

AUSTRALIA / JUDGMENT

Song v Dickson

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation:

Song v Dickson [2025] NSWCATAP 82

Hearing dates:

12 March 2025

Date of orders:

17 April 2025

Decision date:

17 April 2025

Jurisdiction:

Appeal Panel

Before:

S de Jersey, Principal Member

Dr K M George, Senior Member

Decision:

- (1) The time for lodging the appeal is extended to 18 June 2024.
- (2) The appeal is allowed in part.
- (3) Order 6 in 2022/00394010 of 3 June 2024 is set aside to the extent of the following issues which are remitted to a differently constituted Tribunal to be determined on the evidence filed in the proceedings:
 - (a) The tenant's rent reduction claims which were dismissed by way of Order 6 dated 3 June 2024; and

- (b) The tenant's claims for compensation for those breaches extant at 23 September 2022 and for which leave to extend time for filing was refused by way of Order 6 dated 3 June 2024

Catchwords:

APPEAL – error on a question of law – Residential Tenancies Act 2010 (NSW) – compensation – continuing breach – failure to repair defects existing at commencement of tenancy – rent reduction for withdrawal or reduction of goods, services or facilities

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:

Collins v Urban [2014] NSWCATAP 17

Haggerty v Dooley [2021] NSWCATAP 363

Jackson v NSW Land and Housing Corporation [2014] NSWCATAP 22

Mulcair v Callum [2024] NSWCATAP 30

Orr v Cobar Management Pty Ltd (2020) 103 NSWLR 36; [2020] NSWCCA 220

Orr v Hunter Quarries Pty Ltd [2022] NSWCCA 39

Unique Commercial Group Pty Ltd v Cusumano [2024] NSWCATAP 204

Wilson v Chan & Naylor Parramatta Pty Ltd atf Chan & Naylor Paramatta Trust [2020] NSWCA 62

Texts Cited:

Nil

Category:

Principal judgment

Parties:

Bo Whoa Song (appellant)

George Dickson and Edmund O’Gorman (respondents)

Representation:

Appellant (self represented)

Respondent (no appearance)

File Number(s):

2024/00224701

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Nil

Decision under appeal

Court or tribunal:

Civil and Administrative Tribunal

Jurisdiction:

Consumer and Commercial Division

Citation:

[2024] NSWCATCD

Date of Decision:

3 June 2024

Before:

C Campbell, General Member

File Number(s):

2022/00394010 (previously RT 22/56914)

reasons for decision

Introduction

This is an internal appeal under s 80(2) of the Civil and Administrative Tribunal Act 2013 (NSW) (“NCAT Act”) against a decision made in the Consumer and Commercial Division of the Tribunal dated 3 June 2024.

It concerns a residential tenancy agreement signed on 28 April 2021, regulated by the provisions of the Residential Tenancies Act 2010 (NSW) (“RT Act”).

The application to the Tribunal was filed by Ms Song whom we will refer to as the tenant, against Mr Dickson and Mr O’Gorman whom we will refer to as the landlord.

The tenant attended the hearing of the appeal with the assistance of an interpreter. The landlord did not attend the appeal hearing.

For the reasons set out below, we have decided to allow the appeal.

Background

We summarise the decision appealed against as follows:

The rent is to be reduced by \$50 per week from 01 July 2021 to 30 June 2022 in accordance with s 44(1)(b) of the RT Act for the withdrawal of services of the oven and exhaust fan: \$2,600.

The rent is to be reduced by \$60 per week from 28 April 2022 to 28 July 2022 in accordance with s 44(1)(b) of RT Act for the withdrawal of facilities in the bathroom: \$780.

The rent is to be reduced by \$5.00 per week from 17 September 2022 to 28 July 2022 (sic) in accordance with s 44(1)(b) of the of the RT Act for the withdrawal of services in the loungeroom: \$260.

The rent is to be reduced by \$25 per week from 13 January 2023 to 03 March 2023 in accordance with s 44(1)(b) of the RT Act for the withdrawal of the bath facility: \$175

The landlord is to pay the tenant the sum of \$3,815 for the above rent reductions within 14 days from the date of these orders.

