Civil and Administrative Tribunal

New South Wales

Case Name:	Dimunova v Vega
Medium Neutral Citation:	[2017] NSWCATAP 5
Hearing Date(s):	8 December 2016
Date of Orders:	6 January 2017
Decision Date:	6 January 2017
Jurisdiction:	Appeal Panel
Before:	S Westgarth, Deputy President R Titterton, Senior Member
Decision:	(1) Appeal upheld; and (2) The proceedings are to be remitted to the Consumer and Commercial Division of the Tribunal for the purposes of conducting a rehearing before a differently constituted Tribunal
Catchwords:	Duty to maintain – premises in strata scheme
Legislation Cited:	Civil and Administrative Tribunal Act 2013 Residential Tenancies Act 2010
Cases Cited:	Holley v Evatt [2014] NSWCATAP 72 Moniaci v Erickson [2016] NSWCATAP 34
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Renata Terpakova Dimunova (Appellant) Jorge Andras Vega (Respondent)
Representation:	Counsel: Solicitors:

File Number(s):	AP 16/29507
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	Not applicable
Date of Decision:	14 June 2016
Before:	C Marzilli, General Member
File Number(s):	RT 16/12605

REASONS FOR DECISION

Background

1 This is an appeal from a decision made in the Consumer and Commercial Division of the Civil and Administrative Tribunal (the Tribunal) published on 14 June 2016. The Notice of Appeal was filed on 27 June 2016.

2 The appellant is a tenant who entered into a residential tenancy agreement with the respondent as landlord. The appellant brought an application against the landlord (the respondent in the proceeding below and the respondent on appeal) for compensation, and for an order reducing the rent payable on the basis that the premises were unusable or uninhabitable.

3 The decision under appeal (the Decision) made orders reducing the rent from 24 January 2016 to 24 February 2016 to the figure of “nil per week”. In other words, during that period all rent was abated. In consequence, the Tribunal made an order that the respondent pay to the appellant the sum of $754.29. That figure was the rent for the period from 24 January 2016 to 24 February 2016 less the sum of $1,140.00 which had already been paid by the respondent to the appellant.

4 The circumstances giving rise to the application were that the premises (which was a unit in a strata scheme) became partly inundated with water because of a water leak in the common property.

5 For the reasons that follow, we have decided to uphold the appeal, and to remit the proceedings to the Tribunal (differently constituted) for rehearing.

Jurisdiction

6 This is an internal appeal under the *Civil and Administrative Tribunal Act 2013* (NCAT Act). It is brought pursuant to the provisions of s 80 of the NCAT Act and the provisions of cl 12 of Sch 4 of the NCAT Act. In summary, this means that the appellant may appeal as of right on any question of law, or with leave of the Appeal Panel only if the Appeal Panel is satisfied that the appellant may have suffered a substantial miscarriage of justice because:

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

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

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

The Decision

7 The following is a summary of the essential findings of the Decision:

(1) The parties had entered into a residential tenancy agreement dated 9 May 2015 for a term ending on 28 April 2016 at a weekly rental of $480.00 per week;

(2) On 23 and 24 January 2016 (the Appeal Panel notes that the Decision refers to these dates as being 23 and 24 February 2016, this appears to be a typographical error) the premises were flooded with water leaking from a pipe which was part of the common property of the strata scheme for the building of which the premises were part. All the floors in the premises became wet, both carpeted areas and timber flooring. The appellant advised the respondent of the flooding by email on Sunday 24 January 2016;

(3) All the defects with the floors at the premises were repaired on 24 February 2016. From 24 January 2016 to 24 February 2016, the premises did not have floor coverings over the entire premises and in areas previously covered by timber flooring, the concrete floor was exposed;

(4) The appellant and the other occupants moved out of the premises on 29 January 2016 and back into the premises on 25 February 2016;

(5) The appellant seeks reimbursement of the costs incurred in staying at a hotel, a rent reduction, lost wages and Tribunal filing fee;

(6) The appellant lived in the premises with her husband and a child of 24 months;

(7) The respondent has repaid to appellant $1,440.00 of the rent paid; and

(8) The premises were affected by mould.

