VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

RESIDENTIAL TENANCIES DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NO. R2019/7898

CATCHWORDS

Residential Tenancies Act 1997-; Section 27, 52, 53, 54 and 55 Water Act 1989 Section 273A; landlord's claim for reimbursement of water charges; claim dismissed

APPLICANT	Ms Hilary Drew
RESPONDENT	Mr Graham & Mrs Kerry Guy
WHERE HELD	Heidelberg
BEFORE	Hugh T. Davies, Member
HEARING TYPE	Hearing
DATE OF HEARING	17 April 2019 & 29 May 2019
DATE OF ORDER	24 July 2019
CITATION	Drew v Graham (Residential Tenancies) [2019] VCAT 807

ORDER

The application is dismissed.

Hugh T. Davies
Member

APPEARANCES:

For the Landlord Applicant	Ms Love, managing agent
For the Tenant Respondents	Both in person

REASONS FOR DECISION

THE BACKGROUND TO THE PROCEEDING

1 In about 2002, the tenants entered into a written tenancy agreement with Bryan John Drew, now deceased, then the owner of 13 Central Avenue Balwyn North ("the premises"). The initial tenancy agreement was later renewed in writing and eventually the tenancy became periodic at some time well before 2011.

2 Neither of these early tenancy agreements was in evidence at the hearing of this application and there is no evidence as to their terms.

3 From the outset of the tenancy, the account for the supply of water to the premises remained in the name of the landlord who paid for water usage by a direct debit arrangement with Yarra Valley Water ("YVW"). At no time did Mr Drew or the tenants advise YVW that the tenants were occupying the premises.

4 For some time prior to October 2011 Noel Jones (Kew) Pty. Ltd. had been the managing agent of the premises.

5 Mr Drew died in August 2011 and, by some means or other, the applicant, his widow, became the owner of the premises. At about that time the applicant, or someone her behalf, arranged for the direct debit arrangements with YVW to be changed to her bank account.

6 The applicant, or someone on her behalf, instructed the agent to prepare a written tenancy agreement for a tenancy to commence on 19 November 2011 for a term of 12 months. That agreement, dated 4 August 2011, named the deceased Mr Drew as the landlord.

7 There was no evidence before the Tribunal as to the instructions, if any, given to the agent at the time. This agreement was in the standard prescribed form and contained no terms or special conditions relevant to this dispute.

8 In 2012 Jellis Craig took over management of the premises and later prepared a tenancy agreement dated 25 October 2012 renewing the tenancy for 12 months commencing on 19 November 2012; again that agreement named the deceased Mr Drew as landlord.

9 There was no evidence before the Tribunal as to the instructions, if any, given to the agent at the time. The 2012 agreement, apart from providing for a different term and a later rent increase, was on the same terms and conditions as the 2011 agreement.

10 In 2017 the applicant, or someone assisting with her affairs realised, by examining the accounts from YVW, that she was paying for water consumed at the premises; this led to the agent approaching the tenants regarding the issue with the result that water account was transferred into

the names of the tenants in January 2018. The tenants seem to have gone along with the new arrangement.

11 Later discussions between the agent and the tenants to resolve a dispute about reimbursement of earlier water charges came to nothing and this application was filed on 1 March 2019.

12 As at the date of the final hearing the tenancy continues a periodic basis and Jellis Craig continues to be the managing agent for the landlord.

13 None of the above is in dispute in the proceedings and therefore constitutes part of the Tribunal's findings as to fact.

THE APPLICATION

14 The landlord claims reimbursement of $10992.48 for charges she has paid for water consumed by the tenants at the premises from January 2013 until January 2018, allowing the tenants what the landlord's agent has calculated as rebates the tenants would have been entitled to receive had they been paying the water bills over the years. Why January 2013 was chosen as the starting date was not clear from the evidence.

15 Whist the application is brought under Section 452 RTA it can and should be regarded as an application under Section 55 RTA for reimbursement of water charges paid.

16 The landlord also made a claim, withdrawn at the final hearing, for expenses incurred in having an electrician attend the premises in 2018.

17 The landlord's claim, quite simply, is that the terms of the tenancy agreements signed in 2011 and 2012, which were in standard form and contained no special conditions relevant to matters in dispute, required the tenants to pay for water consumed at the premises, that they have not paid, that she is therefore entitled to be reimbursed for the expenses she has incurred in that regard and that RTA required the tenants to meet those charges.

THE CROSS APPLICATION

18 The cross application, in which the tenants sought to recover expenses they claim to have incurred over many years in running a water pump at the premises can be dealt without substantial comment. The tenants conceded at the final hearing that, if the landlord's claim failed, their claim should be dismissed as withdrawn.

THE HEARINGS

19 At each of the hearings the landlord was represented by Ms Love, an employee of Jellis Craig. She and each of the tenants gave sworn evidence.

20 There were no other witnesses. The application was part heard and adjourned on 17 April.

21 On 28 June 2019 I made orders permitting the parties to lodge written submissions as to implications of the relevant provisions of RTA and the Water Act 1989

22 The landlord's made no such submissions

23 The tenants' submissions were contained in a new application they mistakenly filed believing that was what was required. Registry of the Tribunal communicated with the tenants leading to the fresh application not being processed. What that application contained will be accepted as the tenant's submissions which do no more than refer to the relevant sections of the two (2) Acts.

