Civil and Administrative Tribunal

New South Wales

Case Name:	Pan v Malveholm
Medium Neutral Citation:	[2021] NSWCATAP 101
Hearing Date(s):	13 April 2021
Date of Orders:	22 April 2021
Decision Date:	22 April 2021
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member J Kearney, Senior Member
Decision:	1. Appeal upheld. 2. The decision of the Tribunal at first instance is set aside. 3. The whole of the case as originally put to the Tribunal is to be re-determined by the Tribunal as originally constituted in accordance with law and these reasons. 4. The re-determination of the case should occur without further evidence from the parties unless the Tribunal otherwise grants leave. 5. The parties are to be afforded the opportunity to make further submissions to the Tribunal prior to the re-determination of the matter.
Catchwords:	LEASES AND TENANCIES – excessive rent – reduction or withdrawal of goods, services or facilities – reduction or withdrawal must be by the landlord – covenant to provide the residential premises in a reasonable state of cleanliness and fit for habitation - covenant to provide and maintain the residential premises in a reasonable state of repair
Legislation Cited:	Residential Tenancies Act 2010 (NSW), ss 44(1)(b), 52(1)-(1B), 63

	Residential Tenancies Act 1987 (NSW), s 47(1)
Cases Cited:	Cominos v Di Rico [2016] NSWCATAP 5 Eliezer v Residential Tribunal (2001) 53 NSWLR 657; [2001] NSWSC 1092 Roberts v NSW Aboriginal Housing Office [2017] NSWCATAP 9
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Kristy Pan (Appellant) Sanna Malveholm (First Respondent) James Pralija (Second Respondent)
Representation:	E Quach (Agent) (Appellant) Second Respondent (on behalf of both Respondents)
File Number(s):	2021/00056064 (AP 21/03841)
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	7 January 2021
Before:	A Lynch, Deputy Divisional Registrar (Conciliation)
File Number(s):	RT 20/37331

REASONS FOR DECISION

1 This is an appeal by a landlord from orders of the Tribunal requiring the landlord to pay the tenants $4,840 as a refund of excessive rent due to a reduction or withdrawal by the landlord of certain services or facilities provided with the residential premises, and $400 as compensation for damage to clothing.

2 In our opinion the Tribunal did not apply the correct legal principles in relation to the claim for a reduction or withdrawal by the landlord of certain services or facilities under s 44 of the *Residential Tenancies Act 2010* (NSW) (the "RTA") and, erroneously, did not apply its mind to whether the tenants were (instead) entitled to compensation (rather than a refund of excessive rent), for example under s 52 of the RTA. In certain respects, the Tribunal's reasons also appear inadequate.

3 In relation to the reduction or withdrawal of certain services or facilities, the Tribunal erred in failing to recognise that under s 44 it is only reductions or withdrawals of goods, services or facilities *by the landlord* which allow for an order that rent payable under a tenancy agreement is excessive. In this case part or all of the relevant reductions or withdrawals of services or facilities were, as we read the Tribunal's reasons, caused not by the landlord but by the body corporate or the two tenants or all three.

4 In addition, some of the problems complained of appear to have existed from the beginning of the tenancy (although the reasons are not entirely clear on this point). If so, s 44 of the RTA would not apply as that section concerns *reductions* or *withdrawals* of services or facilities i.e. something less than existed at the commencement of the tenancy. Further, the nature of the problems (and the fact they existed at the time of the commencement of the tenancy) suggest there may have been breaches of s 52 or s 63 of the RTA, a claim not considered by the Tribunal.

Background

5 The parties entered into a 12-month residential tenancy agreement which commenced on 17 September 2019. The tenants continued to reside at the premises on a periodic agreement at the conclusion of the 12-month term.

6 The problems complained of were water entry, mould and electricity supply in the kitchen and living room (which the evidence suggested were on one circuit).

7 The Tribunal said that there was some overlap between the tenants' claims, but essentially there was a claim for $10,500 for loss of income, a claim for a rent reduction and a claim for $400 for compensation for damage to goods.

8 The Tribunal said that oral evidence was provided by the second respondent, Mr Pralija, at the hearing (we were not provided with a sound recording or transcript of that evidence). The Tribunal said that Mr Pralija's oral evidence was that when the tenants moved into the apartment there was some evidence of mould that was noted on the ingoing condition report dated 19 September 2019. The tenants outlined their concerns with the property by email dated 19 September 2019 (2 days after the commencement of the tenancy). Mr Pralija said that there was then a succession of problems with leaks and mould in the property evidenced by the substantial amount of correspondence between the tenants and the landlord's agent.