8 The following further findings were made in the Decision:

(1) There was no breach of the residential tenancy agreement by the respondent. The water pipe which burst causing inundation "was not attributable to any act or omission of the respondent";

(2) The evidence did not support a finding that the respondent or the respondent's agent stated that hotel costs of the appellant would be reimbursed to her. Even if such a promise were to have been made, without some consideration passing from the appellant to the respondent, such a promise would not be enforceable to vary the residential tenancy agreement between the parties or create a fresh legally enforceable contract between the parties. The appellant's emails, purporting to refer to an agreement cannot overcome this issue of enforceability;

(3) The premises were wholly uninhabitable during the period from 24 January 2016 to 24 February 2016, and the Tribunal was satisfied that it should make an order pursuant to s 45 of the *Residential Tenancies Act, 2010* (RT Act) that the rent payable during the period 24 January to 24 February 2016 be reduced to nil; and

(4) There was no cause of action pursuant to s 190 of the RT Act for breach, and therefore no award for loss of wages can be made. The appellant's other claims for compensation were also dismissed.

Grounds of Appeal

9 The grounds of appeal identify both questions of law and leave grounds. A summary of the grounds of appeal is set out below.

Ground 1

10 The Tribunal applied the wrong test/asked itself the wrong question in determining whether a breach of the residential tenancy agreement had occurred, and consequently whether the appellant was entitled to an order as to compensation. The appellant had sought compensation under s 187(1)(d) of the RT Act for the cost of hotel accommodation while the rented premises were under repair. The Tribunal dismissed the claim, finding:

> there was no breach of the Residential Tenancy Agreement between the Respondent [sic]; the water pipe which burst causing the inundation was not attributable to any act or omission of the Respondent; therefore an application pursuant to section 190 of the Act [sic]

11 The appellant submits that, in making the above finding, the Tribunal asked whether the inundation was attributable to any act or omission of the

respondent. The appellant submits that the Tribunal should have asked whether the respondent had breached the agreement between the parties and, if so, whether that breach had caused the appellant compensable loss.

12 The appellant submitted that the landlord's obligation to maintain the property in a reasonable state of repair is set out in s 63 of the RT Act (and incorporated into the agreement by virtue of s 63(4)) and the obligation is further referred to in s 65. The relevant consideration is whether the state of disrepair was caused by a tenant's breach. The test is not whether the disrepair is attributable to an act or omission of a landlord.

13 The appellant submitted that the Tribunal made findings of fact relevant to the determination of breach namely:

(1) The need for repair. Water ingress had damaged carpets and timber floors, the premises did not have full floor coverings between 24 January 2016 and 24 February 2016, the property was effected by mould and that a child lived at the premises;

(2) The damage to the premises caused by the water pipe had been reported to the respondent on 24 January 2016; and

(3) The appellant had left the property on 29 January 2016, five days after the inundation, the property did not have floor coverings until 24 February 2016.

14 The appellant submits that the error was material to the outcome of the case. Because the Tribunal determined that it could only order compensation where the original event arose from an act or omission of the respondent, and did not consider whether subsequent to the pipe bursting the respondent had breached its obligation to maintain the property in a reasonable state of repair, the Tribunal did not go on to consider the loss suffered by the appellant and whether compensation should be granted.

15 This error caused the Tribunal to find, also in error, that the appellant would only be entitled to compensation if she could show the agreement between herself and the respondent's managing agent for reimbursement was enforceable as a variation of their agreement. Had the Tribunal applied the right test, evidence of the agreement between the parties could have gone to the reasonableness of the costs incurred.

16 The two remedies sought by the appellant (abatement of rent and compensation) are not consistent, and nor do they cover the same type of loss – see for example *Moniaci v Erickson* [2016] NSWCATAP 34.

Ground 2

17 The Tribunal made findings of fact as identified in the above summary of ground 1. The evidence established the need for repair, the landlord's knowledge and a reasonable opportunity to repair. For the Tribunal to conclude subsequently that there was no breach of agreement to maintain the property in a reasonable state of repair was unreasonable and against the weight of evidence. The appellant seeks leave to appeal on the basis that the Tribunal's decision on the issue of compensation was against the weight of evidence.

18 In support of ground 2, the appellant submits that the Decision discloses an issue of principle and a question of public importance which might have general application. That issue is the interaction between remedies under s 43(2) of the RT Act for reduction of rent where the premises are unusable and compensation for breach of agreement (s 187(1)(d) and s 190). This decision gives the impression that these remedies are mutually exclusive, and that a tenant is not entitled to claim compensation where the failure to maintain premises originates from an accident, regardless of the evidence that is produced about the time it takes to repair the premises.

