IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2018-004-575
[2018] NZDC 17499

BETWEEN	NORDON 3202 LIMITED Appellant
AND	SHAILAJA NAIR Respondent

Hearing: 21 August 2018

Appearances: S Zhao for the Appellant
N Farrands for the Respondent

Judgment: 3 September 2018

RESERVED JUDGMENT OF JUDGE AA SINCLAIR

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[1] This is an appeal from a decision of the Tenancy Tribunal dated 31 January 2018. In that proceeding the Tribunal ordered that the tenant Shailaja Nair was not liable for all but the last two Watercare accounts for water supplied to the premises; and further, that the Bond Centre was to pay the bond of $1,950 to Mrs Nair.

[2] The landlord Nordon 3202 Limited (the landlord) submits that the Tribunal's decision was wrong in fact and law. The landlord applies to introduce new evidence and raises a number of grounds of defence. I propose to address these matters in the order in which they were raised in the landlord's submissions.

(i) Failure to adjourn

[3] Mrs Nair resides overseas and was represented at the Tenancy Tribunal hearing by Ms Angela Fahey. At the commencement of the hearing, the adjudicator satisfied herself that Ms Fahey had the requisite authority to act and that Mrs Nair resided overseas and was not returning to New Zealand. The landlord contends that Mrs Nair was a key witness in the dispute and that the inability to cross examine her was prejudicial to its case. It submits that there was no affidavit evidence as to whether Mrs Nair could have been available for a hearing at a future date.

[4] In the notice of hearing, the Tribunal set out the matters for determination which included outgoings under s 39 of the RTA. In addition, at the commencement of the hearing, the adjudicator clarified the issues to be decided as being the bond refund and liability for water rates. If the landlord considered that Mrs Nair's evidence was necessary to address either of these issues, its representative could have applied for an adjournment at any time during the hearing. It is apparent from the transcript that no such application was made. In any case, I do not accept that that there is any merit in the landlord's assertion of prejudice having regard to my findings below.

(ii) Failure to adjourn or to consider counterclaim

[5] The Tribunal ordered the Bond Centre to pay the bond of $1,950 to Mrs Nair. The landlord opposed the release of this payment but had not lodged a counterclaim. During the course of the hearing, the landlord's representative requested that the Tribunal join the landlord's counterclaim to Mrs Nair's claim.

[6] Section 22B(2) of the Residential Tenancies Act 1986 (RTA) provides that "if the tenant applies to the Tribunal and the landlord seeks payment of the bond in whole or in part, the landlord *must* file an application with the Tribunal that sets out the landlord's claim." In the present case, as no counterclaim had been filed by the landlord, the adjudicator made the order to release the bond accordingly.

[7] The landlord contends that the Tribunal could have waived compliance with this requirement under s 96(2) RTA which permits the Tribunal to waive compliance

with a procedural requirement and/or under s 85(1) RTA which states the Tribunal shall exercise its jurisdiction in the manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants.

[8] This argument is moot as the bond payment has been released to Mrs Nair. However, I note that the tenancy ended on 12 August 2017 over 5 months prior to the hearing. As the adjudicator observed, the landlord had had ample time in which to lodge its cross application. In addition and importantly, the language used in s 22B(2) RTA is mandatory. In this case, the landlord failed to take the requisite step of filing its application and therefore faces the consequence that it must pursue its counterclaim separately.

(iii) Admissibility of new evidence

[9] The landlord seeks leave to file an affidavit by Catherine Zhao a director of the landlord company. Some of the matters covered in the affidavit related to the landlord's counterclaim. The landlord contends that the dispute would be expeditiously resolved in accordance with s 85(1) RTA, if the landlord's counterclaim could be considered by the District Court. As noted above, the landlord failed to file its counterclaim prior to the Tribunal hearing and there is no basis on which this Court can now hear the landlord's counterclaim as part of this appeal.

[10] The other evidence sought to be admitted related to the tenant's liability for water rates, and in particular to the following:

(a) A meeting and discussion that allegedly took place on 19 January 2014 between Mrs Zhao and Mrs Nair as to her family's financial background; and

(b) Previous communications between Mrs Zhao and Mrs Nair with regard to water charges when there was a leakage at the property in 2016.

This evidence is not fresh and was clearly available at the time of the hearing. Mr Zhao, counsel for the landlord, contends that the landlord was taken completely by

surprise at the hearing when the decision in *Woollams v Simpson*[1] was raised and says that the landlord could not be expected to have given evidence on matters relating to that decision.

[11] I do not accept this argument. If the landlord was not familiar with the judgment, it was open to its representative to request time to read it and consider its implications. It is apparent from the transcript that this was not done. In addition, the proposed evidence lacks particularity and I am not satisfied that it is credible and cogent. Finally, having reviewed *Woollams* and subsequent District Court judgments, and for the reasons discussed below, I do not consider that the proposed evidence is of any particular relevance in determining the water rates claim.