9 The landlord had offered since September 2020 to conduct a mould clean as recommended by an expert (Mould Pro), however the tradesmen were unable to gain access to the premises to conduct that work. In his evidence Mr Pralija acknowledged that the mould clean offered by the landlord had not been done because the tenants had refused access to the tradesmen as the first respondent had been involved in a motor vehicle accident and she had suffered injuries as a result of the accident.

10 The water leaks complained of intruded into two rooms: the main bedroom and the main living area. The Tribunal found that:

> "… since the commencement of the tenancy, there has been a leak from the balcony causing water to enter the property in the main bedroom and the main living area. Both the landlord's agent and the tenant agreed that the issue with the main bedroom had been resolved and the carpet replaced in the main bedroom."

11 That left the problem with water entering the main living area. The Tribunal said that:

> "Both parties in their evidence agree that water enters the main living room each time it rains. This has caused mould in the main living room carpet as shown in the photographs provided by the tenant. The landlord conceded the need to replace the carpet (email of 7 May 2020 to confirm quote p86) but has delayed doing so until the balcony repair is complete. There is also an ongoing issue with the air conditioning unit and mould in other areas of the unit. This in part has not been rectified since 1 September 2020 as the tenants have not allowed access."

12 The reference to “the balcony repair” is a reference to a repair by the body corporate which had accepted that it was responsible for repairing that leak. In relation to that issue the Tribunal said:

> “The report of Mr Davies about the water leak establishes there is a leak between the base of the sliding door frame and tile floor resulting in carpet damage and leaking from the balcony into the main living area. Email evidence from the landlord's agent shows strata accepted responsibility for the repair on 18 August 2020 (p100). The repair was followed up by the landlord's agent until 30 September 2020 when it appeared three quotes were obtained by strata and were being considered however the repairs have not been done to date.”

13 The Tribunal said that Mr Pralija stated that, because the balcony had leaked since the commencement of the tenancy, and despite continuous discussions and promises to repair, water entered the property through the balcony door into the main living area every time it rained.

14 The Tribunal said that this resulted in a long running damp issue, mould issues and a constant damp smell in the property. The Tribunal said that there was mould in the air conditioning unit and in the bathroom as a result of inadequate ventilation, and that those matters had significantly reduced the amenity of the property for the tenants.

15 The Tribunal said that the tenants claimed that as a result of those problems the rent was excessive and should be reduced by $210 per week. The claim for loss of income was not pressed. The Tribunal said that despite attempts to resolve those issues, and a “revolving door of tradespeople”, the main balcony leak and the ventilation issues had not been repaired.

16 The Tribunal said that the landlord submitted that she believed that the number of dogs in the property were contributing to the ventilation and humidity within the property. The Tribunal dismissed that submission because there was no independent evidence to support the proposition that the presence of the dogs in the property contributed to the mould or lack of ventilation in the property. The Tribunal said that in those circumstances it found that the presence of dogs did not contribute to the mould and smell in the property.

17 The Tribunal said that Mr Pralija also gave evidence in relation to an electrical issue in the property, stating that if more than one appliance was used in the kitchen for example, the electricity shut off.

18 As we have noted at [10] above, the Tribunal found that there had been a leak from the balcony causing water to enter the property in the main bedroom and the main living area "since the commencement of the tenancy", with the main bedroom water entry repaired and the carpet in that room replaced.

19 The carpet in the main living area required replacement, and the landlord was willing to do so, but not until the body corporate fixed the water entry into that area. At least some of the mould had not been cleaned because the tenants denied the tradesmen access.