Reply to appeal

19 The respondent has filed a reply which in summarised form states the following:

(1) The respondent did maintain the property in a reasonable state of repair. When the water leak occurred and was identified, the agent, on behalf of the landlord, followed up and pushed for the issue to be resolved with the strata manager as soon as possible. Therefore, the landlord acted diligently to ensure the issue was resolved as soon as possible;

(2) The water leak was a strata issue as the pipe burst on common property and then affected several units in the block. Therefore, the landlord did not have any control over the incident occurring; and

(3) The respondent agrees with the Tribunal's determination that there was no breach of the agreement.

Oral submissions

20 At the hearing the appellant submitted:

(1) Her claim was for $6,489.12 calculated as follows:

Costs of her accommodation - $7,638.50

Plus lost wages - $804.91

Sub total - $8,683.41

Less paid by landlords - $2,194.29

Balance - $6,489.12

(2) The respondent had an obligation to respond reasonably to the water leak and did not act quickly enough. The appellant referred to emails which were before the Tribunal at the first instance hearing establishing that the appellant reported the leak to the respondent's agent on 23 January 2016, that there were subsequent reports by email to the respondent's agent, but that the premises were not restored and put into a habitable condition until thirty four days later. The water leak required urgent attention. The fire brigade broke into the premises on 26 January 2016 (when the appellant was absent) to inspect the premises. The respondent breached its obligations to provide and maintain the residential premises in a reasonable state; and

(3) There was an agreement between the appellant and the respondent's agent that the appellant should move to a hotel and that the hotel costs would be reimbursed by the respondent to the appellant. We were taken to emails which were said to constitute evidence of such an agreement. The Decision was in error in deciding that there was no evidence of an agreement;

21 The respondent's agent made submissions at the hearing to the effect that there was no agreement for the hotel costs to be paid by the respondent. The payment which the respondent made to the appellant was made as a good will gesture only. The respondent was not responsible for the water leak and acted reasonably and promptly when informed of the leak.

Our Decision

22 In our view, the appeal should be upheld and the proceedings remitted to the Tribunal for a rehearing. Our reasons are as follows.

23 The provisions of the RT Act relevant to this appeal are contained in ss 43(2)(a), 45, 63(1), 65(2) and (3), 187 and 190. The relevant parts of these sections are set out or summarised below.

24 Section 43(2)(a) provides:

> **43 Rent reductions**
>
> (2) **Premises unusable**
>
> The rent payable under a residential tenancy agreement abates if residential premises under a residential tenancy agreement are:
>
> (a) otherwise than as a result of a breach of an agreement, destroyed or become wholly or partly uninhabitable

25 Section 45 provides that the Tribunal may on application by the landlord or the tenant make an order determining the amount of rent payable if the rent is abated under s 43(2).

26 Section 63(1) provides:

> **63 Landlord's general obligation**
>
> (1) A landlord must provide and maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.

27 Section 65(2) and (3) provides:

> **65 Tenants remedies for repairs**
>
> (2) **Orders for repairs**
>
> The Tribunal may make an order that the landlord carry out specified repairs only if it determines that the landlord has breached the obligation under this Act to maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.
>
> (3) The Tribunal must not determine that a landlord has breached the obligation unless it is satisfied that:
>
> > (a) the landlord had notice of the need for the repair or ought reasonably to have known of the need for the repair, and
> >
> > (b) the landlord failed to act with reasonable diligence to have the repair carried out.

28 In addition, s 190 provides that a landlord or tenant may apply to the Tribunal for an order in relation to a breach of a residential tenancy agreement and s 187 provides that the Tribunal may on application make one or more of the orders set out in s 187. One such order is an "order as to compensation".

29 Here, the Tribunal found that the respondent had not breached the residential tenancy agreement, but it exercised the power contained in s 45 to determine the rent on the basis that the rent was abated under s 43(2)(a). The exercise of that power involved a finding that the premises became wholly or partly uninhabitable "otherwise than as a result of a breach of an agreement".

30 In our view, this was an appropriate order if the finding that the respondent was not in breach of the residential tenancy agreement is correct.

