

AUSTRALIA / JUDGMENT

Chalker v Reardon [2020] NSWCATAP 187

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Chalker v Reardon [2020] NSWCATAP 187

Hearing dates: 18 August 2020

Date of orders: 10 September 2020

Decision date: 10 September 2020

Jurisdiction: Appeal Panel

Before: P Durack SC, Senior Member

P H. Molony, Senior Member

Decision: (1) The appeal is allowed.

- (2) Set aside the order made by the Tribunal on 4 June 2020.
- (3) Declare that the appellants must pay the respondent, pursuant to s 47 (5) or s187 (1) (c) of the Residential Tenancies Act 2010, the amount of the water charges paid by the respondent to the appellants over the period from 16 June 2017 to 20 January 2020 as determined by the Tribunal in accordance with Orders (4) and (5) below.
- (4) The proceedings are remitted to the Tribunal at first instance (either the same or a differently constituted Tribunal) for a re-determination of a part of the respondent's case, namely the quantum of the amount of the water usage charges paid by the respondent to the appellants over the period from 16 June 2017 to 20 January 2020 which the appellants must repay the respondent in accordance with Order (3).
- (5) As to Order (4), the Tribunal at first instance is to make directions for the provision by the parties of such further evidence and written submissions as the parties may wish to rely upon.

Catchwords: APPEALS – residential tenancy- water charges paid by tenant when not required to pay – claim for refund - quantum to be repaid – adequacy of reasons – redetermination required

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)

Residential Tenancies Act 2010 (NSW)

Cases Cited: Rice Marketing Board for the State of New South Wales v Forbidden Foods Pty Limited; Forbidden Foods Pty Limited v Rice Marketing Board for the State of New South Wales [2020] NSWCATAP 182

Category: Principal judgment

Parties: Frank Chalker (First Appellant)

Judy Chalker (Second Appellant)

Chelsea Reardon (Respondent)

Representation: Solicitors:

Appellants (Self Represented)

Respondent (Self Represented)

File Number(s): AP 20/27610

Publication restriction: Nil

Decision under appeal Court or tribunal: NSW Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 04 June 2020

Before: P Boyce, Senior Member

File Number(s): RT 20/08630

REASONS FOR DECISION

Background and decision on appeal

1. The appellants (the Landlords) are the landlords of residential premises located on part only of their rural property in south-western New South Wales.
2. The respondent (the Tenant) occupied those residential premises over the period from about 16 June 2017 until about 5 June 2020 under two residential tenancy agreements. Over that period the respondent made numerous payments to the appellants for water usage charges but stopped doing so after 20 January 2020 when she came to believe that she was not obliged to pay these charges.

3. On 21 February 2020, the Tenant commenced proceedings in the Tribunal to recover the amount of water usage charges she had paid. In those proceedings it came to be common ground between the parties that the Tenant had not been obliged to pay these water usage charges because the conditions which entitled the Landlords to payment set out in s 39 of the Residential Tenancy Act (the Act) had not been met.
4. Consistently, with this common ground, the Tribunal, in its reasons issued on 11 June 2020, found that the Tenant had not been required to pay water usage charges because the landlord had failed to comply with a number of the conditions in section 39 of the Residential Tenancies Act 2010 (NSW) (the Act), namely section 39 (1) (a) (the premises were not separately metered), 39 (2) (failure to give the tenant the water supply authority's bill setting out the charges or other evidence of the cost of water used) and 39 (3) (failure to give the tenant not less than 21 days to pay the charges) of the Act. There was no challenge to these findings on the appeal.
5. The only issue between the parties has been what amount the Tenant has actually paid the Landlords for water charges and whether the Tenant could recover such charges paid under the first residential tenancy agreement which expired before 26 March 2018. The problem in respect of the first issue arises because the payments were made in cash and the documentary evidence about the payments presented to the Tribunal at first instance was far from complete.
6. As to the second issue, the Tribunal concluded that the Tenant had no right to recover water charges paid prior to 26 March 2018, which was the commencement date of a second residential tenancy agreement between the parties. The Tribunal found that the Tenant had previously occupied the premises under a residential tenancy agreement dated 15 June 2017 but concluded that:

The tenant cannot claim for the first tenancy term of the first tenancy agreement as that was brought to an end by the granting of the tenancy agreement on 26 March 2020 (sic).

