Civil and Administrative Tribunal

New South Wales

Case Name:	Chung v Zadeh
Medium Neutral Citation:	[2020] NSWCATAP 230
Hearing Date(s):	22 July 2020
Date of Orders:	5 November 2020
Decision Date:	5 November 2020
Jurisdiction:	Appeal Panel
Before:	L Pearson, Principal Member SThode, Senior Member
Decision:	(1) The appeal is allowed. (2) The award made by the Tribunal in the amount of $4139.00 is set aside. (3) The amount of $4139.00 held by the Tribunal is to be returned to the landlord. (4) The matter is remitted to the Tribunal, differently constituted, for determination according to law and in accordance with these reasons.
Catchwords:	APPEAL – Residential Tenancy - findings of fact – failure to deal with issues in dispute
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Residential Tenancies Act 2010
Cases Cited:	Bartlett v Hewitt [2016] NSWCATAP 40 Collins v Urban [2014] NSWCATAP 17 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Rathchime Pty Ltd v Willat [2017] NSWCATAP 87
Texts Cited:	None cited
Category:	Principal judgment

Parties:	Cynthia Sau Man Chung (Appellant) Marzieh Zohrab Zadeh (First Respondent) Iman Emamian Rad (Second Respondent)
Representation:	Solicitors: Appellant (Self Represented) M Zadeh (Respondents)
File Number(s):	AP 20/21054
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Date of Decision:	13 February 2020
Before:	Member F Holles
File Number(s):	RT 20/04455

REASONS FOR DECISION

Introduction

1 This is an internal appeal under s 80(2) of the *Civil and Administrative Tribunal Act* 2013 against a decision made in the Consumer and Commercial Division of the Tribunal on 14 April 2020.

2 The internal appeal was brought by Cynthia Sau Man Chung (the landlord) against the tenants Marzieh Zohrab Zadeh and Iman Emamian Rad. The landlord appeals against the decision of the Tribunal to order her to pay the tenants the sum of $4,139.00, being rental reduction ($339.00), loss of wages ($2,350.00), cleaner ($370.00) and removalist expenses ($1,080.00). For the reasons set out below we have decided to allow the appeal.

3 For convenience we shall refer to the appellant as the landlord and to the respondents as the tenants.

Background

4 The following facts are not controversial. The parties entered into a residential tenancy agreement on or about 5 September 2019 for a fixed term of six months. The lift in the strata scheme was inoperable from 25 November 2019 until 15 January 2020. On 24 December 2019 the tenants provided a written notice of termination to the landlord. On 28 December 2019 the tenants vacated the residential premises.

5 An application to the Tribunal was lodged on 24 December 2019 seeking orders pursuant to section 104 of the *Residential Tenancies Act 2010* (the RT Act) for termination on the grounds of undue hardship. In the section "Reasons for the Orders" the tenants also sought an order for "rent reduction" and compensation for removalist fees, lost wages and other incidentals for unspecified amounts. The matter was listed for a Conciliation and Group List hearing on 13 February 2020.

6 As the tenants had vacated the premises, thereby terminating the tenancy, an order for termination was no longer required and the application was amended, the Tribunal Member noting "the tenant (sic) claims a refund of the bond and compensation in the amount of $9000".

Tribunal proceedings and decision

7 The matter was listed for hearing on 14 April 2020 and the Tribunal ordered the landlord to pay $4139 to the tenants on or before 12 May 2020.

8 Written reasons for decision were given after the hearing and the Tribunal Member provided a breakdown of the heads of damage as found: "rental reduction $339; loss of wages by both applicants $2350; cleaner $370; removalist $1080".

9 The reasons for decision are set out in full:

> This is a claim for compensation arising from a lift failure in a multi-storey residential block. Whilst this lift failure was not the landlord's fault, it had a significant impact on the tenants, who had a stair climb of 108 stairs to reach the unit.… The respondent landlord fairly conceded that the issue of the break lease fee did not apply and should, in the circumstances, not affect the return of a bond. The issue of the other compensation claimed is to some extent, at least, contested. The applicants were intending to move to their own home at the end of the

> lease. The need to break this lease, and lease another property until completion of their own property [which I understand from the evidence was a matter of weeks from today] impacts on the claim they're making.
>
> I find the claim for a 15% reduction in the rent for the period from 26 November 2019 to 28 December 2019 [33 days] reasonable and accept the calculation of $339.00.
>
> The applicants have claimed a total of 12 days loss of wages between both of them totalling $7050 for finding a new rental, packing and unpacking their property and moving. In the circumstances and in the absence of more evidence of the specific time spent on each task, I am prepared to accept a total of two days each for the pack and move. I have no rational basis for the assessment of the time taken to locate a new letting. I will allow two days at $651 per day and 2 days at $524 per day [being the respective daily rate of the two applicants] totalling $2350.
>
> I accept that the cleaner recommended by the respondent's agent and the removal costs arose from the need to vacate the property and find another pending the completion of their home. These costs total $1450.