20 The Tribunal reasoned as follows:

> "20. I find, based on the independent reports, that there is a failure to properly repair the leak and ventilation issues with the property. There is mould throughout the property and a smell of mould in the property as per the Mould Pro report. The carpet in the main living area has not been replaced, a new exhaust fan has not been installed in the second bathroom, and humidifiers have not been installed to reduce the humidity and mould in the property. I accept and the tenant confirmed that as a result of Ms Malevhon's motor vehicle accident in September 2020 they have not allowed the mould clean to be done.
>
> 22. There is no independent evidence that suggests that the water pressure clean or the presence of the dogs in the property has contributed to the mould or lack of ventilation in the property. In the circumstances I do not find they have contributed to the mould and smell in the property.
>
> 23. I find that, although the owner has made some efforts through their agent to ask strata to attend to repairs, the fact that this property has had these issues since the commencement of the tenancy in September 2019 is evidence there were insufficient efforts to resolve the problems.
>
> 24. The agent has obtained quotes for some repairs to the electrical circuits (Page 122 of landlord's evidence) and, although I do not find this is as significant an issue as the water and mould, it has contributed to an ongoing loss of amenity of the property. I find, based on the oral evidence of Mr Pralija and the electrical quote supporting his claim, that the kitchen and living rooms are only on one circuit. This amounts to a partial withdrawal of services as well as the electricity is cutting out with use of more than one appliance.
>
> 25. The landlord has withdrawn services in accordance with Section 44 by failing to repair the leak and by not replacing carpet, electrical issues and the significant delay in attending to the mould clean. There has been a continued loss of amenity to the property with the smell and visible mould in the property. The tenant pays an amount of $800 per week in rent. I find that the rent is excessive in light of the failure to repair and the loss of amenity to the property.

> The Tribunal can only make an order for a period of 12 months pursuant to Section 44 therefore the rent should reduce from 7 January 2020 to no more than $700.00 per week. From 1 September 2020 when the landlord was prepared to attend to the mould clean the rent should be reduced to $720.00 per week for 18 weeks up to the date of the hearing. This amounts to a deduction in rent for 34 weeks of $100.00 per week ($3400) and a deduction in rent for 18 weeks of $80.00 per week ($1440). The landlord is to refund this sum to the tenant of $4840.
>
> 26. In relation to the claim for $400.00 for compensation for damage to the clothing, I rely on the photographs and oral evidence of the tenant, Mr Pralija to find that there has been some damage as a result of mould on his clothing. There has been a breach of the tenancy agreement due to the failure to repair to allow for an award of compensation. I do not have any accurate way to estimate the loss so in the circumstances will allow the amount of $400 claimed. The cost is a reasonable cost as to even clean the mould from the clothing evidenced in the photographs would amount to the sum claimed.
>
> 27. The tenant claimed under various provisions. However, there is some overlap between the provisions so I have relied on Section 44 of the Act to cover the claims for compensation or loss claimed other than the specific damage to goods prior to the date of the hearing. The claim for economic loss is not sufficiently foreseeable, nor established by any evidence so I decline to make any orders in relation to loss of income. I do not find the property is uninhabitable or partially uninhabitable as required to make orders under Section 45 as the tenants have chosen to continue to reside in the property and the water ingress is arising from rain events so is not continuous. The mould issues will be somewhat resolved with the mould clean."

21 The result was that the Tribunal awarded the tenants $4,840 as a refund of excessive rent and a further $400.00 for damage to Mr Pralija's suits.

Relevant Provisions of the Residential Tenancies Act

22 Three provisions of the RTA are relevant to this appeal: s 44(1)(b), s 52(1)-(1B) and s 63.

23 Section 44(1)(b) says:

> **44 Tenant's remedies for excessive rent**
>
> (1) Excessive rent orders The Tribunal may, on the application of a tenant, make any of the following orders—
>
> (a) …
>
> (b) an order that rent payable under an existing or proposed residential tenancy agreement is excessive, having regard to the reduction or withdrawal **by the landlord** of any goods, services or facilities provided with the residential premises and that, from a specified day, the rent for residential premises must not exceed a specified amount.
>
> (Emphasis ours)

24 Section 52(1)-(1B) says:

52 Landlord's general obligations for residential premises

(1) A landlord must provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant.

(1A) Without limiting the circumstances in which residential premises are not fit for habitation, residential premises are not fit for habitation unless the residential premises—

(a) are structurally sound, and

(b) …

(c) have adequate ventilation, and

(d) are supplied with electricity or gas and have an adequate number of electricity outlet sockets or gas outlet sockets for the supply of lighting and heating to, and use of appliances in, the premises, and

(e) – (g) …

(1B) For the purposes of subsection (1A)(a), residential premises are structurally sound only if the floors, ceilings, walls, supporting structures (including foundations), doors, windows, roof, stairs, balconies, balustrades and railings—

(a) are in a reasonable state of repair, and

(b) with respect to the floors, ceilings, walls and supporting structures—are not subject to significant dampness, and

(c) with respect to the roof, ceilings and windows—do not allow water penetration into the premises, and

(d) ...