The application is otherwise dismissed.

Tribunal proceedings and decision

An earlier application RT 22/18153, making substantially the same claims as the application the subject of this appeal, was lodged by the tenant on 18 April 2022 and was withdrawn on 20 September 2022.

The application to the Tribunal 2022/00394010 (previously RT 22/56914) which is the subject of this appeal was lodged by the tenant on 23 December 2022 ("the proceedings").

It appears that the proceedings were first listed before the Tribunal on 30 January 2023 when orders were made for the parties to provide their evidence. On 22 March 2023 the Tribunal amended the directions to allow both parties further time to provide their evidence.

The proceedings were listed for a contested hearing on 3 August 2023. The tenant appeared in person, assisted by an interpreter, and the landlord was represented by Mr Khadaroo of the agency Dixon Real Estate, Kingsford, NSW.

There were two claims for determination at the hearing at first instance:

The claim for a rent reduction pursuant to s 44(1)(b) due to the landlord's failure to conduct repairs with diligence, or at all;

The claim for compensation to the jurisdictional maximum of \$15,000.00 arising from the landlord's failure to repair, in breach of s 63 of the RT Act.

The hearing was adjourned part-heard on 23 August 2023 to allow the tenant to make oral submissions regarding an extension of time to bring her claim for compensation.

At [41] of the decision, the Tribunal notes that on 12 September 2023 the parties were sent an email informing them that when the part-heard matter resumed, both parties would be given an opportunity to make submissions in relation to the tenant's application to extend time for the filing of the claim for compensation. On that same date a notice of hearing was sent to the parties advising the matter would be next listed on 27 October 2023 at 1.15PM.

Prior to the hearing on 27 October 2023, the tenant made two requests for an adjournment, both of which were refused.

The tenant did not appear when the hearing was listed on 27 October 2023. The Tribunal determined the evidence was concluded and reserved its decision.

In the decision dated 3 June 2024 the Tribunal relevantly found that:

The landlord withdrew services, goods and facilities, being the oven, exhaust fan, light globe and bathroom while works were required and the tenant was entitled to a rent reduction during the periods of withdrawal;

The premises were clean and habitable at the time the tenant moved in;

The landlord attended to the repair of the cooktop and mirror promptly and the tenant was not entitled to a rent reduction for those items;

The tenant's comments on the ingoing condition report were of little evidential value because the report was completed 7 months after the commencement of the tenancy;

The tenant requested repairs to a number of items, most of which she had observed at the open house inspection prior to entering into the tenancy agreement;

The tenant was not entitled to a rent reduction for items that were never provided with the premises because they could not have been withdrawn by the landlord;

The tenant's claim for compensation arose more than 3 months prior to filing the application and she was well aware of the time limits and the need to apply for an extension of time since at least 18 May 2023. However, she did not apply for an extension of time to provide written submissions in support of an extension of time.

Scope and nature of internal appeals

To succeed in an appeal, the tenant must demonstrate either an error on a question of law, which, except in an appeal from an interlocutory decision, may be argued as of right; or that permission (that is, "leave") to appeal should be granted to bring the appeal: NCAT Act, s 80(2).

In *Unique Commercial Group Pty Ltd v Cusumano* [2024] NSWCATAP 204 at [25]-[40], the Appeal Panel set out the principles concerning questions of law within s 80 of the NCAT Act. An appellant is required to identify a pure question of law which then becomes the subject matter of the appeal:

discernment and care must be taken to ensure the grounds relied upon by the appellant, properly understood, raise questions of law and arise in the proceedings; or whether leave is required. (at [39])

See also *Wilson v Chan & Naylor Parramatta Pty Ltd atf Chan & Naylor Paramatta Trust* [2020] NSWCA 62 at [4] and [11]; *Orr v Hunter Quarries Pty Ltd* [2022] NSWCCA 39 at [12], [14]; *Orr v Cobar Management Pty Ltd* (2020) 103 NSWLR 36; [2020] NSWCCA 220.

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. Leave to appeal may only be granted if an appellant establishes it may have suffered a substantial miscarriage of justice because the decision was not fair and equitable, against the weight of evidence or there was significant new evidence that was not reasonably available at the time of the original hearing. The principles concerning the grant of leave to appeal are set out in the Appeal Panel decision of *Collins v Urban* [2014] NSWCATAP 17 (Collins).

Submissions and evidence

In deciding the appeal, we have had regard to the following:

The Notice of Appeal lodged on 18 June 2024

The tenant's submissions filed on 3 July 2024 (74 pages)

The tenant's submissions filed on 4 November 2024 (472 pages)

The tenant's submissions filed on 27 November 2024, including a transcript of proceedings as prepared by the tenant

The original orders appealed against

The directions made by the Appeal Panel in these proceedings, including on 3 October 2024, 4 November 2024 and 27 November 2024

The oral submissions of the tenant at the hearing of the appeal.

The landlord did not lodge a Reply to Appeal or any submissions to be taken into consideration nor did the landlord attend the hearing on 12 March 2025.

Notice of Appeal

The Notice of Appeal was lodged on 18 June 2024, which is one day outside the 14 day time period specified in cl 25(4)(b) of the Civil and Administrative Tribunal Rules 2014 (NSW) (the Rules).

The tenant filed an amended Notice of Appeal on 3 July 2024.

The tenant therefore requires an extension of time to bring the appeal.

The appeal was first listed for call-over directions on 10 July 2024. As the tenant failed to attend the call-over the appeal was dismissed.

The tenant filed a reinstatement application of the appeal and the reinstatement application was granted and the appeal reinstated on 28 August 2024.

The appeal was listed for call-over directions on 2 October 2024.

The appeal was first listed for hearing on 27 November 2024 at which time the tenant and the agent Mr Khadaroo attended the hearing. The hearing was adjourned and further directions made for the filing and service of submissions.

The appeal was listed for hearing on 12 March 2025.

Grounds of appeal

At the appeal hearing, the appellant confirmed that the grounds of appeal on which she relied were those specified in the amended Notice of Appeal lodged on 3 July 2024. They are the same grounds identified in the Notice of Appeal dated 18 June 2024:

The Tribunal was wrong to conclude that a rent reduction could not be awarded for repair issues that were present at the start of the tenancy; and

The Tribunal was wrong to conclude that the entire claim for compensation was out of time, as it should have considered whether any of the issues constituted ongoing breaches for which compensation could be awarded for losses suffered in the three months prior to the application being made.

Consistent with the principles outlined above, both of these grounds raise a pure question of law, namely that the Tribunal failed to apply the correct legal principle.

The appeal on that ground may therefore be made as of right.

In her amended Notice of Appeal, the tenant stated other bases for which leave would be required under Cl 12(1) Schedule 4 of the NCAT Act: that the decision was not fair and equitable; the decision was against the weight of evidence; and significant new evidence was now available that was not reasonably available at the time of the hearing.

The Appeal Panel has not considered the grounds for leave to appeal because:

The tenant did not identify them at the appeal hearing as grounds on which she relied; and

For the reasons below, the Appeal Panel is satisfied the appeal should be allowed because of errors on a question of law specified above. Therefore, there was no utility in the Appeal Panel considering whether it should grant leave to appeal on the other grounds raised.

At the appeal hearing the tenant confirmed that she was not appealing the rent reduction orders which were made in her favour.

Extension of time

Section 41 of the NCAT Act allows the Appeal Panel to make an order extending time for the filing of the appeal, if satisfied that leave should be granted.

The relevant principles which generally inform the exercise of the discretion to extend time were set out in *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22 at [22].

Relevant factors to consider include the length of the delay, the reasons for the delay, whether the appellant has a fairly arguable case and the extent of any prejudice suffered by the respondent.

