

AUSTRALIA / JUDGMENT

Knezevic v KIrby [2017] NSWCATAP 190

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Knezevic v KIrby [2017] NSWCATAP 190

Hearing dates: 24 July 2017

Date of orders: 20 September 2017

Decision date: 20 September 2017

Jurisdiction: Appeal Panel

Before: M Harrowell, Principal Member

R Titterton, Senior Member

Decision: 1 In relation to the unpaid gas bill of \$264.88, leave to appeal is granted, and the appeal allowed in part.

2 Order 1 made 21 March 2017 is varied as follows:

"(1) The landlord Danny Knezevic is to pay the tenants Duncan Kirby and Kaila Adams the sum of \$850.23 immediately."

3 Order 2 takes effect on 21 March 2017.

4 Otherwise the appeal is dismissed.

Catchwords: Residential tenancy agreement – tenant's liability for water, gas and electricity charges where no separate meters – where no meter readings.

Legislation Cited: Residential Tenancies Act 2010

Residential Tenancies Regulation 2010

Cases Cited: Collins v Urban [2014] NSWCATAP 17

Calin v The Greater Union Organisation Pty Ltd (1991) 173 CLR 33

Maintek Services Pty Ltd v Stein Heurtey SA [2013] NSWSC 266

Texts Cited: Nil

Category: Principal judgment

Parties: Danny Knezevic (Appellant)

Duncan Kirby and Kaila Adams (Respondents)

Representation: Mr Knezevic represented himself.

Ms Adams represented herself and Mr Kirby

File Number(s): AP 17/15853

Publication restriction: Unrestricted

Decision under appeal Court or tribunal: Civil and Administrative Tribunal

Jurisdiction: Consumer and Commercial Division

Date of Decision: 21 March 2017

Before: K Ross, Senior Member

File Number(s): RT 16/44017, RT 16/50803

reasons for decision

1. This is an appeal from a decision of the Consumer and Commercial Division of the Tribunal (the Tribunal) made 21 March 2017 (the Decision).
2. The Tribunal heard and determined two matters. The first was the application of the present respondents (the tenants) for the return of their bond and refund of utility charges. The second was the application of the present appellant (the landlord) for payment of rental arrears, unpaid utilities, and compensation for various repairs. The Tribunal ordered the landlord to pay the tenants \$1,151.11, being a refund of certain electricity and gas charges of \$1,657.97, less rent owed in the sum of \$542.86.
3. The landlord seeks leave to appeal in respect of the amount he was ordered to pay the tenants. In relation to the gas bill of \$264.88, leave to appeal is granted, and the appeal allowed in part. Otherwise the appeal is dismissed.
4. In the result, the Appeal Panel orders the landlord to pay the tenants the sum of \$850.23.

Background

1. The Tribunal heard two applications referred to above on 6 February 2017. Each of the landlord and the tenants appeared in person. The Tribunal noted at [1] that the landlord sought an order that the tenants pay him a total of \$2,634 as follows:

yard mowing and tidying hundred and \$120.00, "my time and effort" \$200, rent arrears \$760.00, electricity and water unpaid bills \$300.00, new electricity bill \$435.00, latest electricity bill \$145.00, gas bill \$264.00, cleaning \$400.00, light globes \$10.00, timber blind \$150.00.

1. The tenants opposed those orders. They said that they were owed five days rent, and sought a refund of \$1,657.97 which they had paid for electricity, water and gas. They said that there was no evidence that the premises were separately metered.
2. For the reasons explained in the Decision, the only amount found owing by the tenants to the landlord was rental arrears in the sum of \$542.86. The landlord's other claims were dismissed. Otherwise the Tribunal ordered the landlord to pay the tenants \$1,151.11, being a refund of certain electricity and water usage charges of \$1,657.97, less rent owed in the sum of \$542.86.