25 Section 63 says:

63. Landlord's general obligation

(1) A landlord must provide and maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.

(2) A landlord's obligation to provide and maintain the residential premises in a reasonable state of repair applies even though the tenant had notice of the state of disrepair before entering into occupation of the residential premises.

(3) A landlord is not in breach of the obligation to provide and maintain the residential premises in a reasonable state of repair if the state of disrepair is caused by the tenant's breach of this Part.

(4) This section is a term of every residential tenancy agreement.

26 Although not identical, one can see that there is significant overlap between the obligations of landlords under ss 52 and 63.

The Appeal

27 The appellant appealed on a number of grounds, one of which was that the Tribunal erred in applying s 44 of the RTA to the ingress of water into the main living area because the fault was the responsibility of the body corporate, and not the landlord.

28 We have also examined the material – as we are required to do per the holding in *Cominos v Di Rico* [2016] NSWCATAP 5 at [13] and like cases - and discerned otherwise in the Tribunal's decision.

29 As we agree with the appellant's submission noted above, together with the additional errors we have identified, and because the appropriate remedy to grant in light of those errors is for the matter to be remitted to the Tribunal as originally constituted to be determined in accordance with law and these reasons, there is no need to consider the other grounds of appeal.

30 Section 44(1)(b), in terms, applies to the reduction or withdrawal *by the landlord* of any goods, services or facilities.

31 Its statutory predecessor was s 47(1) of the *Residential Tenancies Act 1987* (NSW). That section was in these terms:

> 47(1) A tenant under a residential tenancy agreement may, at any time, apply to the Tribunal for an order declaring that the rent payable under a residential tenancy agreement or a proposed residential tenancy agreement for residential premises already occupied by the tenant is excessive, having regard to the reduction or withdrawal by the landlord of any goods, services or facilities provided with the premises."

32 It will be noted that the words "having regard to the reduction or withdrawal by the landlord of any goods, services or facilities provided with" are identical in both s 44(1)(b) and s 47(1).

33 McClellan J considered s 47(1) in *Eliezer v Residential Tribunal* (2001) 53 NSWLR 657; [2001] NSWSC 1092. In that case the tenants complained of great inconvenience caused by the occupants of a nearby dwelling. The tenants commenced proceedings against the landlords in the Residential Tribunal seeking an order pursuant to s 47 of the *Residential Tenancies Act 1987* that the rent payable was excessive due to the reduction by the landlords of facilities provided with the premises, and an order pursuant to s 16 of the

Residential Tenancies Act that the landlords pay $1000 as compensation for breach of their contractual obligation to provide quiet enjoyment. His Honour recorded the relevant part of the decision of the Tribunal as follows:

> "[28] The Tribunal also turned attention to s 47 of the Act and concluded that the expression "goods, services or facilities provided with the premises" does not extend to matters which were not within the effective control of the landlord.
>
> [29] Attention was drawn to the discussion in Anforth, "Residential Tenancies Law and Practice New South Wales", LBC, Sydney, 1998 at 157–158, and the Tribunal member expressed the conclusion that: "A landlord who owns one lot in a strata scheme could not provide, and could not agree to provide, neighbouring flats and common property free of noisy persons".
>
> [30] The conclusion was effectively that the landlord was not required by s 47 to take steps to control or exclude noise created by strangers. It was concluded that the obligation in s 47 is limited to facilities over which the landlord has physical control."

34 His Honour decided that s 47 did not apply to the actions of people other than the landlord. His Honour held, at [37]:

> "With respect to s 47, I agree with the construction of the Residential Tribunal of the words "goods, services or facilities provided". In my opinion, s 47(1) is confined to the physical and other facilities, goods or services, provided within, or as part of, the tenanted property, **and only if the landlord reduces or withdraws those facilities does an obligation arise**. In circumstances where there has been a reduction in the quality of the amenity to be enjoyed in the tenanted premises by the actions of a third party, a complete stranger to the tenanted property, no breach of s 47(1) can occur."
>
> (Emphasis ours)

35 We can see no reason why s 44(1)(b) of the RTA should be interpreted any differently.

36 In this case, as we read the Tribunal's reasons, the tenants were responsible for part of the loss of amenity complained of because they declined to allow tradesmen to enter the premises to clean the mould.