(iv) Liability for water rates

[12] The tenancy commenced on 25 January 2014 and ended on 12 August 2017. The tenancy agreement provided that "tenants are responsible for water, garden, power, and all other costs". Furthermore, pursuant to s 39(3) and (4) RTA, Mrs Nair was responsible as tenant for water charges "that are exclusively attributable to her occupation of the premises, where the water supplier charges for water to the premises on the basis of consumption."

[13] In this case, for the whole of the term of the tenancy, namely 3 ½ years, the landlord failed to provide Mrs Nair with any accounts for water rates. On the final day of the tenancy, she was presented with a breakdown of water charges compiled by the landlord totalling $4,303.59. The adjudicator, following the District Court judgment in *Woollams,* held that Mrs Nair was liable for the latest two Watercare bills presented to her after the tenancy ended. The landlord submits that the Tribunal misapplied *Woollams*.

[14] In the *Woollams* case, the tenant had been presented at the end of her tenancy, with a claim for water rates for the three years of her tenancy. The tenancy agreement stated that the tenant was liable "to pay the cost of water supplied to the premises during the tenant's occupation provided such water was separately metered to the

[1] *Woollams v Simpson* Auckland DC CIV-2005-004-1583 16 March 2006.

tenant's premises and separately charged for by way of metered usage". Judge McElrea stated:

> [11] In my view, there is an implied term in this tenancy agreement that the landlord would provide accounts to the tenant at regular intervals so as to enable repayment to be made. ... I imply such a term because it seems to me to be a necessary term to make commercial sense of the agreement. How can a tenant be expected to pay for a regular charge such as a quarterly charge unless it is told the amount of the charge from time to time? That makes nonsense of any attempt to budget, which presumably most tenants have to do, whether they be commercial or residential tenants. It makes nonsense of any proper concept of financial management as between parties to a commercial arrangement.
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> [12] I note that the particular wording of the provision of the Tenancy Agreement is one expressed in these terms that the obligation is to pay for the cost of water supplied to the premises "provided such water is separately metered to the tenant's premises and separately charged for by way of metered usage". That refers, in the facts of this case, to a quarterly charge, and where charges are made quarterly the clear implication is that the tenant will pay them quarterly unless some other arrangement is made. No such arrangement was made here.
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> [13] As a result, in my view, there is a requirement on the landlord seeking to rely on any such arrangement in the lease, that accounts be supplied quarterly or at least within a reasonable period such as within a few weeks after the account is due, unless some other arrangement is agreed between the parties. Failure to do that has predictable consequences for any tenant and apparently did have for this tenant. In my view, the implied term which I read into the Act and into this agreement is necessary in order to make the clause a workable one from a commercial point of view, and in order to decide this matter according to the substantial merits and justice of the case.

[15] This judgment was followed by Judge Gittos in *Braganza v Saia*[2]. In that case, there had been a failure by the landlord to deliver invoices for water and waste water throughout the term of the tenancy. His Honour agreed with and applied the judgment of Judge McElrea in *Woollams*. He said:

> [15]….It is plainly incumbent on a landlord to set out with clarity what it is that he claims is due as and when it falls due, and, when it comes to water, to provide the bills to the tenant as they fall due, so that the tenant may make any challenge to the supply that he thinks is appropriate and make arrangements for the payment in a timely fashion.
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> [16]….If the tenant is to be asked to pay after the event with no opportunity to check the calculation or to make provision for payment at the time, he is at a manifest disadvantage…

[2] *Braganza v Saia* DC Auckland CIV-2010-004-002024 1 November 2010.

[16] In *Euro Land Limited v Hill*[3] Judge Spiller upholding the Tribunal's decision, noted with approval, the statement by Judge Gittos in *Braganza* that the charges for water are to be recoverable only upon the basis that bills have been provided to the tenant as and when they fall due so that the tenant may make proper provision for their payment at a reasonable time.

(a) Misapplication of Woollams

[17] Mr Zhao submits that the Tribunal misapplied *Woollams* in this case for the following reasons:

(a) There is no evidence that the tenancy agreement without such an implied term would be a commercial nonsense. Mrs Nair would not be someone who lived on a tight budget and in any event, the bond money would have been available to cover such contingencies.

(b) Although the Tribunal made references to the express wording of the tenancy agreement, it appears that the Tribunal did not consider that these words added anything more to Mrs Nair's obligation to pay under s 39 RTA. There was no further analysis of "these simple and yet forceful words expressly written: "responsible" and "all other costs" to establish the scope of the tenant's responsibility".

(c) There is no evidence to support the substantial merits and justice of the case being in favour of Mrs Nair. The landlord submits that Mrs Nair was fully aware or ought to have been fully aware of her obligation to pay for water. She had never offered to pay nor raised any issues regarding not being charged. The "unconscionability" in the context of s 85(2) in *Woollams* was absent in this case.

[18] The landlord says that the financial position of Mrs Nair is considerably different to that of the tenant in *Woollams*. In that case, the tenant was a single mother with two children to support and was described as "living from pay day to pay day".

[3] *Euro Land Limited v Hill* DC Hamilton CIV-2014-019-860 18 September 2014.

Mr Zhao submits that in this case, there was no evidence before the Tribunal that Mrs Nair would have been under any financial difficulty if she had been required to pay the water rates. Indeed, there was no evidence as to Mrs Nair's financial circumstances. However, I do not consider that Mrs Nair's financial position is a determining factor as to whether such a term should be implied. It can be expected that most tenants whether residential or commercial tenants need to budget for such outgoings and as Judge Mc Elrea held, the implied term is necessary to make commercial sense of the agreement.

[19] The facts in this case are otherwise very similar to those in *Woollams.* I do not accept that the wording of the tenancy agreement alters or adds anything to the wording of s 39 RTA and requires any particular consideration in the context of the application of the *Woollams* judgment. It is the obligation of the landlord to supply the water rates accounts to the tenant. Furthermore, this obligation cannot be deflected by saying that the tenant was aware of their responsibility to pay such outgoings and/or did not raise the issue.

[20] In the present case, as in *Woollams*, the landlord failed to charge water rates for the whole of the term of the tenancy and proceeded to deliver a schedule of water charges on the final day of the tenancy. As the Tribunal noted, Judge McElrea held that such conduct is quite unconscionable. His Honour was of the view that implying a term as to the delivery of these accounts in a timely manner was necessary "in order to decide the matter according to the substantial merits and justice of the case" under s 85(2) RTA.

[21] For the above reasons, I consider that the Tribunal properly applied *Woollams* in implying a term in the tenancy agreement imposing an obligation on the landlord to deliver copies of the invoices at the time the charges were made or shortly thereafter. The Tribunal was accordingly entitled to find that the landlord had not complied with this term, and that Mrs Nair was liable to pay the two most recent Watercare accounts only.

(b) *Woollams wrongly decided*

[22] In the event that I am of the view that *Woollams* had been correctly applied, Mr Zhao goes on to submit that the decision in *Woollams* was wrongly decided and ought not to be followed. In particular, he contends that there was no basis on which to imply a term requiring timely delivery of water accounts into the tenancy agreement under the five-point test in *BP Refinery (Western Port) Pty Ltd v Shire of Hastings*[4]. In that case, the Court held that for a term to be implied the following conditions to be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied as a contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; and (5) it must not contradict any express term of the contract.

[23] In summary, Mr Zhao submits that:

(a) Monthly liability for water bills is well known and that it would be inequitable for a tenant to keep silent and wait for the landlord to remind the tenant, especially if this would only need to be once.

(b) Without the term implied by the Tribunal, the tenant could still discharge its obligation by inquiring about the bills. The term is not necessary to give business efficacy to the agreement.

(c) Although parties would unhesitatingly agree to such a term had it been brought to their attention, parties are unlikely to agree to a consequence where forgotten accounts would be completely waived.

(d) Such a term would require precision in its details ie the length of time by which the landlord must provide an account. The Tribunal had at best arbitrarily allowed two months of water bills. Therefore, the term

[4] *BP Refinery (Western Port) Pty Ltd v Shia of Hastings* (1977) 16 ALR 363 at 376.

is not capable of clear expression and needs express agreement between the parties.

(e) Finally, as previously submitted, such an implied term would contradict the express words "responsible" and "all other costs" establishing the scope of Mrs Nair's responsibility under the agreement.

[24] The decision in *Woollams* has been followed in two subsequent District Court judgments. I do not consider that there is any basis on which that judgment should not be followed in this case. I agree that it is necessary to imply the term to ensure commercial efficacy for the reasons set out in the cases discussed above.

[25] Mrs Nair's obligation to pay water rates arises under s 39 RTA and the tenancy agreement. I do not accept that the implied term in any way contradicts the express words of the water rates provision in the agreement. The term imposes an obligation on the landlord requiring the timely delivery of accounts. If the landlord complies with the term then the tenant continues to be liable for all the water rates. I consider that the term is clear as to its meaning and does not require the elaboration which Mr Zhao appears to contend is necessary.

[26] I further agree with Mr Farrands, counsel for Mrs Nair, that it is not the obligation of the tenant to have to follow up on accounts. A landlord is expected to exercise proper financial management in the context of the commercial arrangement between landlord and tenant, and is responsible on this basis, for the delivery of accounts for water rates to the tenant.

[27] Finally, I agree with Judge McElrea in *Woollams,* and am of the view that implying such a term in this tenancy agreement is entirely consistent with the requirements set out in s 85(2) RTA.

Conclusion

[28] I do not consider that there is any merit in any of the arguments raised by the landlord and the appeal is dismissed.

[29] Mrs Nair is entitled to costs. If these cannot be agreed between the parties, then Mrs Nair is to file and serve a memorandum within 10 working days after the date of the judgment and the landlord is to file and serve its memorandum 7 working days thereafter.

AA Sinclair
District Court Judge