Notice of Appeal and Reply to Appeal

1. Following the Decision, the landlord filed a Notice of Appeal on 4 April 2017. He also sought a stay of the operation of the orders of the Tribunal.
2. In his Notice of Appeal, the landlord states that he wishes to challenge on appeal the order of the Tribunal that "ALL monies owing to the landlord to be repaid. Bills etc". He states his grounds of appeal as:

"I have showed & provided evidence, the tenants Duncan Kirby & Kayla Adams are liars & have NO EVIDENCE !!"

1. The landlord says that the Decision was not fair and equitable as he provided all the evidence, and because he has text messages from Ms Adams that shows proof. He says that the Decision was against the weight of the evidence, again because he has photos and text messages from Ms Adams that proved his point. He says that the Tribunal should have given more weight to the photos. Finally, he says that there is significant new evidence available that was not available at the time of the hearing. He states that he thought he had had more than enough evidence, and wonders how "you people", presumably a reference to the Tribunal and/or the Appeal Panel, can "even consider them".
2. Finally, the landlord states he requires an extension of time in which to file his Notice of Appeal, as he has been "really busy".
3. The grounds of appeal are further explained in two documents attached to the Notice of Appeal. The first is titled "Reasons for Appealing", the second "text transcripts – available on my iphone".
4. In his first document, the landlord states that he has evidence "(photos)" which "clearly shows" that there were separate water and electricity meters. He says that these meters were explained in "the add" and shown and explained again to the tenants when they viewed the property. The landlord states that when the meters were shown to the tenant Mr Duncan Kirby, Mr Kirby said "yeah, you just work it all out and we will pay our share".
5. The landlord then relies on text messages between him and the tenants as follows

T to L, 30 March 2016: I was just wondering if you worked out how much your little bit of electricity is. I am going to pay it tomorrow that's all.

L to T, 30 March 2016: No Kaila, I haven't!! I though you & Duncan could go to my meter & work it out yourselves & just pay that much less in rent due!! Does that make sense?

T to L, 1 April 2016, Hey Danny, yep that makes sense. I have already paid the \$760 before I messages you so I'll just take it off next week's rent, but we are having trouble working out your bit, it if you could work it out for us this bill and then before you give us the bill in future that it be great.

L to T, 1 April 2016: Oh ok! Yeah just get Duncan to write out what the metre readings are for both boxes & when the next bill comes in we can work it out!! From now I will pay a third of the bill.

1. The second document "text transcripts - available on my iPhone", simply repeats these text messages. It is not clear whether these text messages were available to the Tribunal. The landlord seemed uncertain about what materials he had provided to the Tribunal. However, as these messages were tendered without objection to the Appeal Panel we propose to take them into account.
2. Included in the appeal papers were rebuttal photographs. It appears that these photographs, or at least the majority of them, were not before the Tribunal. There are four photographs that are relevant to our deliberations which could be considered to be new evidence. These purport to show separate water and electricity meters, one each for the main residence, one each for the separate dwelling.
3. The tenants filed their Reply on 19 April 2017. In summary, they support the orders as made by the Tribunal. They do not accept that the Notice of Appeal was filed within time. However, the Appeal Panel is satisfied that the Notice of Appeal was filed within the time provided for in the Rules of the Tribunal (that is, 14 days of the publication of the reasons for decision appealed from).
4. The tenants say that there was no evidence provided to the Tribunal that there were separate water and electricity meters. The tenants further submit that no meter readings were ever provided to them. They submit they paid all the bills in the landlord's name which were provided to them. Attached to their Reply to Appeal are various documents including a statement of evidence/submission which was before the Tribunal. Ms Adams told us, and we accept that, she read this document to the Tribunal. Relevantly, that document states:

Danny explained (as in the lease agreement) the bills would be divided/worked out by the "meters" as he stated he would be having builders out the back working on what look like to be an unfinished granny flat (he explained they'd be using the water and electricity but not the gas) never once did Danny provide a metre reading ever, instead he gave us all water rates/electricity & gas bills in his name to pay. Never once did Danny say any person would be living out the back. Never once he say he be renting or he and his girlfriend would be residing there as we would NOT have agreed to that and hence why it is not stated in the lease.

. . .