37 It is true that the Tribunal recognised that fact and altered the weekly reduction of rent from $100 to $80, but there were no reasons given by the Tribunal why a $20 difference was considered appropriate given the apparent significance of the loss of amenity caused by the mould compared to the other reduction or withdrawal of services or facilities.

38 It is also true to observe that assessing such figures is evaluative and necessarily impressionistic, but in our opinion, something needed to be said to give the reader of the reasons some idea what was in the Tribunal's mind in reaching that amount, particularly when the RTA sets out in s 44(5) a non-exclusive list of facts to be considered where s 44 is applicable.

39 In addition, the continual entry of water, which impliedly was a cause of the continuing mould, was, on the Tribunal's reasons, the result of a failure by the body corporate and not the landlord to repair the leak. As it is our opinion that s 44(1)(b) should be interpreted in the same way as McClellan J interpreted its predecessor, the failure to repair that leak and the resultant loss of amenity cause by it could not be laid at the feet of the landlord under s 44.

40 Thus, the Tribunal erred in that respect and, subject to the exception we shall later mention, the matter will need to be re-determined. We are unable to re-determine the matter ourselves because the landlord did not lodge and serve the material upon which intended to rely on the appeal (contrary to the directions given to it), and the tenants' material did not reach us before the hearing of the appeal. Thus, we do not have the documentary evidence which was before the Tribunal (consisting of some 500 pages) nor were we provided with a sound recording or transcript of the oral evidence. Accordingly, the matter should be returned to the Tribunal as originally constituted to be re-determined.

41 However, a little more must be said.

42 The Tribunal appears to have found that the leaks existed from the commencement of the tenancy. If so, those leaks and any mould then present would need to have been taken into account because s 44(1)(b) only applies to a "reduction or withdrawal" of services or facilities. Section 44 does not establish some standard of condition against which premises are to be judged, such standards are expressed elsewhere in the RTA such as in, for example, ss 52 and 63.

43 In *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 the Appeal Panel held, in relation to s 44(1)(b), at [124]:

> "As to what constitutes a reduction, in our view this means the goods, services or facilities are of a qualitative or quantitative standard which is less than what a landlord is required to provide under a residential tenancy agreement. On the other hand, a withdrawal suggests there must be a removal or inability to use the particular goods, services or facilities. That is, the goods services or facilities or part of them are no longer available to a tenant."

44 In relation to whether the presence of mould might be caught by the obligation set out in s 63 (and perhaps s 52) the Appeal Panel in *Roberts* held at [113]:

> "There is no doubt a landlord is under an obligation to carry out all repairs necessary to maintain the premises in a reasonable state of repair: see s 63 of the RT Act. The obligation to repair includes an obligation to make good and maintain internal surfaces affected by mould which is caused by defects in the exterior of the premises."

45 In relation to the problem with an electrical circuit, it is not clear whether the problem existed at the time the tenancy commenced or subsequently. If it existed at the time the tenancy commenced, then one would think s 44 would not have applied as nothing was "reduced" or "withdrawn" from the time the tenancy commenced. However, as with the mould, the problem with the circuit may have been caught by ss 52 or 63 or both.

46 Sections 52 and 63 are in different terms to s 44(1)(b), and may or may not apply in this case, but those sections should have been considered as required by *Cominos v Di Rico* and like cases.

47 For those reasons the decision below will be set aside and will need to be re-determined with the exception of one matter.

48 That matter is the finding by the Tribunal that the presence of dogs in the property did not contribute to the mould and smell in the property. The Tribunal made that finding given the lack of independent evidence and the landlord has not demonstrated on this appeal that that finding was incorrect. Therefore, no further effort or expense should be incurred in litigating that matter and, in accordance with these reasons and Order 3, that finding should not be revisited.

49 As the parties should be given the opportunity to make further submissions to the Tribunal, we shall make an order to allow for that to happen. Otherwise, the parties should be confined to the evidence which was given to the Tribunal at

first instance (both documentary and oral) unless the Tribunal grants leave otherwise.

Orders

50 We make the following orders:

(1) Appeal upheld.

(2) The decision of the Tribunal at first instance is set aside.

(3) The whole of the case as originally put to the Tribunal is to be re-determined by the Tribunal as originally constituted in accordance with law and these reasons.

(4) The re-determination of the case should occur without further evidence from the parties unless the Tribunal otherwise grants leave.

(5) The parties are to be afforded the opportunity to make further submissions to the Tribunal prior to the re-determination of the matter.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar

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