature of the respondent's application for termination of the lease. Termination was asserted to have been sought in response to the applicant's claim for compensation and after an unsuccessful attempt had been made to increase the rent. The respondent's decision to sell the property was alleged to stem from a tactical ploy to enhance the prospects of success of the application for termination.

    (d) ACAT did not consider the applicant's capacity to carry on his normal business activities when deciding the termination application.

    (e) ACAT ignored a "pledge" the applicant had made to remedy the rent account, including to bring it up-to-date.

    (f) ACAT unfairly ordered the applicant to vacate the premises immediately following the hearing on 16 November 2017.

    (g) ACAT did not give reasons for its decision.

    (h) ACAT did not consider the applicant's overpayment of rent, which had resulted from a rounding up of the figures.

    (i) ACAT did not consider the applicant's right to quiet possession.

    (j) ACAT did not properly apply the provisions of the *Residential Tenancies Act 1997* (ACT).

(k) ACAT blocked the applicant's email address, such that he was prejudiced in his capacity to provide materials to ACAT.

25. The respondent addressed the above complaints generally and specifically. I was first taken to a decision of the ACT Court of Appeal in *Eastman v Commissioner for Social Housing* [2011] ACTCA 12; 22 FLR 278 ('Eastman'), which sets out the relevant principles in matters of this type. The decision provides at [58]:

> The plain intention of the legislature is to provide a filter for appeals from the tribunal. What is tolerably clear from the plain words of the section is that it is insufficient to point to a question of law. Something more is required. We agree with the primary judge that it is necessary for an applicant to demonstrate that he or she at least has an arguable case, that the tribunal erred in its resolution of a question of law and that the result of the error would have been more favourable to him or her. Otherwise, it would be futile to grant leave…

26. It is important to note that when *Eastman* was decided an applicant was restricted to appealing from the tribunal on a question of law. Under the current rules, an appeal may be brought in respect of a question of law or fact. Nevertheless, the principles stated in *Eastman* remain relevant.

27. The respondent pointed out that, when AA 43 of 2017 was heard on 1 December 2017, the Tribunal made this finding:

> To the extent that this tribunal might be asked to complete the task of the original tribunal in relation to section 48 of the Residential Tenancies Act, the tribunal is satisfied that in the context of the protracted access proceedings, that breach of the order to provide access justified termination of the tenancy. For these reasons, we will dismiss the application for appeal, other than to correct the orders, order five, in relation to the amount of money owing as at 16 November…

28. The respondent made the point that the litany of complaints made by the applicant did not address the decision made in proceedings RT 300 of 2017, or the internal appeal (AA 23 of 2017), which concerned the respondent's application for an order allowing his agent's access to the premises for the purposes of carrying out an inspection. As the applicant did not appeal AA 23 of 2017, he could not now make a complaint about the access issue which had been found to justify the termination.

29. In other words, whatever merit there may have been in the applicant's list of complaints, the result of an appeal would not be more favourable to him because, as a result of the decision in AA 23 of 2017, the appeal is futile.

30. In the applications before me the applicant did make some complaints about some aspects of the decision regarding access. However, the applicant has not appealed from this decision and it cannot now be attacked. Perhaps more importantly, the applicant's submissions did not address the decision on 1 December 2017 in respect of the effect of the access decision on the termination issue.

31. This point is probably enough to dispose of the current application. Nevertheless, in fairness to the applicant's arguments, I think it appropriate to deal with his list of complaints.

32. I will deal with the applicant's complaints in the same order in which they were made. It will be necessary to refer to the transcripts of 16 November 2017 and 1 December 2017 respectively. I will refer to the former transcript as the first transcript and the latter as the second transcript.

(a) The issue is whether ACAT took into account the applicant's financial problems, which were beyond his control, in dealing with the non-payment of rent. Commencing at page 217 line 5 of the first transcript, President Symons refers to s 49(2) of the *Residential Tenancies Act 1997* (ACT) and makes a finding that, notwithstanding this subsection, a termination and possession order should be made. In the second transcript, more explicit consideration is given to this issue. Commencing at page 4 line 7, specific reference is made to the "banking issues" that the applicant was suffering. There was also a recognition of the difficulties the applicant faces in challenging the exercise of a discretion. It is also worth noting that the taxation issues that the applicant mentioned before me were not in evidence before ACAT. There is another matter that I should mention here. Reading the first transcript at page 217 and onwards, it is apparent that the applicant treated President Symons with a significant lack of respect. The patience shown by President Symons was remarkable. The applicant did not behave in that manner before me. He presented his arguments politely and answered questions appropriately.

(b) It may be the case that there were errors in the receipts provided by the respondent's agent. The question is whether that was taken into account by the Tribunal. Pages 214 and 215 of the first transcript explicitly address this issue. If there were errors, as alleged by the applicant, it is difficult to see how it would be relevant to the question of termination. It was acknowledged that the applicant had difficulties paying the rent. Even if incorrect receipts made the accounting of rental payments difficult, there was no suggestion that they caused any actual detriment in the calculation or payment of rent.