Scope and nature of internal appeals

10 Internal appeals may be made as of right on a question of law, and otherwise with permission (that is, the "leave") of the Appeal Panel: s 80(2) *Civil and Administrative Tribunal Act* 2013 (NCAT Act).

11 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question;

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

12 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal

Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:

(a) the decision of the Tribunal under appeal was not fair and equitable; or

(b) the decision of the Tribunal under appeal was against the weight of evidence; or

(c) significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

13 In *Collins v Urban* [2014] NSWCATAP 17 (*Collins v Urban*), the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

Submissions and evidence

14 In deciding the appeal, we have had regard to the following:

- The Notice of Appeal lodged on 13 May 2020, as well as the appellant's outline of submissions with attachments and a transcript of proceedings filed on 18 June 2020.
- The Reply to Appeal lodged on 3 June 2020 with attachments and the evidence relied upon at the hearing below.

15 Both parties were satisfied that the Appeal Panel had received all documents they sought to rely on.

16 The operation of the order that the landlord pay the tenants the amount of $4,130.00 was stayed pending the determination of the appeal, subject to the condition that the landlord pay that amount to the Tribunal pending the appeal.

Grounds of Appeal

17 The grounds of appeal set out by the landlord in the Notice of Appeal are as follows:

(1) the Tribunal failed to apply the correct principles of law;

(2) the Tribunal identified the wrong issues or asked the wrong question;

(3) the Tribunal took into account irrelevant considerations;

(4) the Tribunal made findings in the absence of evidence and or that were not open to be made;

(5) the Tribunal failed to provide proper reasons as to why the Appellant was liable to pay the Respondents compensation;

(6) there was no evidence to support the Tribunal's findings of fact in respect of the wage loss claimed by the Respondents.

At the appeal hearing

18 In respect of the first appeal ground the landlord submits that the Tribunal Member failed to identify the provisions of the RT Act relevant to the application. In the landlord's submissions the relevant issues that should have been considered by the Tribunal were:

(1) An order for termination of the tenancy pursuant to section 109 by reason of the premises being uninhabitable;

(2) An order under section 44 of the RT Act, being an order that rent payable under the agreement was excessive having regard to the reduction or withdrawal of services or facilities by the landlord; or

(3) An order for compensation pursuant to sections 187 and 190 of the RT Act.

19 It is the landlord's primary submission the Tribunal considered the wrong test and reached the wrong finding that the tenants validly terminated the tenancy because the property had become "uninhabitable" within the meaning of s 109 of the Act. It is the landlord's submission that the residential premises were not destroyed and had not been rendered wholly or partially uninhabitable. It was the tenants' decision to terminate the lease without just cause, thereby giving rise to a "break lease fee" which the Appellant was willing to forego in exchange for the tenant's agreement not to claim compensation. The landlord also informed the Tribunal at the hearing that the bond had already been returned to the tenants in full and the landlord further conceded that $339 should be paid to the tenants by way of rent reduction pursuant to s44 of the Act.

20 The landlord submits the Tribunal Member misdirected himself when he determined the tenants validly terminated the tenancy because the premises were "uninhabitable" as the lift was not working (see transcript page 5) and the Tribunal erred when it awarded compensation in absence of a finding of breach of the residential tenancy agreement by the landlord. It is submitted that the

Tribunal found, correctly, that "the lift failure was not the [appellant's] fault" and consequently it was not open to the Tribunal to award damages.

21 In respect of quantum, it is submitted the Tribunal erred in finding that the tenants had to move twice by reason of the landlord's breach. The parties entered a residential tenancy agreement for a fixed term of six months, to expire on 5 March 2019. The tenants sought a short term lease as they anticipated moving into their own newly constructed premises. As at the hearing on 14 April 2020 the tenants had not moved into their new premises and it is the landlord's submission the tenants would have had to move twice in any event, as they were required to vacate the residential premises at the end of the lease on 5 March and as there was no evidence before the Tribunal that the residential tenancy agreement would have been extended and their new premises were not ready for occupation.

22 Secondly, the Tribunal Member fell into error awarding damages for lost wages in the absence of any evidence in support. There was no evidence of wage records showing on balance that the tenants took time off work and the tenants gave no sworn evidence to support their claim. A print out purportedly from the tenants' employer did not bear Mr Rad's name, nor did it disclose that he had taken time off work at the relevant time, or at all. Ms Zadeh's wage slip similarly did not demonstrate wages lost for time off work at the relevant time. The landlord submits there was either no evidence to support a claim for lost wages, or alternatively the finding was against the weight of the evidence.

