



Civil and Administrative Tribunal
New South Wales

Case Name: Stokes v Zarimis

Medium Neutral Citation: [2021] NSWCATCD 23

Hearing Date(s): 30 April 2021

Date of Orders: 8 June 2021

Decision Date: 7 June 2021

Jurisdiction: Consumer and Commercial Division

Before: J Rose, General Member

Decision: The application is dismissed because, having considered the material placed before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established.

Catchwords: LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Rent — abatement of rent — whether premises became partly uninhabitable during the term of the tenancy agreement
LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Repairs

Legislation Cited: Residential Tenancies Act 1997 (ACT)
Residential Tenancies Act 2010 (NSW)
Residential Tenancies Regulation 2019 (NSW)

Cases Cited: Beerby v NSW Department of Housing [1996] NSWRT 216
Briginshaw v Briginshaw (1938) 60 CLR 336
De Soleil v Palmhide Pty Ltd [2010] NSWCTTT 464
Finn v Finato [2004] NSWCTTT 179
Gray v Queensland Housing Commission [2004] QSC 276
Hampel v South Australian Housing Trust [2007] SADC

64

Mohr v Marks [1991] NSWRT 172

Morgan v Liverpool Corporation [1927] 2 KB 131

Proudfoot v Hart (1890) 25 QBD 42

Re Newal [2003] ACTSC 31

Summers v Salford Corporation [1943] AC 283

Tabert v NSW Land and Housing Corporation [2001]
NSWCA 182

Warner v Hung, in the matter of Bellpac Pty Limited
(Receivers and Managers Appointed) (In Liquidation)
(No 2) [2011] FCA 1123

Texts Cited: Nil

Category: Principal judgment

Parties: Josie Stokes (Applicant)
Elisse Zarimis (Respondent)

File Number(s): RT 21/06235

Publication Restriction: Nil

REASONS FOR DECISION

- 1 These proceedings arise out of a residential tenancy agreement (the tenancy agreement) between the applicant (the tenant) and the respondent (the landlord) concerning a residential apartment at Matraville NSW (the premises). The premises is part of a larger apartment building strata-titled. The tenant continues to occupy the premises.
- 2 By her application lodged on 10 February 2021, the tenant has sought orders:
 - (1) reducing the rent payable on the grounds that the premises are unusable or uninhabitable or destroyed; and
 - (2) that the landlord carry out repair as to the premises, pursuant to ss 45 and 65(1)(a) of the *Residential Tenancies Act 2010* (NSW) (the RT Act).
- 3 As set out in the “Reasons for the Order/s” panel on the application form, the tenant alleges that the shower in the main bedroom en-suite has not been usable since the commencement of the tenancy agreement on 24 July 2020 in that water shower walls against the south-facing wall and does not float

towards the shower drain, over tops the installed metal strip in the shower and subsequently slides the bathroom floor. She seeks a rent reduction of \$100 per week out of her current rent of \$620 per week until repair works are completed to rectify the drainage issue or the end of the tenancy agreement, whichever occurs first. She also seeks to argue that the landlord is obliged to repair the premises by installing a shower screen door with a plastic guard, to prevent water escaping from the shower.

- 4 The landlord opposes the orders sought. She argues that the works claimed by the tenant are not a repair but constitute an improvement of the premises which the landlord is not obliged to do. She denies that the en-suite is uninhabitable and therefore denies that the tenant is entitled to the asserted rent reduction.
- 5 Conciliation was in the Tribunal on 3 March 2021, but was not successful. The Tribunal then adjourned to for this hearing and made orders for the parties to provide to each other and to the Tribunal copies of all documents on which they intended to rely at this hearing, including witness statements from parties' witnesses. The tribunal also noted that the legislation sets out the matters which the Tribunal may consider in determining an application that the rent excessive and provided a list of the evidence the parties may choose present.