(c) The Tribunal addressed the allegation of retaliatory action from page 4 line 33 of the second transcript. The Appeal Tribunal conducted a fresh examination of the issue and a finding was stated from page 5 line 15. The matter was obviously considered.

(d) As already observed, on page 217 of the first transcript President Symons considered s 49(2) of the *Residential Tenancies Act 1997* (ACT) and considered the appropriateness of a termination and possession order. The subsection is discretionary and the requirements (as stated in *House v The King* (1936) 55 CLR 499) to overturn such a decision are not present here.

(e) As far as the "pledge" is concerned, it is difficult to understand the relevance of the applicant's assertion. If there was such a pledge, this would have been a relevant consideration in an assessment of s 49(2), but not determinative of the issue. Firstly, a pledge is a promise which may or may not be thought to be honoured. Secondly, s 49(2)(b) allows a termination order to be granted notwithstanding a finding that a pledge has been made.

(f) The applicant's assertion of immediate eviction is incorrect. In the first transcript, from page 218 line 35, the initial order for immediate possession is made. However, after intervention by the respondent's representative, the order was amended to allow the applicant a further three days. I do acknowledge that, after the length of time that the applicant had been a tenant, three days grace does seem somewhat unfair. He would have endured a good deal of panic over the weekend, which made up part of the three days. However, he did obtain further time as a result of filing his application for leave

to appeal. Perhaps more importantly, the amount of time allowed is a consequence of the order and not a factor going to the making of the order.

(g) The applicant wrote to ACAT seeking reasons for the decisions of 16 November and 1 December 2017. ACAT responded by providing the applicant with the first and second transcripts and informing him that the reasons had been given orally and could be found within the transcripts. The respondent referred me to the decision of Mossop J in *Clarkson v St Vincent De Paul Samaritan Services* [2016] ACTSC 235 at [90] and [91], in which his Honour said that there was no obligation on ACAT to provide reasons unless a request had been made for reasons. In this matter, a request was made and transcripts were provided. This raises the issue of whether the transcripts amount to sufficient reasons for the decisions. I think they do. In *Beale v Government Insurance Office (NSW)* (1997) 43 NSWLR 430 at 442, Meagher JA said that the essential ingredient of reasons was that they told the loser why he or she lost. In the first hearing before President Symons, it is difficult to follow the reasons, but this is only because of the persistent interruptions by the applicant. In my view, President Symons explained the basis for her various conclusions. It is perhaps ironic to observe that the proof of the applicant knowing why he was losing is because the knowledge generated his acerbic comments. The second transcript contains a more traditional setting out of reasons, which plainly exposes the manner in which the Appeal Tribunal reached its final decision. Finally, I note that s 60(2) of the *ACT Civil and Administrative Tribunal Act 2008* (ACT) permits the provision of reasons by way of "a transcript of an oral statement of reasons for the making of the order".

(h) There was no evidence of overpayments before the Tribunal, other than to the extent that any compensation awarded would have created a rental credit in the applicant's favour. The compensation claim was dealt with separately and did not impact upon the rental issue.

(i) There is no doubt that the applicant had a right to the quiet enjoyment of the premises. He listed a number of matters which he said affected his capacity to enjoy the property, including a broken spa, broken and dangerous fence palings and the numerous and unjustified visits by the managing agent. Although not ostensibly connected to this issue, the applicant also referred to the respondent's representation at the hearing concerning the access orders. He said that the person representing the respondent did not have a lawful entitlement to do so. As I have already said, this decision is not the subject of an appeal and is not relevant to the present dispute. More generally, the question of the interference to the applicant's enjoyment of the property was not a matter that goes to whether the lease should be terminated. President Symons, and the Appeal Tribunal, considered the justness of the termination and ultimately found that it was appropriate.

(j) This complaint concerned the proper application of the *Residential Tenancies Act 1997* (ACT). The applicant did not extend this ground beyond the issue concerning the receipts. That issue has been dealt with above.

(k) I accept that the applicant experienced difficulty in sending emails to the Tribunal. This matter is referred to in the first transcript from page 221 line 30.

I do not know the background to what occurred. I do not see how this issue affected the validity of the Tribunal's decision. If the applicant experienced any difficulty in providing materials to the Tribunal by email, materials could have been delivered by mail or by hand.

33. The result of the above is that I reject each of the applicant's complaints. Noting the futility of the complaints, the result is that the application for leave must be refused.

34. I make the following order:

    (i) The application for leave to appeal filed on 13 December 2017 is refused.

    (ii) The applicant is to pay the respondent's costs of the application.

35. I will hear any submissions seeking an alternate costs order.

I certify that the preceding thirty-five [35] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Elkaim.

Associate:

Date: 8 March 2018