

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

MITCHELL v XU (Residential Tenancies) [2020] ACAT 110

RT 122/2020

Catchwords: **RESIDENTIAL TENENCIES** – residential tenancy agreement v occupancy agreements – the concept of a tenant's 'home' and the degree of security, privacy and autonomy required – unmetered utility services – 'no visitor' house rule – four weeks' notice for tenant to vacate a periodic tenancy – overcrowding – 'have regard to the Occupancy Principles'

Legislation cited: *Residential Tenancies Act 1997* 6, 6A, 6E, 71B, 71C, 71E, 73, 74, standard terms, 52, 53, 88

Cases cited: *Bangura v Fan* [2013] ACAT 38
BGBZ and National Disability Insurance Agency [2019] AATA 3505
Commissioner for Social Housing v Johnson [2014] ACAT 57
Conteh v Fan [2011] ACAT 45
Environmental Collective Housing Organisation Inc v Mathias [2019] ACAT 9
Lochrin v Jaiswal [2018] ACAT 78
Minister for Immigration and Citizenship v Khadgi [2010] FCAFC 145
Re Dickeson and Secretary Department of Social Security [1989] AATA 190
Singh v Minister for Immigration and Multicultural Affairs [2001] FCA 389
Toora Women's Inc v Various Tenants [2020] ACAT 2

List of Texts/Papers cited: Anforth et al, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017)

Tribunal: Senior Member A Anforth

Date of Orders: 16 December 2020

Date of Reasons for Decision: 16 December 2020

**AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL)**

RT 122/2020

BETWEEN:

DARCY MITCHELL
Applicant

AND:

SALLY XU
Respondent

TRIBUNAL: Senior Member A Anforth

DATE: 16 December 2020

ORDER

The Tribunal orders that:

1. The respondent is to pay to the tenant the sum of \$680, being the whole of his bond.
2. The respondent's claim against the applicant's bond is dismissed.

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Senior Member A Anforth

REASONS FOR DECISION

1. On 7 December 2019 the applicant entered an oral agreement with the respondent to lease one bedroom in a three bedroom house, owned and occupied by the respondent, at a rent of \$170 per week. The house had one bathroom, one toilet, one laundry and one kitchen. The applicant paid the respondent \$680 as bond, \$340 for two weeks of advance rent and took up residency.
2. There were no agreed fixed terms to the agreement. The respondent asserted that it was a term of the agreement that either party would give the other four weeks' notice of intention to terminate. It was said to be a term of the agreement that the applicant would abide by a set of 'house rules' which included not having visitors without the respondent's consent.
3. The respondent did not deposit the bond paid by the applicant with the ACT Rental Bonds office.
4. When the applicant moved into the house the respondent was living in the house and was using the lounge room as her bedroom. There was a male in one bedroom, one bedroom was empty and the applicant was in the other bedroom.
5. On 11 December 2019 the applicant's girlfriend came over to the house to visit the applicant. The respondent told the applicant that the girlfriend had to leave, and the house rules provided there were to be no visitors at the house without the respondent's consent.
6. In early January 2020 the respondent's daughter and her partner moved into the house and took a residence in the lounge room. The respondent moved into the one vacant bedroom.
7. On 7 February 2020 the respondent told the applicant that he had to vacate the house for two hours without any explanation. In that time the respondent had an 'open house' for the purpose of finding a sale for the house.
8. On 17 February 2020 the applicant gave the respondent notice of his intention to end the agreement and leave the premises on 28 February 2020. The respondent then informed the applicant that she intended to deduct 11 days of rent from the bond for the remaining part of the four weeks of notice that was required.

9. On 18 February 2020 the applicant's mother rang the respondent to question the decision to deduct the money from the bond. The respondent declined to speak with the mother about the matter. Some arguments ensued.
10. On 21 February 2020 the applicant lodged an application with the tribunal seeking the full refund of his bond in the sum of \$680.
11. The applicant attempted to vacate the premises on 27 February 2020 but the respondent denied him access to the house and his room to obtain the possessions. Further arguments ensued between the applicant's mother and the respondent's daughter leading to police involvement.
12. On 21 April 2020 the respondent lodged a response with a statement. In that statement the respondent wrote:

(a) It is our house rule that the tenants are required to give 4 weeks of notice before they wish to terminate their rent (hence the 4 weeks of bond) or bond will be deduced accordingly, and that they are not allowed to have visitors over without consent. All my previous and current tenants were made aware of these rules before they started renting.

(b) To be fair, if I ever needed the tenants to leave, I will also give them 4 weeks of notice.