Danny wasn't around for a few weeks in July & informed us Victoria Lawler (who we only knew as the lady the rent is paid to) is doing an inspection. While she was there she asked for money for bills for the last three months, I was extremely upset, crying & shaking, I said for them to at least go us halves because the people staying out the back. Danny agreed to pay half the bills. Then that week he returned we noticed him & Victoria moving in the granny flat in late July. I was in shock and soo angry that they think it's okay to live in the property we are paying for which is not in the lease and not agreed upon using electricity/water & gas. We felt stuck and intimidated the whole time.

The first electricity bill in early 2016 when it was just us & some builders was under \$300. The second with us & another family of 4 in the granny flat was under \$500 but when Danny & Victoria were living there the electricity alone was \$880 & he wanted us to pay \$600 (that's when I rang fair trading) . . .

Procedural History

1. The appeal was first listed for directions on 6 April 2017. The Appeal Panel made directions listing the appeal for call over and for the hearing of an application for a stay of the Decision on 20 April 2017.
2. On 19 April 2017, tenants filed their Reply to Appeal.
3. At the call over on 20 April 2017, the Appeal Panel made the usual directions for hearing. These directions included for the landlord to file and serve evidence and submissions, and, if relied upon, a copy of the sound recording and a typed copy of the relevant parts. Similarly, the respondents were required to provide evidence and submissions in reply, including the sound recording and a typed copy of the relevant parts if not already provided by the landlord. The appeal was listed for hearing on 25 May 2017.
4. At the hearing on 25 May 2017 the matter had to be adjourned, as it became clear the parties wished to make submissions about what had occurred at the hearing by the Tribunal.
5. Also, the landlord clarified what items he was pursuing on appeal as follows:
 1. yard mowing and tidying hundred and \$120.00- no invoices as landlord did work himself, not pressed;
 2. "my time and effort" \$200- no invoices and not pressed,
 3. rent arrears \$760.00- no challenge to Tribunal's determination that unpaid rent was \$542.86;
 4. electricity and water unpaid bills \$300.00, new electricity bill \$435.00, latest electricity bill \$145.00- claim pressed;
 5. gas bill \$264.00- claim pressed;

6. cleaning \$400.00- not pressed;
7. light globes \$10.00- not pressed;
8. timber blind \$150.00- not pressed;
1. In short, the landlord only sought to challenge the decision concerning electricity and water usage and gas.
2. In adjourning the hearing, the following directions were made by the Appeal Panel.
 1. The appeal is adjourned part heard for hearing on a date to be fixed by the registrar in the week commencing 24 July 2017.
 2. The Appeal Panel notes the only issues for determination (Issues for Determination) on the appeal are whether the Tribunal was correct to dismiss the appellant's claims for:
 - a. water and electricity usage; and
 - b. gas usage.
 3. On or before 30 June 2017, the appellant is to provide to the Appeal Panel and the respondents:
 - a. A bundle of all documents provided to the Tribunal at the original hearing relevant to the Issues for Determination together with the sound recording of that hearing and a typed copy of all relevant parts relating to the Issues for Determination.
 - b. A calculation of how each amount claimed for water, electricity and gas usage is calculated, cross referenced to the evidence of the relevant meter readings.
 - c. A bundle of all new evidence sought to be relied on which was not provided to the Tribunal at the original hearing (for which the leave of the Appeal Panel will be required, such leave to be determined at the adjourned hearing).
 - d. Any further written submissions in support of the appeal.
 4. On or before 14 July 2017, the respondents are to provide to the Tribunal and the appellant:
 - a. any other evidence provided to the Tribunal at the original hearing not included in the appellant's bundle which is relevant to the Issues for Determination, including a typed copy of any relevant parts of the sound recording.
 - b. Any new evidence now sought to be relied upon which was not provided to the Tribunal at the original hearing ((for which the leave of the Appeal Panel will be required, such leave to be determined at the adjourned hearing).
 - c. Any further written submissions in opposition to the appeal.
1. The hearing resumed on 24 July 2017.