1. As to the first issue, the Tribunal reasoned:

On the invoices adduced in evidence by the landlords the water usage charge for the period 1 April 2018 to 31 December 2019 was \$3,948.80. The Tribunal is satisfied on the evidence adduced by both parties this represents the amount the tenant wrongfully paid during the current term of the tenancy as (sic) is a reasonable assessment of the amount that the tenant is entitled to be repaid.

1. The Tribunal ordered the Landlords to pay the Tenant the sum of \$3,948.80 immediately, which amount the Landlords have now paid following the lifting of a stay order, initially, made in the appeal proceedings.

The appeal and our consideration

1. On the appeal, the appellants challenge this order and complain that it exceeded the amount of the water charges that the evidence showed had been paid by the Tenant. They contend that the Tribunal, instead, should have ordered that they pay the amount of \$855.68 (we note that this is a larger amount than the amount the Landlords claimed at first instance was repayable). They say that the Tribunal erred by, mistakenly, basing its decision upon the water authority's (Goldenfields Water) bills to the appellants in respect of the whole of their rural property, whereas the Tenant was charged for, and paid, lower amounts that covered water usage at the residential premises only.
2. In her reply to the appeal, the Tenant not only took issue with this contention but complained that the Tribunal had, wrongly, rejected her claim for water charges paid in respect of her occupancy under the first residential tenancy agreement. In effect, the Tenant cross-appealed from the order that the Tribunal made.
3. We are satisfied that both the appeal and the cross-appeal should be allowed on the basis of errors of law.
4. The Tribunal's reason for refusing recovery of water usage charges paid in respect of the first residential tenancy agreement set out above is not a legally recognised ground for refusing the Tenant's claim. The Tenant's claim was either under s 47 (5) of the Act or a common law claim in restitution in respect of which the Tribunal had power to order payment of an amount of money pursuant to s187 (1) (c) of the Act. The fact that the first residential tenancy agreement had expired and been succeeded by the second tenancy agreement 26 March 2018 was not an answer to such claims.
5. On the appeal, the Landlords did not put forward any other reason why the Tenant should not recover water charges paid in respect of the first residential tenancy agreement, apart from their general contention that the Tenant had not proved what amount of charges she had paid.
6. As to the issue about how much the tenant actually paid, in our opinion, the Tribunal erred in law because it either did not consider, properly, the Landlords' case, including their evidence, about quantum, or it failed to provide adequate reasons for its conclusion as to the quantum of the charges paid by the Tenant.
7. As appears from a transcript of the hearing at first instance, the Landlords' case (presented by their real estate agent) about the amount of the water usage charges paid by the Tenant was that she paid amounts by reference to handwritten invoices that were regularly provided to the Tenant by the Landlords and that these payments came to a total of only \$558.20 (see line 427 of the transcript). According to the Landlords, these handwritten invoices contained figures for water usage based upon readings the Landlords took from a meter near the residential premises and not from the readings of the meter measuring the supply of water to the whole of their rural property, which were the readings used by

Goldfields Water when billing the Landlords. According to the Landlords, they applied the water usage rate contained in the bills from Goldfields Water to the readings from the meter near the residential premises in their handwritten invoices to the Tenant. They claimed that the regular amounts for water usage charged to, and paid by, the Tenant were, substantially, less than the charges set out in the bills from Goldfields Water.