THE TENANTS' DEFENCE TO THE APPLICATION

24 The tenants claim that, at the outset of the tenancy, the garden at the premises was in poor condition and that, in discussion with the landlord, they agreed to re-establish and maintain the garden. They claim that, in return, the landlord agreed to meet the cost of all water consumed at the premises until the garden was re-established and to leave the account with YVW in his name. This they agreed to, but the agreement was not reflected in any written tenancy agreement nor otherwise evidenced in writing.

25 They further claim that, in about 2004, the premises were flooded, that it was discovered that there were serious drainage problems at the premises, that the problem had to be addressed to avoid future flooding and damage to the premises and that the drainage works, if rectified by the normal method of replacing drains, would involve a cost well in excess of $50000.00.

26 They further claim that the landlord came up with a simpler and much cheaper solution which involved the installation of a drainage pit to trap storm water and then discharge the water from the pit and the premises by use on an electric pump.

27 They claim that the landlord undertook that, if they agreed to this proposal, he would continue to leave the water account in his name and to meet all water supply costs in consideration of the huge expense he was avoiding by adopting this solution.

28 The tenants claim that they raised no objection and agreed that, as they would not be paying for any water consumed, they would bear the cost of the electricity consumed in running the pump.

29 The tenants say they agreed to this proposal overall and that no claim was ever made for the reimbursement of water bills until the applicant did so in 2017. They also claim that the premises never flooded after the installation of the pit and pump and that nothing else has been done to address the drainage problem which they maintain would have continued unabated if the pit and pump had not been installed.

THE APPLICANT/LANDLORD'S RESPONSE TO THE TENANTS' DEFENCE

30 The applicant and her agent claim to have had no knowledge of the water arrangement until advised of it by the tenants in 2017, when the agent made a claim for what is now claimed in these proceedings; they do not admit that the arrangement ever existed

31 The claim is that the tenants are to be bound by Section 52 RTA and to the terms of the 2011 and 2012 agreements, those agreements making no reference to the water arrangement or anything like it The claim is that, because the tenants signed those agreements in their form, they cannot go behind the written terms to argue that they should have the ongoing benefit of the water arrangement, nor have a defence to the claim as brought against them in this proceeding.

ADDITIONAL FINDINGS AS TO FACT

32 There being no evidence to contradict the tenants in this regard, the Tribunal finds that, in about 2002 and 2004, they and Mr Drew did come to the arrangements they allege. Mr Drew agreed to leave the water account in his name and to meet all costs. From this it follows that the tenants and Mr Drew intended that these arrangements continue in place at least until October 2011 when new tenancy agreements came into effect.

33 The Tribunal also finds that neither of the agents nor the applicant, or anyone acting on her behalf, had any knowledge of these arrangements.

34 The tenants most likely became aware of the Mr Drew's death late in 2011.

35 The tenants claim, and the Tribunal finds that, the rent and term of the agreements aside, there was no discussion between the parties as to any of the terms of the 2011 and the 2012 agreements, that the tenants, rightly or wrongly, assumed that the water arrangements would remain in place, and that the written agreements would be on the same terms as existed prior to November 2011.

36 The applicant played no part in negotiating the terms of the 2011 or the 2012 agreements both of which, more likely than not, were signed on her behalf by her agent at the time.

37 The tenants did not read either of the 2011 or the 2012 agreements in any detail before signing; they did not turn their minds to whether the water arrangement was or should be referred to in the agreement. In a sense they acted unwittingly if, by signing these agreements, they were altering their obligations to meet water charges.

38 That both the 2011 and 2012 agreements named the deceased as the landlord more likely than not arose from an oversight giving rise to an error neither the then landlord nor the tenants noticed.

39 It is probable that neither Mr Drew nor the tenants were aware of, but if aware of did not turn their minds to, the provisions of Section 52 to 55 RTA or Section 273A of the Water Act at any time; it is just as probable that the applicant, in paying for water charges from 2011 to 2017, did so without realising she was paying for charges for which the tenants might be responsible; the applicant would have been aware of this had she examined those accounts and then could have sought to regularise the situation if the tenants were required at law to meet the water charges

CONCLUSIONS

40 At no time did the tenants or either landlord conduct their affairs or negotiations by reference to the Water Act or RTA; in 2017 it was the applicant's realisation of the fact that she was meeting water charges, and her or her agent's reference to the terms of the then tenancy agreement rather than any knowledge of either act, that prompted her to take action.

41 It might be argued that. were it not for Section 52 (3) RTA, the terms of the periodic tenancy which existed until late 2011, regardless of who was entitled to claim to be the landlord from time to time, contained terms including the water arrangement. If that argument were sustained, the terms of the water arrangement could well have continued to be terms of the periodic tenancy however long it continued.

42 Any argument that, after 2012, any agreement by the parties varying the tenants' obligations under Section 52 (1) RTA could only be enforced if in writing, as Section 52 (3) RTA requires, would presuppose that there was an existing or potential liability for the tenants to avoid.

