Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Salmo v Park [2015] NSWCATCD 86**
Hearing dates:	1 July 2015
Decision date:	17 July 2015
Jurisdiction:	Consumer and Commercial Division
Before:	P French, General Member
Decision:	1 The Tribunal makes a declaration pursuant to section 111(2) of the Residential Tenancies Act 2010 (the Act) that the tenant, Kyungai Park, failed to give a termination notice to the landlords, George and Therese Salmo, in respect of the Residential Tenancy Agreement, in accordance with Part 5 of the Act. 2 Pursuant to section 187(1)(c) of the Act, the tenant, Kyungae Park, is ordered to pay to the landlords, George and Therese Salmo, the sum of $4,500.00 within fourteen (14) days of the date of these orders, being a break fee arising from the tenant's early termination of the Residential Tenancy Agreement. 3 Pursuant to section 187(1)(c) of the Act, the tenant, Kyungae Park, is ordered to pay the landlords, George and Therese Salmo, the additional sum of $795.15 within fourteen (14) days of the date of these orders, being for the costs of cleaning of the swimming pool, garden and yard maintenance, and water usage in respect of the rented premises. 4 Pursuant to section 175 of the Act, Rental Bond Services is to pay to the Landlords, George and Therese Salmo, the whole of the tenant's rental bond No K809496-4 lodged in respect of the rented premises. Any amount received is to be credited against the money orders.
Catchwords:	RESIDENTIAL TENANCY; tenant early termination of fixed term tenancy; requirements for notice; break fee, landlords' claim for break fee; breach of agreement; landlords claim for breach of agreement; maintenance of swimming pool, maintenance of yard and garden; light globes; rental bond, landlord's claim for payment from rental bond.
Legislation Cited:	Residential Tenancies Act 2010

Category:	Principal judgment
Parties:	George and Therese Salmo (applicants) Kyungae Park (respondent)
Representation:	Tenant in person Managing Agents for Landlords
File Number(s):	RT 15/39277 & RT15/40490
Publication restriction:	Nil

REASONS FOR DECISION

1 These proceedings involve two applications by the landlords of the rented premises seeking Orders against the tenant. These applications were dealt with together.

2 The first application was filed with the Tribunal on 19 June 2015, prior to the tenant delivering vacant possession of the rented premises to the landlords. In this application, the landlords sought an Order from the Tribunal pursuant to sub-section 187(1)(c) of the *Residential Tenancies Act* 2010 (the Act) that the tenant pay them the sum of $4,500.00 being a break-fee equivalent to six (6) weeks rent associated with the tenant's early termination of the Residential Tenancy Agreement. The landlords also sought an Order pursuant to sub-section 187(1)(h) of the Act to the effect that the tenant is liable under the terms and conditions of the Residential Tenancy Agreement to pay a break fee equivalent to six (6) weeks rent.

3 The second application was filed with the Tribunal on 29 June 2015, after the tenant delivered vacant possession of the rented premises to the landlords. In this application, the landlords seek and Order from the Tribunal pursuant to sub-section 187(1)(c) that the tenant pay to the landlords the sum of $1,034.15, being the costs of cleaning of the swimming pool of the rented premises in the sum of $520.00, for maintenance of the gardens and yard of the rented premises in the sum of $480.00, and final water usage of $34.15. The landlords also seek an Order from the Tribunal pursuant to section 175 of the Act directing Rental Bond Services to pay the tenants rental bond to the landlords. Additionally, the landlords seek an Order from the Tribunal pursuant to section 111 of the Act declaring that the tenant's termination notice was or was not given in accordance with the Act.

THE RESIDENTIAL TENANCY AGREEMENT

4 The Residential Tenancy Agreement (**Agreement**) between the landlord and the tenant was not submitted into evidence before the Tribunal. However, it was common ground between the parties that the Agreement was in standard form. The Agreement was for a 12 month period commencing on 13 April 2015 and ending on 12 April 2016. The rent was $750.00 per week. The Agreement included the standard form (additional term) Clause 41 break fee.

5 On or about 30 March 2015 the tenants paid two-weeks rent in advance and a rental bond of $3,000.00 to the Managing Agents. The Managing Agent lodged the tenant's rental bond with Rental Bond Services.