2. Again the sound recording was not provided, nor was a typed copy of relevant parts. The Tribunal understands, and accepts, that the landlord attempted to obtain a copy of the sound recording of the hearing before the Tribunal. However, he was not able to do so. Due to mechanical issues with the recording equipment no sound recording was available. Neither party complied with these directions by providing a statement of what occurred at the hearing.
3. Consequently, the parties were sworn as witnesses in the appeal for the purpose of providing evidence about what happened at the hearing at first instance.

Consideration

1. As recorded above, the only issues to be resolved in the appeal was whether the Tribunal was correct in deciding the tenants were not liable to pay:
 1. Gas charges; and
 2. Water and electricity charges.
1. The making of internal appeals in the Tribunal is addressed in s 80 of the Civil and Administrative Tribunal Act 2013 (NCAT Act). If an appellant is able to identify an error involving a question of law, there may be an appeal as of right. Otherwise, leave to appeal is required: see s 80(2)(b). Leave may only be granted if the appellant can demonstrate that they may have suffered a substantial miscarriage of justice: see cl 12 of Sch 4 to the NCAT Act.
2. The Appeal Panel in *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 considered the requirements for establishing an "error of law" giving rise to an appeal as of right and noted at [11] that, in circumstances where appellants are not legally represented, it is apposite to approach the issue by looking at the grounds of appeal generally.
3. As it transpired, the appeal concerned only challenges to findings of fact or questions of fact, for which leave to appeal is required under s 80(2)(b) of the NCAT Act. In relation to appeals against decisions made in the Commercial and Consumer Division, Sch 4 cl 12(1) of the NCAT ACT provides that the Appeal Panel may grant leave only if it is satisfied that the appellant may have suffered a substantial miscarriage of justice because: (a) the decision under appeal was not fair and equitable; or (b) the decision 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).
4. The starting point in resolving this appeal is the findings made by the Tribunal and the reasons for the Decision. The relevant findings are set out in par [3] of the Decision as follows:
 1. The tenancy commenced on 18 November 2015 and ended on 14 October 2016;

2. The landlord managed the tenancy himself;
 3. The agreement entered into did not reflect the standard residential tenancy agreement described in the Residential Tenancies Act 2010 and Residential Tenancies Regulation 2010;
 4. The landlord did not lodge the bond with the Rental Bond Board until after the tenancy ended, on 4 November 2016;
 5. There was no ingoing or outgoing condition report;
 6. There are two dwellings on the property, the main house occupied by the tenants, and a separate dwelling, construction of which was being completed when the tenancy began.
 7. The agreement signed by the parties says "the gas bill will be solely the responsibility of [the tenants]. The electricity and water bills will be worked out through the electricity and water meters".
1. The agreement entered into by the parties was titled "Lease Agreement". This document was in evidence before the Appeal Panel and we reproduce it below:

I Duncan & Kaila agree to lease the property at XXXX for a period of 24 months [to] 18th [November] 2017.

\$1500 will be paid and held by the landlord for damages or repairs needed to be done the lease agreement expires in all remaining money will be refunded to Duncan and Kayla.

Weekly rent will be \$380 and paid every Wednesday, commencing from 18 November 2015.

Rent may rise with inflation et cetera however. However 6 weeks' notice will be given, so as to allow Duncan and Kayla sufficient time to if they choose to continue the lease, or cease with the lease.

The gas bill will be solely the responsibility of Duncan and Kayla.

Electricity and water bills, will be worked out through the electricity and water metres.

Responsibilities for Duncan and Kayla are to maintain the back yard lawn.

House Rules: No smoking & No Pets

1. The agreement was not in the standard form residential tenancy agreement provided in the Residential Tenancies Act, 2010 (RT Act). However, the RT Act provides that certain terms specified in the RT Act form part of every RT Act and cannot be excluded: see RT Act ss 15 and 21.
2. It is appropriate therefore to set out the relevant legislative requirements that apply in respect of gas, electricity and water charges. The relevant obligations of the tenant include those found in ss 38-40 of the RT Act:

38 Utility charges payable by tenant

- (1) A tenant must pay the following charges for the residential premises:
 - (a) all charges for the supply of electricity, gas (except bottled gas) or oil to the tenant at the residential premises if the premises are separately metered,
 - (b) all charges for the supply of bottled gas to the tenant at the residential premises,
 - (c) all charges for pumping out a septic system used for the residential premises,
 - (d) any excess garbage charges relating to the tenant's use of the residential premises,
 - (e) any other charges prescribed by the regulations.
- (2) This section is a term of every residential tenancy agreement.

39 Water usage charges payable by tenant

- (1) A tenant must pay the water usage charges for the residential premises, but only if:
 - (a) the premises are separately metered or the premises are not connected to a water supply service and water is delivered to the premises by vehicle, and
 - (b) the premises contain water efficiency measures prescribed by the regulations for the purposes of this section, and
 - (c) the charges do not exceed the amount payable by the landlord for water used by the tenant.
- (2) A tenant is not required to pay the water usage charges unless the landlord gives the tenant a copy of the part of the water supply authority's bill setting out the charges, or other evidence of the cost of water used by the tenant.
- (3) A landlord must give the tenant not less than 21 days to pay the water usage charges.
- (4) A tenant is not required to pay the water usage charges if the landlord fails to request payment from the tenant within 3 months of the issue of the bill for those charges by the water supply authority.
- (5) Subsection (4) does not prevent a landlord from taking action to recover an amount of water usage charges later than 3 months after the issue of a bill for those charges, if the landlord first sought payment of the amount within 3 months after the issue of the bill.
- (6) A landlord must ensure that the tenant receives the benefit of, or an amount equivalent to, any rebate received by the landlord in respect of any water usage charges payable or paid by the tenant.

Note. Tenants under social housing tenancy agreements may be subject to different provisions in relation to the payment of charges for water usage (see Division 3 of Part 7).

- (7) This section is a term of every residential tenancy agreement.

40 Payment of rates, taxes and certain utility charges by landlord

- (1) A landlord must pay the following charges for the residential premises:
 - (a) rates, taxes or charges payable under any Act (other than charges payable by the tenant under this Division),
 - (b) the installation costs and charges for initial connection to the residential premises of an electricity, water, gas, bottled gas or oil supply service,
 - (c) all charges for the supply of electricity, gas (except bottled gas) or oil to the tenant at the residential premises that are not separately metered,
 - (d) the costs and charges for the supply or hire of gas bottles for the supply of bottled gas at the commencement of the tenancy,
 - (e) all charges (other than water usage charges) in connection with a water supply service to separately metered residential premises,
 - (f) all charges in connection with a water supply service to residential premises that are not separately metered,
 - (g) all charges for the supply of sewerage services (other than for pump out septic services) or the supply or use of drainage services to the residential premises,
 - (h) any other charges prescribed by the regulations.
- (2) This section is a term of every residential tenancy agreement.
 1. In so far as the written agreement to which we have referred above is inconsistent with any term included in the agreement by the Act or the regulations, it is prohibited and void: see s 21 of the Act.
 2. We note that the reference to "premises" in the Act is the residence rented by the tenants, described in the Decision as "the main house" (see par [3(7)]).
 3. We will deal with each of the gas and electricity and water charges in turn.

Gas

1. The landlord had sought an order that the tenants pay a gas bill of \$264.00. The amount of the invoice was in fact \$264.88: see bundle MFI 1.
2. When the written agreement is read with the RT Act and the terms implied thereby, it is clear that the tenants were required to pay for gas, subject to whether the residential premises were separately metered.
3. The Tribunal refused to make that order, as the main house and the separate dwelling were not separately metered for gas. The Tribunal did not accept the landlord's oral evidence that gas was not connected to the second dwelling, as he had provided no other evidence to corroborate this statement.

4. However, at the appeal hearing, the landlord tendered the following documents:
 1. An Elgas tax invoice for \$74.80 dated 16 August 2016; this invoice is for a service charge for "2 x 45kg Cylinder/tank holdings";
 2. An Elgas tax invoice for \$200 dated 20 June 2016; this is for the gas for the "2 x 45kg" cylinders of LPG.
1. The landlord gave sworn evidence to the Appeal Panel that he had provided all his gas invoices to the Tribunal. This evidence supports the landlord's oral evidence at the original hearing that, as he claimed before the Tribunal, natural gas was not connected to his dwelling and that the supply to his dwelling was bottled gas
2. The tenants submitted that the landlord's evidence and submission were an "invention". However, there was and is no evidence to support the tenants' submission and no other reason to reject the evidence of the landlord to which we have referred. Rather, the evidence establishes that natural gas was provided to the tenants living in the main house, the other premises being supplied by bottled gas.
3. The Tribunal failed to take into account the evidence of the installation of LPG tanks for the separate dwelling in about July 2016. In failing to do so, and in rejecting the landlord's claim, the Tribunal came to a conclusion that was against the weight of the evidence: *Calin v The Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 41-42, *Maintek Services Pty Ltd v Stein Heurtey SA* [2013] NSWSC 266 at [153], cited in *Collins v Urban* [2014] NSWCATAP 17 at [77]-[79].
4. It follows that, in this respect, leave to appeal should be granted and the appeal allowed for the purpose of adjusting the amount the landlord was ordered to pay the tenants by reducing that amount by \$264.88.

Electricity and water

1. No party suggested that there was evidence of readings from separate electricity or water meters. While there was some, inconclusive, evidence of separate meters (in the form of the photographs tendered on appeal), and that was the effect of the landlord's evidence, no evidence of readings was ever provided.
2. The hearing had been adjourned on the previous occasion for the provision of that evidence, which was not provided to the Appeal Panel. The evidence before the Appeal Panel was the evidence which was apparently before the Tribunal, that the landlord instructed the tenants on 30 March to "work it out yourselves". How the tenants could do so without any readings was never explained.
3. In these circumstances, we do not consider that the Tribunal erred in its conclusion.

Orders

1. In its decision the Tribunal ordered that the landlord repay to the respondents the sum of \$1,115.11. This was made up as follows:
 1. Refund of electricity and water usage charges- \$1,657.97: see Decision at [27];
 2. Less: rent arrears of \$542.86: Decision at [26].
1. How the amount of \$1,657.97 is calculated is not explained in the written reasons. While the orders made refer to "Refund of electricity water and gas charges" under the hearing "Reasons", the order does not identify how the sum of \$1,657.97 is calculated.
2. The only explanation as to what was being allowed for this sum is found in [27] of the Decision. Although the heading immediately before [27] refers to "Refund of \$1,657.97 paid for electricity water and gas". the Decision at [27] states:

As the Tribunal, for the reasons set out above, is not satisfied that the landlord has charged the tenants for water usage and electricity by reference to separate meter readings, and he has provided no proper evidence of what the meters are actually reading, the Tribunal is not satisfied that the landlord's charging of these amounts to the tenant was lawful. The landlord is to refund the amount paid by the tenants to them forthwith.

1. That is, a refund was ordered for "water usage and electricity" only, and did not include as part of the order that the landlord refund any gas charges previously paid.
2. This finding was not challenged by either party in the appeal.
3. It follows that the amount of \$1,115.11 (being \$1657.97 refund for electricity and water charges only less rent arrears of \$542.86), which the landlord was originally ordered to pay the respondents, should be reduced by \$264.88 (being the unpaid gas bill) to \$850.23.
4. For the above reasons, we make the following orders:
 1. In relation to the unpaid gas bill of \$264.88, leave to appeal is granted, and the appeal allowed in part.
 2. Order 1 made 21 March 2017 is varied as follows:

"(1) The landlord Danny Knezevic is to pay the tenants Duncan Kirby and Kaila Adams the sum of \$850.23 immediately."

1. Order 2 takes effect on 21 March 2017.
2. Otherwise 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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Decision last updated: 20 September 2017

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