43 The 2012 amendment to the Water Act was not expressed as being retrospective and, by reason of Section 14 (2) of the Interpretation Legislation Act 1984, therefore did not affect existing rights and obligations under RTA.

44 Since that amendment the liability of any tenant to pay for water usage can only arise under Section 52 RTA if the requirements of Section 273A of the Water Act have been met.

45 Section 273A of the Water Act, as it now stands, was introduced by the Water Amendment (Governance and other reforms) Act 2012 which came into law before the 2012 tenancy commenced.

46 Prior to that amendment, from 1993, the Water Act had provided that it was the responsibility of the occupier of property to advise the relevant water authority that it was the occupier of the premises and if the occupier did not do so it would be liable for charges for water consumed since the water meter at the premises had last been read.

47 At no time in or after 2012 and prior to 2017 did the applicant give YVW the notice Section 273 A (c) requires and so she did not comply with that Act.

48 There is no provision of RTA which provides that a landlord must comply with the Water Act provisions and cannot be held or remain responsible for water usage charges; in my finding that is exactly what the applicant has brought upon herself.

49 When the 2012 tenancy agreement was signed it created a new and separate tenancy, created after the introduction of the 2012 amendment to the Water Act which imposed upon the applicant the obligation to advise YVW that the tenants were occupiers with effect from November 2012.

50 The terms of the 2012 agreement requiring the tenants to pay for water, in the light of the above findings and conclusions, would amount to the inclusion of an illegal term s imposing an obligation which did not exist under RTA.

51 The applicant seeks to require strict compliance with the terms of the 2012 agreement but does not acknowledge what the Tribunal regards as her strict obligation under the Water Act.

52 On these bases the application is dismissed.

Hugh T Davies
Member

SCHEDULE OF LEGISLATION

THE RESIDENTIAL TENANCIES ACT 1997 ("The Act")

Section 27 Invalid terms

(1) Subject to subsection (3), a term of a tenancy agreement is invalid if it purports to exclude, restrict or modify or purports to have the effect of excluding, restricting or modifying—

(a) the application to that tenancy agreement of all or any of the provisions of this Act; or

(b) the exercise of a right conferred by this Act.

(2) A term referred to in subsection (1) includes a term that is not set out in the tenancy agreement but is incorporated in it by another term of the tenancy agreement.

(3) Subsection (1) does not apply to a term of a standard form tenancy agreement for a fixed term of more than 5 years that is inconsistent with, or varies the requirements of, this Part.

(4) A provision in a written tenancy agreement or any other agreement that requires a party to a written tenancy agreement to bear any fees, costs or charges incurred by the other party in connection with the preparation of the tenancy agreement is invalid.

Section 52 Tenant's liability for various utility charges

A tenant is liable for—

(b) the cost of all water supplied to the rented premises during the tenant's occupancy if the cost is based solely on the amount of water supplied and the premises are separately metered;

(d) all sewerage disposal charges in respect of separately metered rented premises imposed during the tenant's occupation of the rented premises by a water corporation under the **Water Act 1989** ;

Section 53 Landlord's liability for various utility charges

(2) A landlord may agree to take over liability for any cost or charge for which the tenant is liable under section 52.

(3) An agreement under subsection (2) must be in writing and be signed by the landlord.

Section 55 Reimbursement

(1) If a landlord pays for anything for which the tenant is liable under section 52, the tenant must reimburse the landlord within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(3) Subsection (1) does not apply if there is an agreement to the contrary under section 53.

Section 68 Landlord's duty to maintain premises

(1) A landlord must ensure that the rented premises are maintained in good repair.

WATER ACT 1989 –

Section 273A Liability of occupier

(1) The occupier of property is liable for any water usage charge or sewage disposal charge imposed in respect of the property if—

(a) the property is—

(i) within the meaning of the **Residential Tenancies Act 1997** let to a tenant under a tenancy agreement; and

(b) the quantity of water supplied to the property is measured by a meter provided or installed by an Authority that only measures that quantity; and

(c) the owner has notified the Authority that the property is so occupied or is such a site and has given the Authority the particulars of the occupier required by the Authority; and

(d) the Authority has recorded the reading on the meter measuring the quantity of water supplied to the property as a result of a notice under paragraph (c).

(2) The Authority must ensure that the reading on the meter measuring the quantity of water supplied to the property is recorded—

(a) within 48 hours after the Authority is given notice under subsection (1)(c); or

(b) as soon as practicable after the Authority is given notice under subsection (1) (c)—

whichever occurs last.

INTERPRETATION OF LEGISLATION ACT 1984 –

Section 14

(2) Where an Act or a provision of an Act—

(a) is repealed or amended; or

(b) expires, lapses or otherwise ceases to have effect—

the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision shall not, unless the contrary intention expressly appears—

(c) revive anything not in force or existing at the time at which the repeal, amendment, expiry, lapsing or ceasing to have effect becomes operative;

(d) affect the previous operation of that Act or provision or anything duly done or suffered under that Act or provision;

(e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision;