

## ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**DAVIS & ANOR v MURDOCH (Residential Tenancies) [2020]  
ACAT 106**

**RT 430/2020**

**Catchwords:** **RESIDENTIAL TENANCIES** – bringing trivial disputes – raising unnecessary procedural issues – the undesirability of reducing social disputes to legal disputes – the need to focus on the substantial merits of the dispute

**Legislation cited:** *Residential Tenancies Act 1997* ss 60, standard terms 91, 94

**Cases cited:** *Hadley v Baxendale* 9 Ex 341

**List of  
Texts/Papers cited:** Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (Federation Press, 7th Ed)

**Tribunal:** Senior Member A Anforth

**Date of Orders:** 18 September 2020

**Date of Reasons for Decision:** 10 December 2020

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

**RT 430/2020**

**BETWEEN:**

**ROBERT DAVIS & DANIELLE DAVIS**  
Applicants/Lessors

**AND:**

**MAX MURDOCH**  
Respondent/Tenant

**TRIBUNAL:** Senior Member A Anforth

**DATE:** 18 September 2020

**ORDER**

The Tribunal orders that:

1. The tenant is to pay the lessors the sum of \$640 on or before 2 October 2020.

.....*Signed*.....  
Senior Member A Anforth

### REASONS FOR DECISION

1. The applicants are the owners/lessors of a two-bedroom apartment in a strata complex in Turner which is privately rented.
2. The tenancy commenced on 26 October 2015 for a fixed term of 12 months after which it became periodic. The rent at that time was \$430 per week and the bond was \$1,720. The residential tenancy agreement was in the standard terms of Schedule 1 *Residential Tenancy Act 1997* with no additional terms. The tenant had permission from the lessor to sub-lease the second bedroom. He sub-let the second bedroom to an unidentified person.
3. In February 2020 a dispute arose between the parties over a rent increase. On 26 February 2020 the issue was resolved by consent order in the tribunal for a \$15 per week increase from 4 May 2020. At the same time and perhaps as a consequence of the rent increase disputes, the parties entered into a protracted dispute over issues of repairs and maintenance of the premises.
4. On 20 May 2020 the lessors gave the tenant a 26 week 'no ground' notice of termination under standard term 94 to vacate by 22 November 2020.
5. On 5 June 2020 the tenant served a notice of intention to vacate under standard term 91(c) to vacate on 23 June 2020 alleging a failure on the part of the lessors to maintain the premises. The lessors responded denying any breach on their part and requiring that the tenant give three weeks' notice.
6. On 10 June 2020 the lessors lodged an application for termination of the tenancy agreement. The lessors sought an order that they were not in breach of the residential tenancy agreement and that the tenant's notice of intention to vacate was invalid for failure to provide three weeks' notice. The lessors also sought orders for:
  - (a) a declaration of what constitutes fair wear and tear in the premises and gardens;
  - (b) reasonable access to the premises to show prospective new tenants;
  - (c) an interim order for their access to the premises for an inspection; and

- (d) compensation in the sum of \$1,963.50 for the time spent by the lessors in dealing with the dispute, with such further time costs as are incurred in finalising the dispute in the Tribunal.
7. Annexed to the application were:
- (a) a copy of the tenancy agreement;
  - (b) the ingoing condition report;
  - (c) the agreement between the parties for sub-letting;
  - (d) a record of email and SMS communications between the parties spanning 118 pages, mostly concerning allegation and counter allegation over the maintenance and access issues; and
  - (e) a record of the maintenance carried out by the lessors.
8. On 17 June 2020 the tenant filed a statement headed 'End of tenancy dispute'. The tenant wrote that a dispute over maintenance and repairs had arisen in early 2020. Part of that dispute concerned the lessors requiring the tenant to fix a curtain bracket in the second bedroom and a window lock. The tenant had a tradesman fix the curtain bracket and fixed the lock himself. The lessors were not satisfied with the quality of either job.
9. The tenant wrote that the maintenance carried out by the lessors was of a poor standard. The maintenance items concerned were a seal in the oven door, replacement of some chipped tiles in the kitchen and the lock on the main bathroom door. In addition, the tenant alleged that the lessor failed to repair a misalignment of the shower door in the ensuite and a window lock did not close properly. The tenant said that the parties had different ideas on the relevant standards of repair expected of the lessor and the tenant in their respective duties.
10. The inference from the tenant's documents is that the relationship between the parties had broken down and had become a contest between them over the enforcement of their competing rights and responsibilities under the tenancy agreement.

11. On 23 June 2020 the tenant vacated the premises at which time the rent was paid up to that date, minus \$0.14. The lessor found a new tenant at a higher rent within a week of the tenant vacating.
12. On 24 June 2020 the lessors filed an amended application seeking three weeks rent in the sum of \$1,440 as compensation for the tenant's abandonment of the premises. In the alternative the lessors sought orders for:
  - (a) \$548.57 for the time lost in finding a new tenant;
  - (b) \$0.14 for rent arrears;
  - (c) \$480 for time lost in the tenant denying access before he vacated;
  - (d) \$159.50 for the Tribunal lodgement fee.
13. On 25 June 2020 orders were made for the matter to be listed for a preliminary conference on 17 July 2020 and hearing on 18 September 2020 with a timetable for filing evidence and submissions. The matter did not settle at the preliminary conference.
14. On 7 August 2020 the lessors filed their submissions and evidence. The lessors argued:
  - (a) the tenant's notice of intention to vacate was defective and invalid so that his vacation of the premises on 23 June 2020 constituted an abandonment. The defects alleged were:
    - (i) the notice nominated the incorrect clause of the standard terms as the basis for the notice;
    - (ii) there was in fact no breach by the lessors;
    - (iii) the notice gave more than two weeks' notice instead of only two weeks;
    - (iv) the notice did not provide particulars of the alleged breaches;
    - (v) the notice was not in the required form.
  - (b) the Tribunal should not waive the defects in the notice under section 60(1)(b) *Residential Tenancy Act 1997*;



- (c) They were entitled to compensation for the excessive time, energy and emotional toll caused by the tenant's conduct and abandonment.
15. On 28 August 2020 the tenant filed his submissions together with some emails between the parties. The submissions repeated matters previously raised by the tenant. The submissions emphasised the aggression in the relationship between the parties, which the emails evidenced.
16. The matter was heard on 18 September 2020. Both lessors and the tenant appeared in person. There were no witnesses called. The matter proceeded by way of a three-way discussion. Both parties reiterated their previous submissions.
17. The Tribunal found that the tenant's allegations of failure to repair, or more particularly, to repair to his aesthetic standards, were 'frivolous' and 'trivial' and as such did not justify a notice of intention to vacate based on any breach by the lessor. The Tribunal found that the lessors' allegations against the tenant for defective repairs were just as trivial.
18. The tenant sought an adjournment to amend his application to seek compensation for breach of quiet enjoyment by the lessor, which the tenant could and should have made any time since the proceedings commenced in the Tribunal. The breaches alleged were the lessors' insistence that the tenant remedy his prior repairs to the curtain bracket and window lock, and the lessors seeking access for inspection and to show the premises to a new tenant. There was no breach of quiet enjoyment in the lessor seeking access in accordance with the residential tenancy agreement. Any inconvenience caused by any unjustified notices in relation to the curtain bracket or window lock by the lessor were so minor as not to warrant any adjournment for any such claim to be made.
19. The Tribunal found that the tenant's notice of intention to vacate was defective in that there was no breach by the lessors that justified the notice. The lessors argued that this invalid notice amounted to a nullity and so the tenant was then duty bound to give a three week 'no grounds' notice which applies to periodic tenancies. Accordingly, the lessor was entitled to three weeks rent as compensation. The Tribunal declined to accept this logic. It was always open to

the tenant to give a three-week notice without the need to specify or rely upon any breach. The fact of asserting a breach in a 'no ground' notice does not invalidate the notice, even if the alleged breach did not occur.

20. If the tenant's notice were taken in substance to indicate his intention to vacate the periodic tenancy, then its deficiency is that it gave two weeks and not three weeks' notice. The loss to the lessor in the tenant in giving short notice is only one week. In fact, the tenant's notice given on 5 June 2020 for vacant possession on 23 June 2020 gave 17 days and so it was only four days short.
21. The lessor argued that they had been deprived of a 'right' to receive the correct notice for which they should be compensated. The Tribunal explained that a contractual breach per se at best attracts nominal damages. Compensation is only awarded where the breach produces a financial loss, and then only in the circumstances set out in the rule in *Hadley v Baxendale*<sup>1,2</sup>. The only loss the lessor had suffered was the four days short notice.
22. This short notice did however have a flow on effect for the lessor. It shortened the time for the lessor to find a new tenant. The lessors could not be certain that the tenant would in fact vacate on 23 June 2020, at least until the tenant actually did so. It was always open the tenant to change his mind for whatever reason and not vacate. The lessors would then have had to pursue an eviction which could take months. In any event, the point is that the lessor could not safely enter a new tenancy agreement with a new tenant until such time as the existing tenant actually surrendered vacant possession. The lessors did move expeditiously and had a new tenant in possession within a week. The tenant did not co-operate with the lessors in facilitating access for prospective new tenants to inspect. For these reasons the outer limit of the lessors' financial loss was one week of rent and the Tribunal determined to allow the whole of that one week.
23. The lessors insisted that they were entitled to compensation for the emotional toll the events had taken and for their time committed to the Tribunal

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<sup>1</sup> 9 Ex 341

<sup>2</sup> Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (the Federation Press, 7<sup>th</sup> ed) at [2.187.3]

proceedings. The Tribunal explained that damages for emotional toll are not recoverable by a lessor against a tenant because:

- (a) there is no equivalent of covenant for quiet enjoyment in favour of a lessor in the standard terms or at common law;
- (b) the common law of contract does not permit recovery for damages of this kind except in the limited class of cases known as the Baltic Shipping cases.<sup>3</sup>

24. The lessors pressed their claim for rent arrears of \$0.14. The Tribunal denied the claim on the bases that the claim was trivial, a waste of public resources and should not have been brought. This sparked a wider dialogue between the lessors and the Tribunal in which the Tribunal put the view that it should focus on the substantial merits of a case and not on procedural technicalities (real or imagined) and trivial proxies for the true dispute. There were issue of public costs and costs to other parties in raising arguments that were either intended to, or had the unintended effect of, circumventing the substantial merits of the dispute.
25. The lessors pressed for the dispute to turn on questions of law as they perceived them, which the Tribunal eschewed for the following reasons. Firstly, the Tribunal did not agree with the accuracy of the arguments of law put by the lessor for the reasons set out above.
26. Secondly and more broadly, some principles of law can be found underlying just about any dispute occurring in society between individuals. Even the innocuous actions of a person patting their pet cat could raise legal issue of the duty owed to animals etc. In the present Tribunal's view, it is neither necessary nor helpful for the Tribunal to adopt the reductionist approach of reducing every dispute that comes before it, to a legal one. Most disputes that come before the Tribunal are fundamentally social disputes and the parties are looking for a resolution of their dispute. They are not interested in paying lawyers to play legal games and have no delusion that they are in the High Court. This is not to

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<sup>3</sup> Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7<sup>th</sup> ed) at [2.187.2]



say that the law is ignored. It sits in the background as the ultimate resolution to any impasse between the parties.

27. The dispute resolving approach referred to above is entirely consistent with the alternative dispute resolution mechanisms used by the Tribunal and by courts generally, where arbitrations/hearing are only invoked after the parties cannot be guided, persuaded, or induced to settle the dispute on a basis that they can live with.
28. In the end the Tribunal formed the view that the legal dimensions of this dispute were 'much ado about nothing'. It was really all about personal animosities being played out in a public forum.
29. The Tribunal ordered that the tenant pay the lessors the rounded off sum of \$640 on or before 2 October 2020. This sum was composed of one week rent and the Tribunal lodgement fee.
30. One of the parties subsequently communicated with the Registrar and asked for reason for the decision. These are those reasons.

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Senior Member A Anforth

**Date(s) of hearing**

18 September 2020

**Applicant:**

In person

**Respondent:**

In person