6 On 1 June 2015, following a number of prior discussions between the tenant, her solicitor and representatives of the Managing Agent, the tenant's solicitor emailed a representative of the Managing Agent (relevantly) as follows (tenant's solicitor's email):

> Re [the rented premises]
>
> We refer to the above and we advised you that you act for your tenant, [tenant's name].
>
> We are afraid that you will be required to speak to me as our client has instructed us to represent her and this will make your reply, based on the Landlord's instructions, to our client below unacceptable and irrelevant.
>
> Even with fair Trading's advice, for client, the Landlord has breached the Tenancy Agreement: Clause 14.1 and 18.5 (Tenant's right to quiet enjoyment and Landlord's general obligations for residential premises).
>
> Minimum notice periods under breach of agreement ground is 14 days when it is a fixed-term agreement.
>
> We advise you that tenants have also rights to give immediate notice if the premises are destroyed, become wholly or partly unusable (other than due to a breach of the tenancy agreement), cease to be lawfully usable as a residence or are appropriated by a compulsory process.
>
> Our client has also attended for medical treatment for anxiety and related symptoms due to fear of being bitten by a large black snake living immediately at the premises on 20 May 2015.
>
> Therefore, where you have not been co-operative, we are hereby instructed to serve 14-days termination notice to you as today, 1 June 2015.
>
> If you still intend to argue with unreasonable and unacceptable allegations not to accept our notice, the next step will be that we are instructed to take this matter to the NSW Civil and Administrative Tribunal (NCAT), so please let us know your acceptance of the termination notice.
>
> ….
>
> We look forward to hearing from you as practically soon as possible.

7 There then followed a series of correspondence between the Managing Agents and solicitors for the landlords with the tenant's solicitor which, respectively, disputed and asserted the validity of the purported notice of termination of tenancy contained in this email, the grounds for the purported termination of the tenancy, and the landlords' entitlement to a break-fee in the circumstances of the early termination of the tenancy. These disputes now come before this Tribunal for determination.

8 The tenant delivered vacant possession of the rented premises to the landlord on Monday 22 June 2015, when the keys to the rented premises were delivered to the Managing Agents.

VALIDITY OF THE TERMINATION NOTICE

9 Section 82 of the Act sets out the requirements for a termination notice. It provides as follows:

> **82 Termination notices**
>
> (1) A termination notice must set out the following matters:

(a) the residential premises concerned,

(b) the day on which the residential tenancy agreement is terminated and by which vacant possession of the premises is to be given,

(c) if the notice is not given under section 84, 85, 96 or 97, the ground for the notice,

(d) any other matters prescribed by the regulations.

(2) A termination notice must be in writing and be signed by the party giving the notice or the party's agent.

(3) A termination notice for a periodic agreement may specify a day other than the last day of a period for the payment of rent as the termination date.

10 Section 223 of the Act sets out the requirements for service of a termination notice. It relevantly provides:

223 Service of notices or other documents

(1) A notice or other document that is authorised or required by this Act or the regulations or a residential tenancy agreement to be given to or served on any person may be given or served by:

(a) in the case of a natural person:

(i) delivering it to the person personally, or

(ii) delivering it personally to a person apparently of or above the age of 16 years at the person's residential or business address, or

(iii) delivering it in an envelope addressed to the person and leaving it in a mailbox at the person's residential or business address, or

(iv) sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or

(v) sending it by facsimile transmission to the facsimile number of the person, or

(b) in the case of a corporation:

(i) leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the corporation or to an address specified by the corporation for the giving or service of documents, or

(ii) sending it by facsimile transmission to the facsimile number of the corporation, …

…

11 The tenant's solicitor's email does not comply with sub-section 82(1)(b) of the Act in that it does not specify the date upon which vacant possession of the rented premises is to be given to the landlord. It does not comply with sub-section 82(2) of the Act in that it is not signed by the tenant or the tenant's solicitor. This email also fails to serve notice of termination of tenancy on the landlord by one of the means required by section 223 of the Act.

12 In these circumstances the Tribunal is satisfied that the landlords are entitled to a declaration pursuant to section 111(2) of the Act that the tenant failed to give a termination notice to the landlord in respect of the Residential Tenancy Agreement in accordance with Part 5 of the Act.

