

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

OMARI v YASSINE (Civil Dispute) [2016] ACAT 112

XD 311/2016

Catchwords: **CIVIL DISPUTE** – jurisdiction of tribunal – breach of promise – return of engagement gifts – location of formation of contract and breach

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008 s 22*
Magistrates Court Act 1930 s 262
Marriage Act 1961 (Cth) s 111A

Cases cited: *Jones v Dunkel* (1959) 101 CLR 298

Tribunal: Senior Member G Lunney SC

Date of Orders: 6 October 2016

Date of Reasons for Decision: 6 October 2016

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) **XD 311/2016**

BETWEEN:

BILAL OMARI
Applicant

AND:

FADWA YASSINE
Respondent

TRIBUNAL: Senior Member G Lunney SC

DATE: 6 October 2016

ORDER

The Tribunal orders that:

1. The application is dismissed for want of jurisdiction.
2. The parties bear their own costs.
3. Execution of the previous order is stayed for 7 business days from the date of this order and the parties have leave to make an application for costs with any evidence and written submissions within 5 business days of the date of this order.

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Senior Member G Lunney SC

REASONS FOR DECISION

Application

1. This was an application which was filed as both a contract and a goods application. It was later amended on 3 August 2016. It alleges that on 30 May 2015, the applicant and the respondent became engaged to marry, and that at an engagement party on the same date, the applicant and his family made gifts to the respondent in contemplation of her marrying the applicant.
2. It alleges that on 25 October 2015, the respondent told the applicant that she no longer wished to marry the applicant and he accepted that advice. The applicant sought return of the gifts which included an engagement ring, on the basis that the condition on which they had been given did not eventuate. These were not returned.
3. The applicant seeks the monetary value of the gifts with interest.

Response

4. This asserts an agreement between the respondent's father and the applicant that he would shortly make arrangements to move to Melbourne from Canberra. After that he showed no interest in doing so and said that he was not going to. He also did not inspect wedding venues with the respondent. As a result of these issues the engagement was called off.
5. Presumably by way of set-off, an amount expended by the respondent or her family on the engagement party was claimed.
6. The response repeats that it was because the applicant did not keep his word to re-locate to Melbourne that the engagement "could not be continued".
7. The response was prepared by the respondent before she engaged a legal representative.

Respondent's Interim Application

8. The respondent has filed an application challenging the jurisdiction of ACAT on the basis that the Federal Circuit Court has jurisdiction since the substance of the claim is 'relationship breakdown'. That application has not been heard.

9. This application was prepared and filed by the respondent's legal representative.

Factual Background

10. The applicant contacted the respondent and the respondent's family with a view to marriage late in 2014. The applicant lived in Canberra, and the respondent in Melbourne at the time.
11. The two met in Melbourne in chaperoned circumstances, and the possibility of marriage was discussed. There is common ground about two significant points at which an agreement to marry may have occurred.
 - (a) The family meeting in Melbourne on 4 April 2015 when it was agreed that the parties would marry and details discussed.
 - (b) The engagement party on 30 May 2015.
12. It is not necessary to determine which was the time of agreement to marry, but it appears that it probably formally occurred at the meeting on 4 April 2015 in Melbourne after previous discussion between the parties and their families. The party was a celebration of the agreement. In any event gifts passed between the parties in contemplation of an agreement to marry mainly at the engagement party.
13. Unhappy differences arose over which there is great controversy, and the engagement failed.

Hearing on 20 September 2016

14. I raised a jurisdictional issue at the outset which I understood had been raised previously at a directions hearing. This related to the jurisdictional limitation imposed by section 262 of *Magistrates Court Act 1930* (**Magistrates Court Act**). This is brought into play by section 22 of the *ACT Civil and Administrative Tribunal Act 2009* (**ACAT Act**). I told the applicant that it was necessary to establish the Tribunal's jurisdiction to hear the matter under those two sections in order for the matter to proceed to a hearing.
15. Section 262 is as follows:

262 Cause of action arising, or defendant resident, outside ACT

The Magistrates Court has jurisdiction to hear and decide a proceeding if—

- (a) the defendant was resident in the ACT when the claim was served on the defendant, even though all of the cause of action in the proceeding arose outside the ACT; or*
- (b) both of the following apply, even though the defendant is not in the ACT:*
 - (i) a material part of the cause of action in the proceeding arose in the ACT, even though part of the cause of action arose outside the ACT;*
 - (ii) the claim is served on the defendant in Australia or an external territory.*

16. During the course of submissions, the solicitor for the applicant indicated that the applicant relied on sub-section 262(b) in establishing the jurisdiction of the Tribunal. The factual basis of that reliance was: the residence of the applicant in the Territory at all material times; the intention of the parties to make their home in the Territory after marriage (an assertion challenged by the respondent); and that breach of the agreement to marry had occurred in the ACT when the respondent telephoned the applicant and in that conversation broke off the engagement. There was also mention of section 20 of the *Service and Execution of Process Act*, however that was not pressed.
17. The applicant called evidence. This included the factual and chronological material filed by the applicant in preparation for the hearing. The applicant and his mother also gave evidence and were cross examined.
18. The applicant's evidence regarding the breaking of the engagement was not clear. He at first referred to the telephone conversation between himself and the respondent as occurring in September 2015, but later changed the date to approximately 20 October 2015. He said that he had his phone on loudspeaker, and that his sister was present during the conversation.
19. He described the respondent's complaints that the relationship was not progressing, but did not describe any attempt that he made in the course of the conversation to meet those complaints or suggest any steps that he could or would take to improve his standing in the relationship. He said that he felt that

she wanted the relationship to end, and after the conversation, he accepted that the relationship was over and it was the end of the engagement. He referred to an SMS which he sent shortly afterwards requesting return of the gifted jewellery, but that it was on an old phone, and he had not been able to produce a copy.

20. His mother, Yusra, also gave evidence. She described the complaints she had in relation to the respondent's behaviour. She particularly cited the failure to agree about location of residence and the size of the engagement party.
21. The respondent gave evidence. She said that she had called the applicant from Melbourne. She said to him that he did not seem to have the motivation to make the relationship work, and that she and her parents were unhappy. She said that she hoped that the applicant would cooperate and that the relationship would proceed. Her evidence was unclear about the ending of the relationship, but she finally said that he ended the relationship.

Consideration

22. Section 111A of the *Marriage Act 1961* provides as follows:

111A Abolition of action for breach of promise

- (1) *A person is not entitled to recover damages from another person by reason only of the fact that that other person has failed to perform a promise, undertaking or engagement to marry the first-mentioned person.*
- (2) *This section does not affect an action for the recovery of any gifts given in contemplation of marriage which could have been brought if this section had not been enacted.*

23. The applicant's claim is for the monetary value of gifts given in contemplation of marriage. These gifts were made at the time of the engagement party and all made in the State of Victoria. The applicant submits that breach of the agreement to marry occurred in October 2015 when he alleges that the respondent terminated the engagement in the conversation referred to. That alleged breach occurred in the ACT thus satisfying the requirements of section 262 of the *Magistrates Court Act* in its application to the civil jurisdiction of the ACAT.

24. In support of that contention, the applicant says that his residence in the Territory and the intention of the parties to live in the Territory after marriage is a material part of the cause of action which arose in the ACT. I do not accept that the place of residence of a party is part of the cause of action of breach of contract as alleged in this proceeding. If there is a breach of the agreement in the Territory, it is because the applicant was in the ACT when he received the phone call and a conversation occurred in the Territory. It was not because he was resident in the Territory which was simply an explanation for why he was where he was. As to the intention of the parties to co-habit in the Territory, it is a disputed allegation and, in any event, is not relevant to the cause of action alleged.
25. If the applicant is to succeed in establishing the connection of the type referred to in section 262 he must establish on the balance of probabilities that there was a breach of the agreement to marry and that it occurred in the Territory. Otherwise the recovery of the gifts, if that can be done, is a matter entirely for Victorian law.
26. The evidence consists of the material filed by the applicant, his oral evidence, his mother's oral evidence and the oral evidence of the respondent. There are many disputed areas in the evidence, however it is relatively easy to gain a general impression of the commencement, progress and deterioration of the relationship between the respondent and the applicant. It is important in examining those events not to impose external or personal standards on them, since it was a relationship that would flourish or fail depending on the personalities of the participants and the environment in which the relationship was created and would exist.
27. There was a period of growth of the relationship commencing with initial contact at the end of 2014 and the time of the engagement party at the end of May 2015. However even by that time there were issues developing which would require resolution if the relationship were to succeed. The most important of these issues was the location of residence and employment of the parties: Melbourne or Canberra. No agreement was achieved and the parties give conflicting evidence about some aspects. To my view it became a major point of

discord. Other differences arose, and the parties seemed unable to deal with these satisfactorily.

28. Matters came to a head at the time of the telephone conversation in October and found expression in it. The applicant gave evidence that he came away from the telephone discussion of October 2015 accepting that the engagement had been called off by the respondent. However, in my view, he did not give clear evidence of words spoken by the respondent which conveyed that meaning. His sister who he said was present and capable of hearing the conversation was not called, and I infer in the absence of explanation that her evidence would not assist the applicant.¹
29. The respondent's evidence was to the effect that she pointed out the problems which she saw existing, but left further negotiation open together with an invitation to the applicant to compromise.
30. In my view the conversation was one between two people in a decaying relationship unable to find a way forward any further. In my view there was not a unilateral withdrawal by one party in breach of a prior promise, but a recognition by two people that their relationship had reached a tipping point, and in the absence of any further action was over.
31. Consequently, in my view there was no 'breach' that occurred in the ACT which would give this Tribunal jurisdiction in the proceedings brought by the applicant. It was mutual recognition of an unhappy state of affairs that was beyond repair. In those circumstances the Tribunal lacks jurisdiction to adjudicate the dispute. The application must be dismissed, and the set-off asserted by the respondent must fail. It is unnecessary to deal with the respondent's interim application and it is dismissed.
32. The respondent at the hearing indicated a desire to seek an order for costs. I will make an order that the parties bear their own costs of the application in accordance with section 48 of the Act, but will delay its execution for seven business days from the date of publication of this decision and give leave to the

¹ *Jones v Dunkel* (1959) 101 CLR 298

parties to make application for costs with any evidence and written submissions within five business days of the date of this order.

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Senior Member G Lunney SC

HEARING DETAILS

FILE NUMBER:	XD 311/2016
PARTIES, APPLICANT:	Bilal Omari
PARTIES, RESPONDENT:	Fadwa Yassine
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	Charles Filgate Giles & Associates
SOLICITORS FOR RESPONDENT	Souki Lawyers
TRIBUNAL MEMBERS:	Senior Member G Lunney SC
DATES OF HEARING:	20 September 2016