(c) I also ask all of my tenants not to bring any visitors into the house, especially not without my consent.

(d) It was also agreed that electricity and gas bills are to be shared between the 3 people living in the house.

(e) There was no agreement that I would lodge Darcy's bond with the ACT Tenancy Board...nor have we lodged bond with the board for any of our current or previous tenants.

(f) When Darcy first started renting, his girlfriend stayed at the house (overnight) without telling us. I then asked him not to bring his girlfriend or anyone over again...About a week before his lease stopped, his girlfriend was in the house again without my permission. Our previous tenant Jessica asked us once whether she could have a friend over for a couple of hours and I allowed that...It is not right to have his girlfriend or anyone over without letting me know first

(g) He uses my detergents and washing powder. He never bought any of those.

(h) The carpet was clearly dirty and was nowhere near as clean as how we gave the room to him.

(i) Darcy was the only one in the household that used fan. I asked him if he would continue to use it and he said yes. So I told him he would need to pay extra electricity bill because he was the only one using it and he said ok. So I will charge him 45 cents extra per day for December and January, 57 days only = \$25.65.

The respondent also claimed that the applicant owed an outstanding share of the gas of \$72.26 and electricity of \$76.64.

13. The statement annexed photos purporting to show some marks on a carpet, copy of electricity and gas accounts and emails correspondence between the parties. None of the emails dated from before the commencement of the agreement.
14. The respondent annexed a note from a previous tenant saying that she had been aware of the four week notice period.
15. On 4 June 2020 the applicant filed a statement from his mother. In that statement the mother said:
 - (a) it was she who brought the advertisement to the attention of her son. The advertisement made no reference to no visitors being allowed;
 - (b) she was present with her son when he moved in on 7 December 2019 and that she had a conversation with the respondent's daughter at the time. The conversation included lodging the bond with the ACT Rental Bonds office which the respondent agreed to do;
 - (c) in early January 2020 the respondent's daughter and partner moved into the house and took up residence in the lounge room;
 - (d) on 21 February 2020 the applicant was part way through moving his things out of the house when the respondent locked him out of the house. The mother called the police for assistance but was told that she needed a court order;
 - (e) the applicant's goods were not retrieved from the house by the mother until 28 February 2020 with the help of a friend. There was no time to clean the room.

16. On 25 June 2020 the respondent filed a second statement. In this statement the respondent enlarged her bond claim to include:
- (a) detergents at \$7.50;
 - (b) washing powder at \$17.50;
 - (c) toilet cleaner at \$5.00;
 - (d) cleaning sponges at \$4.50;
 - (e) JIF at \$4.00;
 - (f) window cleaner at \$3.00;
 - (g) failure to cleaning in accordance with the cleaning roster on 3 days at \$20 each;
 - (h) The total claim, not including the rent, was \$346.05.
17. The matter was listed for hearing on 21 July 2020. The applicant appeared by phone. The respondent appeared by phone with a Mandarin interpreter. The applicant did not know of the hearing. He said he had taken legal advice but was confused about it.
18. The Tribunal told both parties that the case “raised serious issues of law of systemic relevance”. The Tribunal explained the distinction between tenancies and occupancy agreements under the *Residential Tenancy Act 1997* and how the terms of the present agreement were inconsistent with a tenancy agreement and probably inconsistent with an occupancy agreement and to that extent were unlawful. The respondent denied that there was any contract or tenancy agreement and that she was entitled to impose the terms of the present agreement. She later resiled from the assertion that there was no tenancy agreement but seemed to think that there was a distinction between an oral tenancy agreement and one in writing.
19. The respondent asked which terms were unlawful. The Tribunal explained the role of the standard terms and provided examples of terms and actions by the respondent that were probably unlawful:
- (a) Excluding the applicant from the use of the common areas.

- (b) Moving another family into the lounge room without consultation with the applicant.
 - (c) The 'no visitors' rule.
 - (d) Requiring the applicant to leave the house for the open house.
 - (e) Imposing 'house rules' other than by agreement.
 - (f) The lock out.
 - (g) The failure to deposit the bond.
 - (h) Failure to reduce an occupancy agreement to writing after six weeks.
 - (i) The four week termination period.
 - (j) Telling the applicant that he could not use the air conditioner unless he paid extra charges.
 - (k) The utilities charges.
 - (l) The rent is probably excessive.
 - (m) Failure to provide quiet enjoyment.
20. The respondent denied that she had ever required the applicant to do anything he did not want to do. The respondent denied that she changed the locks or locked the applicant out of the house.
21. Orders were made adjourning the matter to 1 September 2020 and in the meantime for the applicant to amend his claim to seek compensation, if that was his intention. This did not occur.
22. On 25 August 2020 the respondent filed a statement by Wen Wen (aka Tiger) who was the daughter of the respondent. Wen Wen said that she assisted her mother in renting out the room. She wrote that she had "told every potential tenant" about the four week notice rule and the 'no visitor' rule. Wen Wen did not say that she personally told the applicant of these rules, or that she was present and heard him told about these rules by the respondent.
23. The matter came back for hearing on 1 September 2020 by telephone. The applicant appeared and the respondent appeared without an interpreter but with

her daughter Wen Wen who spoke fluent English. The Tribunal went through the documents filed and the parties were given the opportunity to say anything further they wished.

24. The respondent maintained that the agreement was a tenancy agreement rather than an occupancy agreement and asserted that this was agreed between the parties. The Tribunal again explained its concern about whether the agreement was in fact a tenancy agreement and if so, the validity of its various terms and the actions of the respondent.
25. It turned out that neither party had served copies of the filed statements on the other party. Orders were made for the Registrar to undertake this task and the parties were given to 1 October 2020 to file final submissions after which the Tribunal would proceed to a decision on the papers. The parties were encouraged to take legal advice on the issues raised.
26. On 24 September 2020 the respondent filed her final submissions in which she reduced the claim for cleaning and products to \$60 for the applicant failure on three occasions to clean; \$50 for an end of lease clean; and \$30 for cleaning products used by the applicant.
27. The applicant did not file final submissions.

Issues

28. The applicant did not take up the Tribunal's invitation to amend his claim to seek damages for various alleged breaches of the standard tenancy agreement by the respondent. Accordingly, his claim is confined to one for the return of his bond.
29. The respondent filed a response in which she claimed the bond for the 11 days residue of the four week notice period, and for the costs of cleaning and cleaning products of \$140.

The systemic issue raised with the parties

30. The systemic issues of concern to the Tribunal concerned whether their agreement could be properly characterised as a tenancy agreement and if it could, then what were its lawful terms.
31. There is no doubt that it is possible for a residential tenancy agreement to arise for the lease of a single bedroom in a house together with a non-exclusive licence to use the common areas.¹ A tenancy of a single bedroom must be distinguished from the case where all the residents form a single joint tenancy, which is not the present case.
32. The Tribunal notes the amendments to the *Residential Tenancies Act 1997 (RT Act)* provided in the *Residential Tenancies Amendments Act 2020 (No2)* which have not yet commenced operation and are therefore not relevant for present purposes.
33. As the law currently stands, where the owner lives in the premises there are three possibilities:
- (a) The owner lives in the house and takes in a resident characterised at law as boarders or lodgers, who occupy a room and have permission to use common facilities.² These arrangements are excluded from the definition of a residential tenancy agreement by section 6E(1)(a) of the RT Act. Boarders and lodgers may fall within the definition of an 'occupant' for the purposes of Part 5A as defined in sections 71B and 71C of the RT Act.
 - (b) The owner lives in the house and takes in an occupant within the meaning of Part 5A of the RT Act for a room, who is not a boarder or lodger, with licence to use common facilities.
 - (c) The owner lives in the house and takes in a tenant within the meaning of sections 6 and 6A of the RT Act for a room, with licence to use common facilities.

¹ Anforth et al, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.3.8]

² See Anforth et al, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.3.8] for the definition of boarders and lodgers

34. Each of these three possibilities constitutes a different contractual licence that carries different rights and responsibilities. The primary issue is which of these possibilities applies in the present case.

35. Section 6A of the *Residential Tenancies Act 1997* defines a residential tenancy agreement as follows:

*(1) An agreement is a **residential tenancy agreement** if, under the agreement—*

*(a) a person gives someone else (the **tenant**) a right to occupy stated premises; and*

(b) the premises are for the tenant to use as a home (whether or not together with other people); and

(c) the right is given for value.

(2) The agreement may be—

(a) express or implied; or

(b) in writing, oral, or partly in writing and partly oral.

(3) The right to occupy may be—

(a) exclusive or not exclusive; and

(b) given with a right to use facilities, furniture or goods.

36. Once an agreement is determined to be a residential tenancy agreement then the standard terms of Schedule 1 *Residential Tenancy Act 1997* automatically apply and the tenant obtains a bundle of rights, including the right to quiet enjoyment of the premises (standard term 52) and the exclusive right of possession of the tenanted part of the property (standard term 53):

52 The lessor must not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises.

53 Unless otherwise agreed in writing, the tenant has exclusive possession of the premises, as described in the agreement, from the date of commencement of the tenancy agreement provided for in the agreement.

37. An 'occupancy agreement' is defined in section 71C of the RT Act as:

*71C(1) An agreement is an **occupancy agreement** if—*

(a) a person (the **grantor**) gives someone else (the **occupant**) a right to occupy stated premises; and

(b) the premises are for the occupant to use as a home (whether or not with other people); and

(c) the right is given for value; and

(d) the agreement is not a residential tenancy agreement.

(2) The agreement may be—

(a) express or implied; or

(b) in writing, oral, or partly in writing and partly oral.

Note After 6 weeks, the occupancy agreement should be in writing (see s 71E (c)).

(3) The right to occupy may be—

(a) exclusive or not;

(b) given with a right to use facilities, furniture or goods.

(4) The person given the right to occupy the premises may be—

(a) a boarder or lodger; or

(b) someone prescribed by regulation for this section.

38. There are no prescribed standard occupancy terms and so the parties may determine their own terms subject to the Occupancy Principles set out in section 71E of the RT Act. These principles come into play because sections 73 and 74 of the RT Act authorise the Tribunal to hear and determine occupancy disputes and when doing so the Tribunal ‘must have regard to the Occupancy Principles’.

39. ‘To have regard to’ the Occupancy Principles does not mean that the Occupancy Principle must strictly apply in each case. It means that the Tribunal is required to give them serious consideration.³

40. Section 71E, as it presently stands, provides:

³ *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 389; *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145; *BGBZ and National Disability Insurance Agency* [2019] AATA 3505

71E(1) *In considering a matter, or making a decision, under this Act in relation to an occupancy agreement for premises, a person must have regard to the following principles (the **occupancy principles**):*

- (a) an occupant is entitled to live in premises that are—
 - (i) reasonably clean; and*
 - (ii) in a reasonable state of repair; and*
 - (iii) reasonably secure;**
- (b) an occupant is entitled to know the rules of the premises before moving in;*
- (c) an occupant is entitled to the certainty of having the occupancy agreement in writing if the occupancy continues for longer than 6 weeks;*
- (d) an occupant is entitled to quiet enjoyment of the premises;*
- (e) a grantor is entitled to enter the premises at a reasonable time on reasonable grounds to carry out inspections or repairs and for other reasonable purposes;*
- (f) an occupant is entitled to 8 weeks notice before the grantor increases the amount to be paid for the right to occupy the premises;*
- (g) an occupant is entitled to know why and how the occupancy may be terminated, including how much notice will be given before eviction;*
- (h) an occupant must not be evicted without reasonable notice;*
- (i) a grantor and occupant should try to resolve disputes using reasonable dispute resolution processes.*

41. A perusal of the definition of a residential tenancy agreement and that of an occupancy agreement set out above, discloses little by way of difference. The key difference is that a residential tenant necessarily obtains the exclusive right of occupancy of the leased part of the premises and the right to the quiet enjoyment thereof, which are rights not automatically conferred on an occupant. Other differences stem from the range of standard terms of residential tenancy agreements set out in Schedule 1 of the RT Act which do not apply to an occupancy agreement; and from the Occupancy Principles which do not apply to residential tenancies.

42. The difference between residential tenancies and occupancy agreement, and the extent of the permissible use of 'house rules' to constrain a resident's rights in the house, have been discussed by the presently constituted Tribunal.⁴
43. In *Conteh v Fan* [2011] ACAT 45 and in *Bangura v Fan* [2013] ACAT 38 the presently constituted Tribunal discussed the effect of overcrowding in circumstances where the lessor takes in as many people as can fit in the house, with little regard to issues of security, privacy or comfort, sometime called 'slum landlords'.
44. One thing that residential tenancies and occupancy agreements both have in common is that they both confer a right on the resident to live in the premises 'as a home'. The RT Act does not define the word 'home' and so it takes its ordinary meaning. The present Tribunal takes some guidance from the *Re Dickeson and Secretary Department of Social Security* (1989) AATA 190 where the Administrative Appeals Tribunal (Cth) took the word 'home' to include the place where a person ordinarily eats morning and night, sleeps and is "the centre of gravity of ones domestic life". The present Tribunal adds that a 'home' is somewhere an adult has a degree of security, privacy and autonomy in making decisions concerning their domestic life, akin to the old adage that 'a man's home is his castle'. Living a domestic life in a premises at the whim and direction of another person is not consistent with the concept of a 'home', nor is living in an overcrowded house with little privacy, security or autonomy in the use of shared facilities.
45. In the present case the respondent closely controlled the applicant's domestic life. The applicant was put on a roster for cleaning, was told that he could not use the air conditioning facilities, he could not have visitors at all without the respondent's prior approval, the respondent could direct any visitors to leave, the applicant could not use the living room and its facilities, he had to leave the house when and for as long as the respondent directed, he had to vacate the premises without cause when directed by the respondent and was locked out by

⁴ *Toora Women's Inc v Various Tenants* [2020] ACAT 2; *Commissioner for Social Housing v Johnson* [2014] ACAT 57; *Lochrin v Jaisval* [2018] ACAT 78; *Environmental Collective Housing Organisation Inc v Mathias* [2019] ACAT 9

the respondent when a dispute arose. The applicant had to use the shared facilities of one bathroom, one toilet and one kitchen with the respondent, her daughter and partner and the male person in the other room.

46. It is difficult to define the concept of a 'home' with precision, but the present Tribunal finds that the degree of control exercised by the respondent over the applicant's domestic life was bordering on 'parental' and would be offensive to most adult persons to the point that he was not granted the right to use the premises as his 'home'.
47. The respondent maintained that the agreement was a residential tenancy agreement. The Tribunal does not accept this characterisation. But if the agreement were taken to be a residential tenancy agreement then the agreement, and the respondent's application of the agreement, would at least infringe the 13 matters set out in [19] above.
48. If the agreement was an occupancy agreement under Part 5A of the RT Act then the Tribunal must have regard to the Occupancy Principles at [40] above. In this event the respondent's terms and conduct at [19] above would breach Occupancy Principles (b), (c), (d), (g), (h) and (i).
49. Either alternative of [47] or [48] would normally attract compensation to the applicant, had he taken up the opportunity the Tribunal gave him to obtain legal advice and amend his application in these terms. This was not done and so the Tribunal does not need to further pursue these breaches and the quantification of compensation.
50. The respondent has charged the applicant for 'his share' of the utility charges. There was no separate metering of his room and so the respondent was not lawfully entitled to levy this charge under a residential tenancy agreement (standard term 42(c)). The utility charges should have factored into the rent. The applicant is entitled to a refund of these amounts.
51. The applicant should have cleaned his room before he left, but the unlawful lockout by the respondent deprive him (and his mother) of the opportunity to do so. The respondent claims \$60 for the applicant having failed on three occasions

to do his rostered cleaning. There was no evidence on the duty to clean, the frequency and the nature of the cleaning or of how the respondent arrived at \$20 per clean. The applicant should have paid for the cleaning products he used which the respondent assessed at \$30. Again, there was no evidence for this sum.

52. The respondent claimed against the bond for the unexpired part of the four weeks' notice period. If the agreement is a residential tenancy agreement, then the four weeks' notice is unlawful, and the applicant only has to give three weeks' notice in a periodic tenancy.⁵ If the agreement is an occupancy agreement, the Tribunal is not satisfied that the applicant was told of, or agreed to, four weeks' notice. The respondent did not reduce this term to writing at the start and did not reduce the occupancy agreement as a whole to writing after six weeks as she was required to do. Nor is it apparent to the Tribunal that the respondent actually suffered any loss by reason of any delay in finding a new 'tenant' for the applicant's room.
53. The applicant agreed to the rent on the basis of the number of occupants in the three-bedroom house at the time. He was not consulted and did not agree to the respondent's daughter and partner taking up occupancy. He would probably have succeeded in an application for a rent reduction in these circumstances.
54. Even if there were some basis for the respondent to recover some small amount from the applicant's bond, the Tribunal is not disposed to order that amount. Firstly, because it would not exceed the utility charges wrongly extracted from the applicant. Secondly, on the facts the respondent has engaged in a series of unlawful conduct that could have resulted in a sizable award to the applicant had he chosen to pursue that path. It would be unconscionable for the Tribunal to order the applicant to pay any amount to the respondent in these circumstances.
55. For the above reason the respondent's claim against the bond is dismissed.
56. The applicant is entitled to a full refund of his bond.

⁵ *Residential Tenancies Act 1997* standard term 88(1)

57. The matter is referred to the Registrar for consideration of the respondent's failure to lodge the bond with the ACT Rental Bonds office given her evidence that this was something she never did with any of her tenants.

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Senior Member A Anforth

Date(s) of hearing	21 July 2020 1 September 2020
Applicant:	In person
Respondent:	In person