CLAIM FOR MONEY - BREAK FREE

13 Clause 41 of the Standard form Residential Tenancy Agreement provides as follows:

41. The tenant agrees that, if the tenant ends the residential tenancy agreement before

> the end of the fixed term of the agreement, the tenant must pay a break fee of the following amount:
>
> 41.1 if the fixed term is for 3 years or less, 6 weeks rent if less than half of the term has expired or 4 weeks rent in any other case, or
>
> 41.2 if the fixed term is for more than 3 years, [specify amount].
>
> This clause does not apply if the tenant terminates the residential tenancy agreement early for a reason that is permitted under the *Residential Tenancies Act 2010* .

14 There is no dispute between the parties that this clause was included in the Agreement that subsisted between the parties. It is also an agreed fact that the tenant terminated the Agreement just over two (2) months into the twelve (12) month term of the Agreement. The tenant is therefore liable to pay the landlord a break fee equivalent to six (6) week's rent unless she is able to prove to the Tribunal that she terminated the agreement early for a reason permitted under the Act.

15 The tenant's solicitor's email asserts a range of grounds for termination some of which are difficult to comprehend in the circumstances of this case. For this reason it is simpler to turn first to the factual circumstances that precipitated the tenant's conduct.

BLACK SNAKE SIGHTING

16 In this respect, on or about Sunday 17 May 2015, the tenant's husband observed what he described as a large black snake in the yard of the rented premises. The tenant or the tenant's husband took a photograph of the snake which is in evidence before the Tribunal. The snake is seen moving along a perimeter fence.

17 Although not entirely clear on the evidence given by the tenant, this appears to have been the only sighting of a (or the) snake. In the alternative, a snake may have been sighted on one other occasion.

18 Upon sighting the snake, the tenant (or her husband) contacted Police who attended the property with a Local Council Ranger. The snake could not be found.

19 The tenants also contacted the Managing Agents and in response to the tenants repeated representations, the Managing Agents took a number of steps to investigate any risk that might be associated with the snake, including by contacting the responsible officer of Ku-ring-gai Council and a representative of WIRES Wildlife Rescue. The Managing Agents advised the tenants about the advice given by these agencies, which was in substance that the snake was likely to have been just passing through the property, is likely to occupy an area within a 7 kilometre radius, and that an attempt to capture it is likely to be futile unless it is sighted again and a snake catcher is called immediately to the scene.

20 The tenants arranged for a representative of a service called "Snakes in the City" to inspect the rented premises and its environs on 6 June 2015 to search for the snake. A report from this representative is in evidence before the Tribunal. Based on the photograph provided, the representative concluded that the snake was a Red Bellied Black Snake. He reported that this species is generally not aggressive unless provoked, but will "quickly try to escape at first opportunity." He expressed the opinion

that the snake is likely to be living in a network of rabbit burrows in the immediate vicinity of the rented premises. He noted that these rabbit burrows are quite extensive, very deep, and have several entrances that are connecting the tunnels, “so it would be almost impossible to know where exactly the snake is, given the large underground tunnel system.”

21 The representative opined that the snake was likely to be using the rabbit burrows as its winter home. He then states: “as Spring begins, the snake will become highly active again – at which time it will leave the area permanently as it goes in search of food and a mate. It will not return to the same place and its highly unlikely that this situation will ever repeat with another snake. The reason why the sake chose this particular area is pure chance.” He goes on “it is highly unlikely that the snake will enter the house at all and it presents no risk to anyone at all. Red Belly Black snakes are very shy and they tend to disappear in the opposite direction at the slightest disturbance.”

22 Apparently this advice did not provide sufficient comfort for the tenants. They continued to make representations to the Managing Agents about the risk they perceived the snake to represent.

23 In response, the Managing Agents arranged for a Reptile Relocation Expert to attend the rented premises on 19 June 2015 to investigate the possibility that the snake was living on or nearby those premises. A report from this investigation is in evidence before the Tribunal. The Expert identified the snake from the tenant’s photograph as a Red Bellied Black Snake. He opined that “these types of snakes are no threat to people if left alone and not provoked or restrained, they are usually very quick to get way from people and will do so at every opportunity.”

