

AUSTRALIA / JUDGMENT

Chandar v Gupta [2024] NSWCATAP 111

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Chandar v Gupta [2024] NSWCATAP 111

Hearing dates: 13 March 2024

Date of orders: 18 June 2024

Decision date: 18 June 2024

Jurisdiction: Appeal Panel

Before: K Rosser, Principal Member

S De Jersey, Senior Member

Decision: (1) Leave to appeal is refused.

(2) The appeal is dismissed.

Catchwords: Appeal - Leases and Tenancies - residential tenancy agreement - compensation for tenants' breach

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

Civil and Administrative Tribunal Rules 2014 (NSW)

Residential Tenancies Act 2010 (NSW)

Residential Tenancies Regulation 2019 (NSW)

Cases Cited: Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69

Collins v Urban [2014] NSWCATAP 17

Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39

Cominos v Di Rico [2016] NSWCATAP 5

Gales Holdings Pty Limited v Tweed Shire Council [2013] NSWCA 382

Hadley v Baxendale (1854) 9 Exch 341

Texts Cited: N/A

Category: Principal judgment

Parties: Manveer Kaur Chandar and Pankaj Kumar (Appellants)

Avishant Gupta (Respondent)

Representation: Appellants (Self-represented)

Respondent (Self-represented)

File Number(s): 2023/433579

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Decision under appeal Court or tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: N/A

Date of Decision: 28 November 2023

Before: S Smith, General Member

File Number(s): 2023/381699

reasons for decision

Introduction

1. This is an internal appeal under s 80(2) of the Civil and Administrative Tribunal Act 2013 (NSW) (the NCAT Act) against a decision made in the Consumer and Commercial Division of the Tribunal on 28 November 2023.
2. The Tribunal's decision concerned an application brought by the respondent (the landlord) against the appellants (the tenants) under the Residential Tenancies Act 2010 (NSW) (the RT Act), in relation to post tenancy charges.
3. The application was heard on 28 November 2023 and the Tribunal's orders and reasons for decision were published on the date of the hearing (the Decision). The Tribunal ordered the tenants to pay the landlord the sum of \$15,000 as compensation for a water damaged floor. The parties confirmed at the hearing that the tenants have paid the full amount to the landlord.
4. The tenants appeal the Decision.
5. At the hearing of the appeal proceedings Manveer Kaur Chandar represented both tenants. She was assisted by an interpreter. The landlord represented himself.
6. For the reasons set out below, we have refused leave to appeal and dismissed the appeal.

Background and Tribunal proceedings

1. The parties entered into an agreement for the tenants to occupy a granny flat with a single doorway connecting the granny flat to the landlord's premises. The agreement was in writing and is called a Room Lease Agreement dated 24 January 2024, with a set of House Rules attached. The tenants moved in on about 24 January 2023.
2. We understand from the Decision that in earlier proceedings before the Consumer and Commercial Division concerning these parties there was a finding that the agreement between them was a residential tenancy agreement for the purposes of the RT Act. This finding was not challenged either in the Tribunal proceedings or in the appeal proceedings.
3. The landlord's proceedings were filed on 5 August 2023. The landlord sought compensation and rent arrears. The only claim determined in favour of the landlord was a claim in respect of damaged flooring. This claim arose from an incident on 2 July 2023, when there was flooding onto the floor of the leased premises in the early hours of the morning, which the tenants cleaned up.
4. The landlord claimed that the tenants left the plug in the kitchen sink early in the morning of 2 July 2023 with water running from the tap. He claimed that this caused flooding and consequential damage across both the flooring of the granny flat and the flooring of the landlord's premises through the common doorway. The tenants claimed that the flooding originated in the landlord's premises. The reasons for decision indicate that the tenants claimed that the landlord's son caused the damage.

The Tribunal's reasons for decision

1. The Tribunal relevantly found:

Noting that the sink was in a part of the premises occupied by the tenants (the landlord having his own separate kitchen) and they were observed mopping up, I am satisfied that it is more probable than not that the tenants deliberately or negligently caused the flooding. I have grave reservations as to why a 9 year old would be up and about at 2 am playing in the tenant's kitchen.

1. The Tribunal noted that the landlord claimed an amount exceeding \$16,000 for this item. The Tribunal ordered compensation in the maximum amount of the Tribunal's jurisdiction of \$15,000: s 187(4) of the RT Act and Reg 40(b) of the Residential Tenancies Regulation 2019 (NSW).

Scope and nature of internal appeals

1. Internal appeals may be made as of right on a question of law, and otherwise with leave of the Appeal Panel: s 80(2) NCAT Act.
2. 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, which includes a failure to afford procedural fairness or the application of an incorrect legal principle.

3. Clause 12(1)(b) of Schedule 4 of the NCAT Act, provides that for the Appeal Panel to grant leave to appeal from decisions made in the Consumer and Commercial, it must be satisfied that the appellant may have suffered a substantial miscarriage of justice on the basis that:
 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).
1. 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 clause 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.

1. Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).
2. In *Collins v Urban*, the Appeal Panel stated at [84] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:
 - (a) issues of principle;
 - (b) questions of public importance or matters of administration or policy which might have general application; or
 - (c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;
 - (d) a factual error that was unreasonably arrived at and clearly mistaken; or
 - (e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.
1. It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided on the appeal and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal: see *Cominos v Di Rico* [2016] NSWCATAP 5 at [13]. We have followed that process in this case.

2. An appeal is not an opportunity for the party who was unsuccessful before the Tribunal to run their case again: Ryan v BKB Motor Vehicle Repairs Pty Ltd [2017] NSWCATAP 39 at [10].

Submissions and evidence

1. In deciding the appeal, we have had regard to the following:
 1. The Notice of Appeal lodged on 29 November 2023.
 2. The tenants' written submissions lodged on 31 January 2024, 5 February 2024 and 29 February 2024.
 3. The landlord's written submissions lodged on 12 December 2023 and 22 February 2024.
 4. The landlord's submission dated 22 February 2024 included transcripts of sections of the hearing before the Tribunal and a USB disc of the hearing.
 5. The Tribunal's reasons for decision dated 28 November 2023.
 6. The procedural directions made at callover on 20 December 2023.
 7. The application to the Tribunal as filed on 5 August 2023.
 8. The oral submissions made by the parties at the appeal hearing.
1. The parties identified in their submissions those documents which were not before the Tribunal at first instance. Those documents were not taken into consideration when deciding the appeal, as the parties did not seek leave to rely on new evidence.
2. We have not listened to the audio recording of the hearing as there was no need to do so. Parties were directed at the callover on 20 December 2023 that if they sought to rely on anything that happened at the hearing at first instance, a typed transcript of the relevant part of the hearing together with the sound recording of the entire hearing must be provided. The landlord included a partial transcript of the Tribunal hearing in his bundle of documents. The tenants did not dispute the accuracy of the transcript. In these circumstances, we have had regard to the partial transcript in deciding the appeal.

Notice of Appeal

1. The Notice of Appeal was lodged on 29 November 2023, which is within the 14 day time period specified in cl 25(3) of the Civil and Administrative Tribunal Rules 2014 (the Rules). The appeal is therefore in time.

Grounds of Appeal

1. The grounds of appeal are:
 1. That there was no evidence that the tenants caused the water damage to the floor of the leased premises by leaving the tap on in their kitchen.

2. That the tenants are not liable to compensate the landlord for any damage to the flooring, including the flooring in the landlord's premises.
3. The maximum amount the tenants can afford to pay is \$6,000.

Issues

1. The issues to be decided in this case are:
 1. Did the Tribunal make an error on a question of law?
 2. If so, should the appeal be allowed?
 3. Have the tenants established a basis for leave to appeal to be granted?
 4. If so, should leave to appeal be granted?

Tenants' submissions

1. The tenants' submissions on the appeal are summarised as follows:
 1. There was no evidence to support the conclusion that the flooding started in the granny flat.
 2. There was a misunderstanding by the Tribunal as the tenants did not give evidence that the landlord's son was playing at midnight in the kitchen of the granny flat.
 3. The mistake the tenants made was not to inform the landlord as soon as they found the water on the floor.
 4. The tenants received a text from the landlord at 11.07 am on 2 July 2023 to say there had been a water emergency from a burst pipeline and the water supply has been disturbed.
 5. The landlord's plumber did not say that the water had come from the tenants' side, being the granny flat; it was the landlord who said that.
 6. At the time the landlord was getting quotes for the new flooring he did not tell the tenants they had to pay for it.
 7. Even if the flooding came from the tenants' side, the tenants should not be responsible for the cost of new flooring in the landlord's premises.

Landlord's submissions

1. The landlord's submissions are summarised as follows:
 1. The photos which show the flooding and damaged flooring in the granny flat are at pp 69-76, 77-99 and 100-110 of the landlord's documents dated 22 February 2024.
 2. The photo of the flooring in the landlord's premises at p 59 of the landlord's documents shows the flooring to be affected but to a much lesser extent.

3. Given that the photos show the water damaged floor to be much more extensive on the tenants' side, the flooding must have started on the tenants' side and not the landlord's side.
4. The flooring was only two years old.
5. The subfloor has a lot of moisture as shown in photos at pp 146 and 147 with resultant mould as shown in the photo at p 149.
6. Given that there is a single slab under the flooring, water has travelled down and dispersed from the granny flat into the landlord's premises.
7. At first the landlord thought it must have been a burst pipe, but he did some diagnostic testing with a plumber over the phone and the result of those tests was that there was no meter reading increase which meant there was no water leakage from a burst pipe.
8. There have been no further leaks since 2 July 2023.
9. One of the tenants (Ms Chandar) told the landlord that she had left the kitchen tap on.
10. The cost incurred for labour to replace the damaged flooring in both the granny flat and the landlord's premises was \$10,241.00. A copy of the invoice is at p 129 of the landlord's documents.
11. The cost of tiles to replace the affected flooring in both the granny flat and the landlord's premises was \$6,194.00 and a copy of the invoice is at p 130 of the landlord's documents.
12. As the timber flooring which was in place in both the granny flat and the landlord's premises was discontinued, the affected flooring could not be directly replaced, but flooring in the whole area still had to be replaced.
13. The landlord did not have an insurance policy which covered accidental damage, so no claim has been able to be made on insurance.

Consideration

Have the tenants established that the Tribunal made an error on a question of law?

1. The tenants have a right to appeal on a question of law. No question of law has been identified by the tenants in the Notice of Appeal or argued at the hearing of the appeal.
2. However, we have considered the documents which have been provided and the tenants' submission that even if they are found to have left the tap running which overflowed to the landlord's premises, then they should not be liable for the cost to replace the damaged flooring of the landlord's premises. We consider that question of law which potentially arises on the appeal is whether the Tribunal applied a wrong principle of law in finding that the tenants were liable to pay compensation to the landlord for the cost to replace the flooring.
3. In our view, the Tribunal did not err in concluding that the tenants were liable to compensate the landlord in this regard.

4. In making a compensation order in favour of a landlord, the Tribunal needs to be satisfied that the tenant has breached a provision of the tenancy agreement or the RT Act. As the parties have not taken issue with the fact that the agreement between them is governed by the laws of the RT Act, their agreement incorporates the standard terms of a residential tenancy agreement as set out in Schedule 1 to the Residential Tenancies Regulation. The standard tenancy agreement includes clause 16 which is in identical language to section 51 of the Act, which provides:

51 Use of premises by tenant

- (1) A tenant must not do any of the following—
 - (a) use the residential premises, or cause or permit the premises to be used, for any illegal purpose,
 - (b) cause or permit a nuisance,
 - (c) interfere, or cause or permit any interference, with the reasonable peace, comfort or privacy of any neighbour of the tenant,
 - (d) intentionally or negligently cause or permit any damage to the residential premises,
 - (e) cause or permit a number of persons to reside in the residential premises that exceeds any number specified in the residential tenancy agreement.

1. Section 51(4) defines the "residential premises" as including:

"everything provided with the residential premises (whether under the residential tenancy agreement or not) for use by the tenant."

1. We are satisfied that the Tribunal applied the principle set out in section 51(1)(d) in relation to its findings regarding the flooring of the leased premises, as it clearly falls within the definition of "residential premises" and as such there is no error on a question of law in this part of the Decision. However, the tenants have contended that even if they are liable for the cost to replace the flooring in the landlord's premises, they are not liable for any damage to the landlord's premises.
2. On the issue of liability, the Tribunal found at the requisite standard of proof - which in civil proceedings is the balance of probabilities - that it was more probable than not that the flooding incident commenced in the leased premises and not in the landlord's premises and that the flooding caused damage to the flooring of the leased premises and the landlord's premises.
3. There was sufficient evidence before the Tribunal to make these findings, including the following:
 1. The landlord's oral evidence that Ms Chandar told him at 11.23AM on the morning of 2 July 2023 that that she had left the tap on in the kitchen and it was her fault and she apologised.

2. The landlord's photographs of the flooring in the leased premises which show the water damage to that floor to be more extensive than the damage to the flooring in the landlord's premises. This supports the landlord's contention that the flooding event started in the kitchen of the leased premises and not in the landlord's premises.
3. The uncontested evidence that the tenants spent considerable time in the early hours of the morning of 2 July 2023 cleaning up the water which had flowed across the floor in their premises. This is established by photos reproduced from video footage taken at about 4.15AM on 2 July 2023, which images are at pp 33-36 of the landlord's documents.
4. The affected floor area in both the leased premises and the landlord's premises, which is shown on a map at p 52 of the landlord's documents.
5. The landlord had done diagnostic testing with a plumber over the phone, which is corroborated by the report from Mulguy Plumbing & Gasfitting report dated 1 November 2023 at p 47 of the landlord's documents.
6. There was no evidence to establish that the flooding was caused by a burst pipe as the landlord had initially thought.
1. A fair reading of the Decision supports a conclusion that the Tribunal was satisfied that the water damage which resulted from the incident on 2 July 2023 was caused by the tenants' negligence. In our view, such a conclusion is supported by the evidence.
2. As the landlord's premises are not included in the definition of "residential premises", we have considered whether the Tribunal erred on a question of law in making a compensation order against the tenants which included the cost of repair of the floor in the landlord's premises.
3. Damages have long been categorised as either direct loss or consequential loss arising out of the breach. The English decision in *Hadley v Baxendale* (1854) 9 Exch 341 established two tests for the recovery of damages when there has been a breach of contract: damages which may fairly and reasonably be considered to arise naturally (first limb) or damages which may reasonably be supposed to have been in the contemplation of both parties (second limb).
4. Given the evidence before the Tribunal, particularly:
 1. The single door between the two sets of premises;
 2. The common slab of the two sets of premises;
 3. The floor map of the two sets of premises at p 52 of the landlord's documents which shows the extent of the water which has flowed into the landlord's premises; and
 4. The photos which show damage on the landlord's side,

we are satisfied that the water damage to the landlord's flooring is loss which meets the first limb as it was damage which may fairly and reasonably be considered to have arisen from the tenants' breach of the tenancy agreement. As such it was open to the Tribunal to find that the tenants were liable for this loss arising from their breach.

1. It follows that we do not consider the Tribunal has erred on a question of law in finding that the tenants breached the tenancy agreement and are liable to compensate the landlord for the damage to the flooring of both the residential premises and the landlord's premises.

Have the tenants established a basis for leave to appeal?

1. The tenants also seek leave to appeal on two of the three grounds set out in clause 12 of Schedule 4 as follows; that is that the Tribunal's decision of the Tribunal was not fair and equitable and that the Tribunal's decision was against the weight of evidence.
2. In relation to the decision not being fair and equitable this ground for leave to appeal is more concerned with process rather than with outcome. The material provided does not establish that the tenants did not have an opportunity to present their case or to have their evidence taken into consideration. This ground for leave to appeal is not established.
3. In relation to the decision being against the weight of evidence, on the material provided for this appeal the tenants have not established that the decision made by the Tribunal was not available to it on the evidence before the Tribunal. In relation to liability, as noted above, there was ample evidence before the Tribunal to support a finding that the flooding incident was caused by the tenants' negligence.
4. On the issue of quantum, the Tribunal found in effect that \$15,000 is an appropriate amount for compensation for the damaged flooring of both the leased premises and the landlord's premises. The tenants submitted that they could not afford to pay more than \$6000 in compensation. The tenants' capacity to pay is not relevant to the issue of quantum. In any event, we note that the tenants have complied with the Tribunal's order and paid the landlord the full amount of compensation.
5. We consider that it was open to the Tribunal to find that the cost of replacement of all of the flooring, rather than the cost of partial replacement or repair, was appropriate compensation. This is based on an email from Winson Jaco Flooring dated 9 July 2023 (at p 53 of the landlord's documents) which states:

"...the current laminate flooring you have has been discontinued by the supplier. Due to the large area that needs to be replaced with the same flooring in the lounge, the only option would be to replace the whole area with a new type of flooring",

1. The tenants have not established that the Decision was not fair and equitable or against the weight of the evidence. We therefore find that the tenants have not established a basis for leave to appeal. Even if they had done so, this is not a case in which we would grant leave to appeal, based on the principles set out in *Collins v Urban* as referenced above.

Orders

1. For the above reasons we make the following orders:

1. Leave to appeal is refused.
2. The appeal is dismissed.

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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