31 However, in our view, it was necessary for the Tribunal to consider whether the respondent had breached the obligations set out in s 63 to provide and maintain the residential premises in a reasonable state of repair. The Tribunal found that the burst water pipe did not occur through any act or omission of the respondent and therefore there was no breach of the residential tenancy agreement. In our view that analysis discloses an error of law. In our view, the obligation set out in s 63 is mandatory (subject to s 65(3)), and is not conditional upon the landlord having it within the landlord's own power the ability to take steps to provide and maintain the residential premises. The fact that another unit owner or the strata committee of the body corporate must take steps to fix the burst pipe does not excuse the landlord of his or her obligations under s 63. The only qualification to these statements is that the duty set out in s 63 is, in our view, modified by s 65(3) which provides that the Tribunal must not determine that a landlord has breached the obligation (that is the obligation which, by virtue of s 65(2), refers back to s 63(1)), unless the Tribunal is satisfied of two matters. The first matter is that the landlord had notice of the need for repair or ought reasonably to have known of the need for repair. The second matter is that the landlord failed to act with reasonable diligence to have the repair carried out (s 63(3)(b)).

32 In the context of residential premises in a strata scheme, what constitutes a failure to act with reasonable diligence will involve a consideration of what steps the landlord is able to take to encourage or force the strata committee to take appropriate practical steps having regard to the fact that the common property is not property owned by the landlord and generally the other lot properties will not be owned by the landlord. This view is supported by the fact that the landlord's obligation to reimburse the tenant for urgent repairs excludes, by the way "urgent repairs" is defined, work needed to repair premises that are owned by a person other than the landlord (see s 62).

33 In our view, the Tribunal has asked itself the wrong question or taken into account an irrelevant question in coming to the conclusion it came to by finding

that because the water inundation was not attributable to any act or omission of the respondent there was no breach. Rather, the Tribunal should have considered whether the landlord had breached his obligations under s 63. Accordingly, the Tribunal has, in our view, erred in law (see *Holley v Evatt* [2014] NSWCATAP 72).

34 This conclusion above does not mean that the respondent has necessarily breached his obligations under s 63. Indeed, on the evidence to which we were taken, it was not obvious that the respondent was in breach. However, the Tribunal did not evaluate the evidence or make findings concerning the performance or breach of the landlord's obligations under s 63. The only appropriate course is to remit the proceedings back to the Division for rehearing.

35 The Decision also dismissed the appellant's contention that the respondent (via his agents) had promised or agreed to pay the appellant's costs during the period she and her family were forced out of the premises and into a hotel. The only reason given was that the evidence did not support such a finding. In addition, the Decision held that even if such a promise had been made by the agent, it would not have been enforceable because the promise was not supported by "some consideration" passing from the appellant to the respondent. This conclusion is, presumably, intended to recognise the general legal principle that a contract may not be binding unless it contains reciprocal promises.

36 The difficulty with the Tribunal's finding is that the evidence relied upon by the appellant is not referred to. At the appeal hearing, we were taken to emails sent by the appellant, to the respondent's agents (there were two firms of agents, one having been appointed after the other's retainer came to an end). Most of the emails came from the appellant but at least one came from an agent. There was also a communication from an agent (a text message) which appears on its face to possibly confirm the existence of an agreement to pay hotel expenses.

37 The finding that there was no evidence constituting an agreement because of a lack consideration is, in our view, a finding which is difficult to understand

without the relevant communications between the parties being identified and considered. Once identified, they should be subject to consideration and conclusions made as to whether there was an agreement between the parties. Even if there was no agreement, a consideration of the evidence relevant to the incurring of hotel costs may have been relevant to the question of the reasonableness of such costs.

38 In conclusion, we are of the opinion that this aspect of the Decision (that is, the finding that there was no promise to pay hotel expenses) is not a decision which was supported by proper reasons. A failure to give proper reasons constitutes a question of law (*Holly v Evatt*).

39 Accordingly, our views on this aspect of the Decision also make it necessary to uphold the appeal and to make an order for a rehearing.

40 It may be the case that on a rehearing the Tribunal finds that the respondent did not breach his obligations under the RT Act. If so, the question will arise whether there was an agreement for the payment of the appellant's hotel expenses. If such expenses were to be fully reimbursed the appellant would have to give a credit to the respondent for the rent payable under the tenancy agreement (but which has not been paid because of the abatement order).

Orders

41 The Appeal Panel makes the following orders:

(1) Appeal upheld; and

(2) The proceedings are to be remitted to the Consumer and Commercial Division of the Tribunal for the purposes of conducting a rehearing before a differently constituted Tribunal.

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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

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