24 The Expert reports that he and his assistant conducted a thorough search of the property, including the roof cavity of the rented premises, and that he did not find any snakes, or any evidence of snakes living there at the time. He states: “we did not find any droppings, tracks, or any shed skin etc, which is usually things that could be found with a snake being resident in the area.”

25 The Expert concluded: “so in my professional opinion, I would say, yes there was a snake on the council strip at front of property from observing the photograph shown to me, but could not guarantee that the snake was living on the property anywhere, it is highly possible that the snake could’ve just been passing through at the time, and is now away from the area.”

26 The tenant reports that the black snake sighting caused her son (a child) extreme distress, which compelled her to vacate the rented premises. Two medical certificates were produced in evidence before the Tribunal in support of this claim. Those certificates state that the child was experiencing continuing anxiety related symptoms due to fear of being bitten by the snake. Those symptoms are reported as not having improved between the date of the sighting of the snake up to 9 June 2015.

27 While the Tribunal has no reason to doubt that the tenant’s son was experiencing the symptoms reported in the medical certificates, from an objective point of view, on the

evidence before it, there was no ascertainable risk to the tenant or her family presented by the single (or possibly double) sighting of the snake that could establish a permissible basis for the early termination of the tenancy under the Act. Specifically, there is no basis upon which it might be reasonably said that this event constituted a breach of the Agreement by the landlords.

28 Accordingly, the tenant cannot escape the consequences of the early termination of her tenancy. Pursuant to clause 41 of the Agreement she must pay the landlords a break fee the equivalent of six (6) weeks rent. The Tribunal makes this order pursuant to sub-section 187(1)(c) of the Act.

CLAIM FOR MONEY – POOL CLEANING, YARD MAINTENANCE AND WATER USAGE

29 The landlord claims from the tenant the costs of cleaning of the swimming pool of the rented premises after the date of vacant possession. It was not in dispute between the parties that at the commencement of the Agreement the swimming pool was in clean and working order, or that at the end of the tenancy the filtration system had been turned off and that the pool was covered in green algae. The landlords submitted photographic evidence to this effect. The tenant did not dispute what was portrayed in those photographs.

30 The landlord submitted a quotation for the rectification of the pool provided by a pool service company in the sum of $520.00. The tenant did not object to the amount of the quote. She told the Tribunal she did not know what it would cost to clean the pool.

31 The tenant said that she should not have to pay for the cleaning off the pool because she did not use it doing the course of the tenancy. However, it was clear on the evidence before the Tribunal that the swimming pool was part of the rented premises and the tenant had an obligation to maintain it in the course of the tenancy. The Tribunal was therefore satisfied that the tenant ought to pay the landlord the costs of cleaning the pool.

32 The landlord claimed from the tenant the costs of garden and yard maintenance. The landlord claims that the gardens and yards were not maintained in the course of the tenancy and were overgrown at the date of vacant possession. The landlord produced a quotation for yard and garden maintenance in the sum of $480.00.

33 The tenant did not dispute this claim, but said that she was unable to use the yard and garden because of her fear of encountering the snake. In the course of the hearing she offered to pay $240.00 towards the rectification of the yard and gardens. The landlord accepted this offer.

34 The landlords claimed from the tenant the costs of water usage at the rented premises as at the date of vacant possession in the sum of $34.15. The tenant told the Tribunal that she accepted she was liable for this cost.

35 Having regard to the matters outlined above the Tribunal is satisfied that the landlords are entitled to an Order pursuant to sub-section 187(1)(c) of the Act that the tenant pay

to them $795.15.

BOND

36 The parties told the Tribunal that as at the date of the hearing the tenant's bond had not been paid out by Rental Bond Services.

37 The landlord requested an order from the Tribunal pursuant to section 175 of the Act that the tenants bond be paid to them in part satisfaction of its claims for money. The Tribunal was satisfied in the circumstances outlined above that the landlords are entitled to this Order. Any rental bond amount paid to the landlords is to be offset against the money orders made in these proceedings.

P French

General Member

Civil and Administrative Tribunal of New South Wales

17 July 2015

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: 04 September 2015