The tenant's explanation for her delay is that she was in Korea at the time the decision was given and she did not return to Australia until 14 June 2023. Further, she contended that her mental and physical health were very poor and she was not familiar with the Australian legal system.

On balance, we are satisfied that an extension of time should be granted for filing of the appeal because:

The delay was very short, only one day, which weighs in favour of granting the extension.

A short extension does not pose any identifiable prejudice to the respondent who has not engaged in the appeal proceedings.

The tenant has a more than fairly arguable case, in relation to the two questions of law she has raised.

The landlord has not provided any submission regarding prejudice that might have been caused to the respondent from the delay.

In the exercise of our discretion, we allow the tenant an extension of time to 18 June 2024 to lodge the Notice of Appeal.

Consideration - rent reduction s 44(1)(b)

The Tribunal made findings of fact that the tenant did request repairs to the premises, most of which she had observed at the open house inspection and prior to signing the residential tenancy agreement.

The Tribunal listed the repairs requested and the dates of notification at paragraph 11. In summary, the Tribunal concluded at [61] that the items were never provided with the premises and therefore could not be said to have been withdrawn during the tenancy in accordance with s 44(1)(b) and accordingly the rent reduction was not awarded for these items.

In reaching this conclusion, the Tribunal did not advert to the Appeal Panel decision of *Mulcair v Callum* [2024] NSWCATAP 30 which found at [52] to [56]:

There is no reason to confine the operation of s 44(1)(b) to goods or facilities falling into disrepair after the residential tenancy commences. The text of the section does not support such a limited construction. Further, the text does not support a construction that goods, services or facilities required to be supplied by a landlord under a residential tenancy agreement, but never supplied during the currency of such an agreement, could not give rise to a relevant reduction or withdrawal for the purpose of that subsection.

The use of the word “provided” suggests a comparison is to be made between of what is provided with what was promised. It does not suggest the Tribunal is prevented from considering what is provided at the date the residential tenancy agreement commences, the date possession is given to a tenant or at any particular date until the tenancy comes to an end.

Rather, where promised goods, services or facilities are never provided or where goods and facilities provided are in a state of disrepair at commencement of the residential tenancy agreement, the act of failing to supply at all or supplying in a state of disrepair or in a limited fashion and not taking corrective action may, itself, constitute a relevant reduction or withdrawal from that which was promised under the residential tenancy agreement.

Our analysis is consistent with what the Appeal Panel said in *Roberts* at [124], namely:

“As to what constitutes a reduction, in our view this means the goods, services or facilities are of a qualitative or quantitative standard which is less than what a landlord is required to provide under a residential tenancy agreement (emphasis added). On the other hand, a withdrawal suggests there must be a removal or inability to use the particular goods, services or facilities. That is, the goods services or facilities or part of them are no longer available to a tenant.”

That is, a reduction or withdrawal is to be considered in the context of the obligation of supply upon the landlord under the relevant residential tenancy agreement.

In light of the Appeal Panel decision of *Mulcair v Callum* we consider the Tribunal fell into error on a question of law because:

It confined the operation of s 44(1)(b) to goods, services or facilities that fell into disrepair after the residential tenancy commenced; and

The Tribunal failed to consider what goods, services or facilities were to be supplied under the tenancy agreement and therefore failed to ask whether there was a reduction or withdrawal from what was promised.

Had the Tribunal applied the principle from *Mulcair v Callum*, there is a realistic possibility that it could have found that the landlord's failure to address repairs identified by the tenant prior to the commencement of the agreement did amount to a reduction or withdrawal of goods, services or facilities, for which a rent reduction could have been awarded.

The appeal from the decision to dismiss the balance of the rent reduction claims succeeds on this ground.

Consideration – compensation claim

The Tribunal determined that the tenant's claim for compensation was made outside the prescribed time and dismissed the application on that basis (at [78] and [85]).

According to the transcript of the proceedings on 3 August 2024 the presiding member referred to the issues underlying the compensation claim as occurring in 2021, but the application was not filed until December 2022.

Section 190(1) of the RT Act and r 39(9) of the Residential Tenancies Regulation 2019 (NSW) provide that a landlord or a tenant may apply to the Tribunal for an order in relation to a breach of a residential tenancy agreement within three months after the applicant becomes aware of the breach.

The Tribunal at first instance had discretion to extend the time for making the application: s 41 NCAT Act; *Jackson v NSW Land and Housing Corporation* [2014] NSWCATAP 22. The Tribunal stated that the tenant did not provide any written or oral submissions regarding an extension of time, despite being well aware of the time limitation (at [84]).

In oral submissions at the hearing of the appeal, the tenant stated that she did provide written submissions to support an extension of time in relation to her earlier, substantially the same, application RT 22/18153; that these submissions were before the Tribunal in 2022/00394010; and the Tribunal failed to consider those submissions.

The tenant has referred us to pages 46 and 47 of her submission filed in the appeal. We are satisfied that this was an extension of time submission in the earlier proceedings which were withdrawn on 20 September 2022 and even if these pages were before the Tribunal in the proceedings which are appealed from, they are not particularly relevant to the proceedings filed on 23 December 2022.

This is particularly so in light of the fact that the Tribunal adjourned the hearing on 23 August 2023 for the very purpose that the parties were required to address the tenant's application to extend time to file the proceedings which was confirmed in the email to the parties from the Registry dated 12 September 2023 (paragraph 41 of the decision).

The tenant failed to provide any written submission pertaining to the proceedings 2022/0039410 and as such we are satisfied that the Tribunal did not make an error in refusing to extend time to file the application to 23 December 2022.

However, in the Appeal Panel decision of *Haggerty v Dooley* [2021] NSWCATAP 363 at [29] the Appeal Panel referred to case law which establishes that a breach of the tenancy agreement can, in some circumstances, constitute a continuing breach, rather than a single breach, such that a claim for compensation is within time if brought within three months of the application to the Tribunal.

The Appeal Panel held:

There is also case law that, in what can be characterised as an alleged continuing breach of the tenancy agreement, a claim for a money order or compensation is within time if brought within three months of the last of that continuum, and that an extension of time may be justified to pick up within the claim for compensation periods prior to the three months preceding the filing of the claim: *Hundt v Kong* [2018] NSWCATAP 156 at [27]-[43] and authority cited therein, being *NSW Housing Corp v Tanious* [2016] NSWCATCD 57, BC 201608161 at [27]-[31] and *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 at [91]; and *Hyndes* at [56]. The tenant did not seek such relief in the present proceedings so we do not need to discuss it further.

We consider that the Tribunal erred by failing to determine that part of the compensation claim for any breaches of the landlord which were extant at 23 September 2022, being the date which represents 3 months before the date of filing the application on 23 December 2022, were filed within the time prescribed by s 190 of the RT Act and cl 39(9) of the Residential Tenancies Regulation 2019 (NSW).

The error of the Tribunal was to apply the three month time limit to the tenant's claim for compensation without considering:

Whether any of the unaddressed repairs were a breach of the landlord's obligations under the Act;

Whether any such breach was a continuing breach and was extant at the date which was three months prior to the date of filing;

If so, whether the tenant incurred any loss during the three months up to the date of the application.

If the Tribunal had considered the correct legal principle we consider that there is a reasonable possibility that the Tribunal could have concluded that there had been a continuing breach by the landlord for some repairs and could have awarded the tenant compensation for losses for the period which commenced three months prior to the filing of the application.

The appeal succeeds on this ground.

Orders

The Appeal Panel makes the following orders:

The time for lodging the appeal is extended to 18 June 2024.

The appeal is allowed in part.

Order 6 in 2022/00394010 of 3 June 2024 is set aside to the extent of the following issues which are remitted to a differently constituted Tribunal to be determined on the evidence filed in the proceedings:

The tenant's rent reduction claims which were dismissed by way of Order 6 dated 3 June 2024; and

The tenant's claims for compensation for those breaches extant at 23 September 2022 and for which leave to extend time for filing was refused by way of Order 6 dated 3 June 2024.

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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