8. At the hearing at first instance and on the appeal, it was common ground that the Tenant did pay the water usage charges (in cash) by reference to these handwritten invoices issued by the Landlords. On the hearing of the appeal, it was also common ground that some 13 of these invoices were in evidence before the Tribunal. However, this was not all of the handwritten invoices for the whole of the period in issue and one of the Tenant's contentions at the hearing at first instance was that a handwritten summary of the water charges presented in evidence by the Landlords was false. The Tenant put forward a quantum of \$7,500.00 for the water charges paid. At the hearing at first instance, she explained that this was an estimate, based upon an estimated monthly charge of \$200, because she no longer had all the handwritten invoices (she returned these when she made her cash payments) and she had no other written record of what she had paid. She said she had requested copies of all the handwritten invoices from the Landlords for the purpose of the Tribunal hearing but these had not been supplied.
9. The Tribunal's reasons contain no reference to these competing contentions, and their supporting material. Instead, the Tribunal arrived at a figure of \$3,948.80 said to be derived from invoices adduced in evidence by the Landlords for the period 1 April 2018 to 31 December 2019. A calculation made for this period from the Goldfields Water bills comes very close to this figure of \$3,948.80, which suggests that the Tribunal derived quantum from the Goldfields Water bills.
10. Adequate reasons from the Tribunal on this quantum issue did not need to be lengthy, but they needed to explain why it was that the Landlords' figure of \$558.20 was rejected and why the quantum was not determined by reference to the Landlords' handwritten material (see the summary of the principles concerning the provision of adequate reasons set out by the Appeal Panel in *Rice Marketing Board for the State of New South Wales v Forbidden Foods Pty Limited*; *Forbidden Foods Pty Limited v Rice Marketing Board for the State of New South Wales* [2020] NSWCATAP 182 at [215]-[219]).
11. It could well be that the Tribunal turned to the Goldfields Water bills as the source of quantum because of a shortage of evidence concerning the whole of the period in issue. However, if so, the Tribunal's reasons needed to explain the reasoning and how such an approach could be reconciled with the Landlords' contention that these bills did not reflect the water usage that was charged to the Tenant.

12. On its face, it is somewhat surprising that the parties have not been able to come to an agreement about such a narrow issue. At the hearing of the appeal, we provided the parties with an opportunity to have a discussion to see if agreement could be reached, bearing in mind the possibility that the result of the appeal would be the need for a new hearing to determine quantum. However, the parties did not take up this opportunity.
13. At the hearing of the appeal (a hearing by telephone because of the Covid-19 situation), it emerged that the Tenant had not, apparently, received the Landlords' written submissions lodged with the Tribunal on 6 August 2020 and the Landlords had not received a bundle of papers relied upon by the Tenant which were lodged with the Tribunal on 11 August 2020. Nevertheless, rather than adjourn the hearing of the appeal, the parties were able to fully address the issue with the Tribunal's reasons upon which the outcome of the appeal has turned and neither party sought an adjournment of the hearing of the appeal.
14. There will have to be a re-determination of quantum by the Tribunal at first instance. We were not supplied with all of the evidence that was before the Tribunal concerning the issue, even though there were directions made for the hearing of the appeal that provided for this to occur. Furthermore, it was clear that there were disputed questions of fact, the resolution of which will be assisted by the presentation of all of the handwritten invoices for water charges that were issued by the Landlords to the Tenant, assuming these are still available. Otherwise, it would seem that the re-determination of quantum will need to involve a process of estimation based upon such reliable material that is found to exist.

ORDERS

1. For the above reasons, we make the following orders:
 1. The appeal is allowed.
 2. Set aside the order made by the Tribunal on 4 June 2020.
 3. Declare that the appellants must pay the respondent, pursuant to s 47 (5) or s187 (1) (c) of the Residential Tenancies Act 2010, the amount of the water charges paid by the respondent to the appellants over the period from 16 June 2017 to 20 January 2020 as determined by the Tribunal in accordance with Orders (4) and (5) below.
 4. The proceedings are remitted to the Tribunal at first instance (either the same or a differently constituted Tribunal) for a re-determination of a part of the respondent's case, namely the quantum of the amount of the water usage charges paid by the respondent to the appellants over the period from 16 June 2017 to 20 January 2020 which the appellants must repay the respondent in accordance with Order (3).
 5. As to Order (4), the Tribunal at first instance is to make directions for the provision by the parties of such further evidence and written submissions as the parties may wish to rely upon.

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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Decision last updated: 10 September 2020

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