23 In reply, the tenants point to the problem with the lift not working, which meant they and their children had to climb 108 stairs to get to their unit. They had to move to another place, and it took time to find somewhere. They had to use their holidays from work to search, and for packing. They paid money to the landlord for services that were not available.

Determination

24 One issue for determination for the Appeal Panel is whether the grounds of appeal as set out raise an error of law, or if the grounds of appeal do not raise errors of law, whether leave to appeal should be granted.

25 We note that the appellant is seeking the leave of the Appeal Panel to allow the appeal. Applying the principles set out in *Prendergast*, above, it is incumbent upon us to identify whether or not the appellant has raised an error of law.

Consideration

26 In respect of ground one of the appeal we find an error of law established but for the reasons that follow, we are not of the view that the error gives rise to a practical injustice and that ground of appeal must fail.

27 The tenancy was terminated by reason of the tenants' vacating the residential premises on 28 December 2020. As the tenancy agreement had been terminated, and in the absence of a claim by the landlord for a break lease fee, it was not a relevant consideration whether the premises were "habitable", or whether the tenants validly terminated the tenancy.

28 The fact that the residential tenancy agreement was terminated had been recognised and the application was relevantly amended at the Conciliation and Group List hearing. The Member noted that the only issue that remained for hearing was the tenants' $9000 claim for compensation. After 28 December 2019 the issue of termination was an irrelevant consideration, as was the issue of whether or not the premises were habitable for the purpose of section 109 of the RT Act. For there to be a continuing controversy in relation to the issue of termination, there needed to be a primary application for a termination order that remained on foot to which any finding as to whether the premises were habitable was relevant. That circumstance no longer existed as a result of the tenants vacating the premises. This ground of appeal lacks utility and should not succeed: see *Bartlett v Hewitt* [2016] NSWCATAP 40.

29 In respect of the second ground of appeal, and concerning the award of damages, as the landlord conceded at the hearing and on appeal, that a rent reduction of $339 pursuant to s 44 of the RT Act was reasonable under the circumstances and this was no longer an issue in dispute that required determination at the hearing. The only issue to be determined by the Member was whether the landlord breached the residential tenancy agreement and was liable for damages for loss of wages, in the sum of $2350, cleaning costs of $370, and removalists' costs of $1080.

30 For the reasons that follow we are of the view that the Member erred when he arrived at a finding that although "the lift failure was not the landlord's fault", damages should be awarded for loss of wages for both tenants as well as cleaning and removalists costs.

31 In the absence of a finding that the landlord breached the terms of the residential tenancy agreement, it was not open to the Tribunal to determine, what, if any losses and damages were suffered by reason of the breach. The Tribunal failed to consider the issue of liability, or alternatively failed to provide considered reasons whether the lift failure amounted to a breach of the residential tenancy agreement. In the context of an application for rent reduction and compensation, the reference to "fault" is in our view not a consideration of the real issues in dispute between the parties. The Tribunal's decision was inadequate as it did not deal with the rights and obligations of the parties under the residential tenancy agreement. In *Rathchime Pty Ltd v Willat* [2017] NSWCATAP 87 an Appeal Panel explained that a failure to deal with matters before the Tribunal for determination will amount to an error of law: see at [70] and [71].

32 Given the Tribunal Member's failure to determine the matters that we have referred to as to breach, the appeal must be allowed on the basis of an error of law.

33 We have decided that the most appropriate course is to remit the proceedings to the Tribunal pursuant to s81(1)(e) of the NCAT Act for the Tribunal to determine:

(1) Whether the failure of the lift for the stated time amounts to a breach of the residential tenancy agreement by the landlord;

(2) In the event a breach is established, whether the breach is causative of the losses and damages as claimed by the tenants and whether an award should be made either pursuant to s44 or s190 of the RT Act.

34 By reason of the concession by the landlord the findings and orders in respect of $339 pursuant to s44 remain in full force and effect and are be accounted for in the final orders of the Tribunal.

35 Accordingly we find an error of law established and remit the application to be determined according to law. The appeal is allowed and the award made by the Tribunal in the amount of $4139 is set aside.

36 The amount of $4,139.00 held by the Tribunal in trust is to be returned to the landlord.

Orders

37 The orders of the Appeal Panel are:

(1) The appeal is allowed.

(2) The award made by the Tribunal in the amount of $4139.00 is set aside.

(3) The amount of $4139.00 held by the Tribunal is to be returned to the landlord.

(4) The matter is remitted to the Tribunal, differently constituted, for determination according to law and in accordance with these reasons.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar