

AUSTRALIA / JUDGMENT

Colman v Dang [2022] NSWCATAP 126

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Colman v Dang [2022] NSWCATAP 126

Hearing dates: 11 April 2022

Date of orders: 29 April 2022

Decision date: 29 April 2022

Jurisdiction: Appeal Panel

Before: S Thode, Senior Member

A Boxall Senior Member

Decision: (1) Leave to appeal refused.

(2) Appeal dismissed.

Catchwords: RESIDENTIAL TENANCY – no issue of principle

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

Residential Tenancies Act 2010 (NSW)

Cases Cited: Collins v Urban [2014] NSWCATAP 17

Lauron v Michael [2021] NSWCATAP 120

Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69;

Minister for Immigration and Multicultural Affairs v Madafferi (2001) 106 FCR 76; [2001] FCA 250

McNeill v The Queen (2008) 168 FCR 198; [2008] FCAFC 80

Texts Cited: Stroud's Judicial Dictionary of Words and Phrases (5th ed)

Category: Principal judgment

Parties: Kylie Colman (Appellant)

Jon Colman (Appellant)

Yong Bing Dang (Respondent)

Representation: Appellant self-represented.

Respondent self-represented.

File Number(s): 2021/00222059

Decision under appeal Court or tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Citation: Not Applicable

Date of Decision: 30 July 2021 and 9 June 2021

Before: K Clark, Member

File Number(s): RT 21/11415, RT 21/1812

reasons for decision

Introduction

1. The appellants were tenants and the respondent to this appeal was the landlord of premises in Point Clare, on the NSW central coast. There was a written residential tenancy agreement signed and dated 10 August 2019 for a fixed term of six months from 24 August 2019 to 23 February 2020 at a rent of \$530 per week.
2. In application RT 21/11415 filed 11 March 2021 the tenants sought orders for rent reduction under s 44(1)(b) of the Residential Tenancies Act 2010 (NSW) (RTA) and an order under RTA s 65(1)(a) that the landlord carry out repairs.
3. In RT 21/18012 filed 25 April 2021 the landlord sought termination from 9 April 2021 for frequent non-payment of rent under RTA s 89(5) and for rental arrears.
4. The matters were first listed on 9 June 2021 and the Tribunal made orders for rent arrears and compensation.
3. The tenants are to pay the landlord the sum of \$5830 for rent owed under the terms of the residential tenancy agreement for the period from 2 February 2021 to 30 May 2021.
4. It is ordered that the rent shall not exceed the sum of \$518.85 per week from 9 June 2021 to the date the leak between roof and awning above deck (sic) is repaired pursuant to order 5. This does not relieve the tenant of the obligation to pay rent arrears under orders 3.
Reasons: rent reduction from today as compensation deck leaking (sic): \$580.
5. The Tribunal orders that the landlord is to cause the undertaking of the following work in a proper and workmanlike manner on or before 13 July 2021.

Details of work order:

repair the guttering near the awning over the deck, so there is no longer a leak between the roof of the house and the awning.

1. The matter was relisted on 30 July 2021 part heard.
2. The Tribunal made final orders on 30 July 2021 awarding \$520 in favour of the tenants for a leaking shower and making an order for rent arrears in the sum of \$7667. The tenancy was terminated and possession was suspended until 20 August 2021. The Tribunal ordered the payment of an occupation fee of \$74.12 per day.
3. The tenants filed this appeal against both decisions on 4 August 2021.
4. Directions made by the Appeal Panel on 8 September 2021 required the parties to provide documents to be relied upon including transcript of the primary hearing. The Appeal Panel has not been provided with written reasons for the decision or transcript.
5. Unfortunately Mr Jon Colman passed away before the hearing of this appeal, and Ms Colman appeared as the sole appellant. We will therefore refer to Ms Colman as the tenant and appellant.

Scope and nature of internal appeals

1. 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).
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:
 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.
1. 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:

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 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.

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. In *Cominos v Di Rico* [2016] NSWCATAP 5, the Appeal Panel stated at [13]:
 13. It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, 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. The Appeal Panel has taken such an approach in a number of cases, for instance, *Khan v Kang* [2014] NSWCATAP 48 and *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69. However, this must be balanced against the obligation to act fairly and impartially (*Bauskis v*

Liew [2013] NSWCA 297 at [68] citing Hamod v State of New South Wales [2011] NSWCA 367 at [309]-[316]). Relevantly, s 38(2) provides that that Tribunal "may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

Submissions and evidence

1. In deciding the appeal, we have had regard to the following:
 1. The Notice of Appeal lodged on 4 August 2021 and attachments constituting some of the evidence filed before the Member below;
 2. The appellant's submissions prepared by Ms Coleman and reduced to 53 pages filed on or about 31 January 2022. Ms Colman confirmed that she had re-filed and re-served the 53-page bundle of evidence to assist the Appeal Panel.
 3. The respondent's submissions and evidence lodged on 7 February 2022.

Notice of Appeal

1. The Notice of Appeal was lodged on 4 August 2021, which is within the 14 day time period specified in cl 25(3) of the Civil and Administrative Tribunal Rules 2014 (the Rules) in respect of the tenant's application.

Grounds of Appeal

1. At the hearing, the appellant confirmed she was pressing two grounds of appeal specified in the Notice of Appeal.
 1. Ground 1 - the Tribunal erred in awarding only \$520 in compensation for the leaking shower. It was the appellant's submission that the award was inadequate and that the impact the leak had on the tenants for the duration of the tenancy was not taken into consideration and that the Tribunal erred when considering the appellant's photographs. It is the appellant's submission that there was mould present however it did not show well in the photographs and the appellant was unable to afford an expert report. A mould inspection report has now been prepared and the appellant seeks to rely on it as 'fresh evidence' that was not reasonably available at the time of the first hearing.
 2. Ground 2 – on 30 July 2021 the Tribunal wrongly calculated in occupation fee at the rate of \$74.12 per day. The daily occupation fee is based on rent payable in the sum of \$518.85 per week, as the Tribunal ordered on 9 June 2021 that the rent shall not exceed \$518.85 per week from 9 June 2021 until such date as the leaking deck is repaired. It is the appellant's submission that the leaking deck was never repaired and that the rent should not have exceeded \$518.85 per week, or \$74.12, for the remainder of the time the tenants remained in occupation. In addition, the rent should have been reduced by a further \$10 from 30 July 2021 onwards because the tenants were awarded a further rent reduction for the leaking shower at \$10 per week. It is the appellant's submission the rent should have been reduced by a further \$10 to \$508.85 per week or \$72.69 per day and that the Tribunal erred in

calculating the occupation fee.

Consideration

1. At the hearing of the appeal the parties supplemented their written submissions with further oral submissions.

Ground 1

1. The appellant's first ground of appeal is described in the attachment to the appeal notice. The appellant submitted that the photographs of mould were not given sufficient weight and apparently the Tribunal rejected the photographs on the basis that they were not very clear and did not depict mould. We have not been provided with a transcript of the proceedings or the Tribunal's reasons for decision.
2. The appellant did not seek to argue that the photographs were not considered by the Tribunal. In the attachment to the notice of appeal the appellant submitted there is "mould present however it did not show well in the photos and we are unable to afford someone to complete the mould inspection" (see notice of appeal attachment page 2).
3. We have not been provided with a transcript of proceedings and nor did the appellant request written reasons for decision. We are therefore not informed of the reasons for decision given by the Member or what weight, if any, was given to the photographs. The appellant was directed by the Appeal Panel to provide evidence in support of the appeal:

The Appellant is to lodge with the Tribunal and give to the Respondent by 29 September 2021:

- (a) All the evidence given to the Tribunal below on which it is intended to rely;
 - (b) any evidence not provided to the Tribunal in making the decision under appeal, on which it is intended to seek leave to rely;
 - (c) The Appellant's written submissions in support of the appeal; and
 - (d) The sound recording or transcript of the hearing at first instance, if oral reasons were given and/or what happened at the hearing is being relied on and a typed copy of the relevant parts.
1. The appellant failed to comply with the directions of the Appeal Panel.
 2. For this reason alone Ground 1 of the appeal must fail. The appellant did not, as she was directed, supply us with the evidence given to the Tribunal, nor a transcript or sound recording of what occurred before the Tribunal. We are not informed what findings the Tribunal made in respect of the photographs or what reasons the Tribunal gave for the award of \$520. We are therefore unable to assess whether the finding and orders were reasonably available to the Member, based on the photographs and other evidence that was tendered before the Member at first instance.

3. We proceeded to hear the appellant's oral submissions to understand her position and to determine the appeal. We heard all of the submissions Ms Colman wished to make on the appeal and for the reasons that follow, we find there are no errors of law that justify upholding the appeal nor should leave to appeal be granted.

Fresh evidence

1. The fresh evidence which the appellant seeks to rely upon is a mould report that the appellant says she was unable to obtain because at the time of the hearing Mr Colman was gravely ill and the household was reduced to one income. Sadly Mr Colman has since passed away. The appellant submits that the report cost around \$1000 and that at the time the evidence was due to be filed for the first hearing, she and her husband could not afford the report.
2. The report constitutes "fresh evidence". It is entitled "Mould and Moisture Audit" and dated 19 October 2021. The document was not served until 31 January 2022 four months outside the timetable allowed by the Appeal Panel.
3. What constitutes fresh evidence has recently been considered by the Appeal Panel in *Lauron v Michael* [2021] NSWCATAP 120 at [21] to [35]. A succinct definition and discussion of what constitutes "fresh evidence" was stated by the Appeal Panel as follows:

"The meaning of that [fresh evidence], as laid down by Hill J. in *Timmins v Timmins* [1919] P. 75, 80, is "evidence" of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing and could not by reasonable means have come to his knowledge before that time." See *Colchester v Peck* [1926] 2 KB 366, per Avory J at 375.

In *Lawless v The Queen* (1978–1979) 142 CLR 659 at 669; [1979] HCA 49 Stephen J said:

"The concept of fresh evidence, as evolved in the cases and in particular in *Ratten v The Queen* (1974) 131 CLR 510, a decision of this Court which was expressed as containing a definitive pronouncement of appropriate principle, requires that the evidence in question, not being before the jury at the trial, was not then available to be called by the defence. If, on the contrary, the defence, knowing of that evidence, elected not to tender it, it will not be fresh evidence. Again, if it is evidence of which the accused "bearing in mind his circumstances as an accused, ... could reasonably have been expected to have become aware and which he could have been able to produce at the trial" it will not be fresh evidence. ... So it is that it is evidence which is "actually or constructively available" to the accused but is not called by him that is spoken of as lacking the quality of fresh evidence."

1. Such principles have been followed in other Australian jurisdictions. In *Minister for Immigration and Multicultural Affairs v Madafferri* (2001) 106 FCR 76; [2001] FCA 250, the Full Court of the Federal Court of Australia (Heerey, Emmett and Conti JJ) said at [30]:

"The ordinary requirements for the receipt of fresh evidence under s 27 is that the party applying for the exercise of discretion must demonstrate that the fresh evidence would not have been available at the initial hearing despite the exercise of reasonable diligence and that if the evidence had been available there was at least a firm chance that the result would have been different."

1. In *McNeill v The Queen* (2008) 168 FCR 198; [2008] FCAFC 80, the Full Court of the Federal Court of Australia (Black CJ, Lander and Besanko JJ) applied the principle in *Lawless v The Queen* to exclude what was claimed to be "fresh evidence" on the basis that such evidence, comprising a book, had been published well before the trial.
2. The Appeal Panel in *Lauron v Michael* (supra) went on to consider Stroud's Judicial Dictionary of Words and Phrases (5th ed) which defines "fresh evidence" by reference to the High Court of Justice decision of *Johnson v Johnson* [1900] P. 19, in which the President explained at 21:

"But it is necessary that magistrates should clearly understand what "fresh evidence" means, though, in my view, there is no real doubt about it. It means practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted: it must relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time. It must amount to what was called in the old forms of pleading *res noviter ad notitiam perventa*. It is altogether a mistake to suppose that "fresh evidence," within the meaning of the Act of 1895, means or includes evidence which could have been called, but which was not in fact adduced, at the first hearing. It would be monstrous to suppose that a party could abstain from calling evidence, and could thereafter proceed to make application upon application, based on evidence which might have been tendered in the first instance. I have no hesitation in saying that to the words "fresh evidence" in s. 7 must be assigned the limited meaning and scope which I have indicated."

1. The appellant now seeks to rely upon the mould report. The report states that mould was detected in the downstairs bathroom and bedroom. The reason why the report was not obtained earlier is that the appellant was impecunious.
2. While we accept that the appellant was under considerable financial stress by reason of Mr Colman's terminal illness, the mould report does not fall within the categories outlined by the authorities. New evidence must "relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time". The report is of the nature of evidence which could have been called but which was not in fact adduced at the first hearing. Further, because we do not have a copy of the reasons for decision, we are not informed why the Tribunal awarded \$520 for the leaking shower. It is submitted that the photographs were not clear enough and this may have been the reason that the Tribunal limited its award to \$520. The mould report

does not assist the Tribunal to establish whether the Tribunal erred when assessing the photographs, or indeed whether it was the assessment of the photographs that led the Tribunal into error. We are not persuaded that the report constitutes "fresh evidence" that was not reasonably available to the appellant at the time of the hearing, and thus we refuse leave to appeal on that basis and refuse to admit that evidence on appeal.

Ground 2

1. The remaining challenge of the appellant to the findings of the Tribunal are based solely on matters of discretion, namely the assessment by the Tribunal of an appropriate allowance made for the excessive rent under section 44 of the RTA. In particular the appellant submits that the Tribunal erred in its assessment of the occupation fee. We consider that this ground of the appeal fails as the Tribunal correctly calculated the daily occupation fee. On 9 June 2021 Tribunal ordered that the rent should not exceed \$518.85. On 30 July 2021 the Tribunal made an order for a rent reduction for \$10 for 52 weeks, payable by way of a lump sum, credited towards the rental arrears. The appellant argues that a further reduction of \$10 should have the reduced the rent further to \$508.10. We disagree.
2. On 30 July 2021 the Tribunal ordered a \$10 rent reduction for 52 weeks (the leaking shower), that being the maximum duration of time permissible under the RTA. As the tenancy was terminated, the award was made, correctly, by way of a one off lump sum payment in the sum of \$520 to be credited towards the rent outstanding. The Tribunal did not make an order for a further \$10 rent reduction. Indeed, had the Tribunal made an order for excessive rent for more than a 12 month period, such an order would be contrary to s44(6)(a) of the Act. The daily occupation fee of \$74.12 was therefore correctly calculated, based on the weekly rent of \$518.85 per week. The second ground of appeal must therefore fail.
3. For the above reasons, the appeal fails in respect of both matters and the appellant fails in her appeal in respect of proceedings RT 21/11415 and RT 21/1812.

Orders

1. The Appeal panel orders that:
 1. Leave to appeal refused.
 2. Appeal 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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