THIS HEARING

- 6 In accordance with the Tribunal's response to the current COVID-19 pandemic emergency, this hearing was conducted by telephone and lasted about 90 minutes. The tenant appeared on her own behalf. The landlord was represented at the hearing by her managing agent, Savina Tambouras of Century 21 Real Estate at Maroubra (the managing agents).
- 7 At the start of the hearing the tenant confirmed that she continued to seek the repair orders and the order for the abatement of rent from 29 July 2020 onwards. Ms Tambouras confirmed that the landlord opposed those orders.

THE COMMON GROUND BETWEEN THE PARTIES

- 8 It was common ground between the parties (and I find accordingly) that:

- (1) The parties entered into a written tenancy agreement for the premises for a term of 52 weeks starting on 24 July 2020 and ending on 22 July 2021.
- (2) Rent is payable under the tenancy agreement at the rate of \$620 a week.
- (3) The premises includes an en-suite bathroom to the main bedroom, which included a shower recess, a wash basin and toilet. There is a small shower screen mounted on the wall between the shower head and the wash basin. There is a floor drain in the shower and the 2nd drain in the vicinity of the wash basin.

THE ISSUES TO BE DETERMINED

9 The issues to be determined in the proceedings are:

- (1) Have the premises become wholly or partly uninhabitable otherwise than as a result of a breach of an agreement, within the meaning of s 43(2) of the RT Act?
- (2) If yes to (1), should the Tribunal make an order determining the amount of rent payable? If yes, at what amount should the rent be determined?
- (3) Has the landlord breached the obligation under s 63 of the RT Act to maintain the premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises?
- (4) If yes to (3), should the Tribunal make an order that the landlord carry out repairs to the shower in the en-suite bathroom? If yes, what repairs should be ordered?

10 The tenant, being the party making the claim in the proceedings, has the burden of proving her claim to the civil standard, being the balance of probabilities. The landlord only has the burden of proving any affirmative defence that she raises to the tenant's claims, which must be proved to the same standard.

11 When proof of a fact is required, the Tribunal must feel an actual persuasion of the occurrence or existence of that fact before it can be found. Actual persuasion is achieved where the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. Reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences: *Warner v Hung, in the matter of Bellpac Pty Limited (Receivers and Managers Appointed) (In Liquidation) (No 2)* [2011] FCA 1123 at [48], per Emmett J, citing *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2.

THE EVIDENCE

12 The tenant relied on the bundle of documents provided to the landlord and lodged with the Tribunal on about 16 March 2021, which was marked as exhibit T1. The tenant's documents included:

- (1) a chronology of significant events prepared by the tenant, which I have taken to be the tenant's witness statement and her submissions;
- (2) a bundle of photographs said to show water spillage in the en-suite after a shower;
- (3) copies of advertisements for similar properties in the locality;
- (4) a statement setting out various medical issues affecting the tenant and including an extract of what appears to be a report from Dr Robert Ward (undated);
- (5) a bundle of email correspondence between the tenant and the managing agents, dated variously between 29 July 2020 and 10 February 2021, some attaching further photographs; and
- (6) an invoice from Sydney City Plumbing Services will addressed to the managing agents, dated 11 November 2020, for a service call at the premises.

The tenant also lodged with the Tribunal an extract of part of the tenancy agreement between the parties.

13 The tenant's chronology of significant events set out a narrative of the email communications between the tenant and the managing agents between 29 July 2020 and 10 February 2021. It also recorded that Sydney City Plumbing replaced an existing metal strip in the bottom of the shower and installed a water-reducing showerhead on 11 November 2020.

14 The landlord did not object to any of those documents being used in evidence in these proceedings.

15 The tenant did not adduce any oral evidence in support of her application, although she made extensive oral submissions about the matter. The landlord also did not seek to question the tenant on the evidence.

16 The landlord relied on the bundle of documents provided to the tenant and lodged with the Tribunal on about 1 April 2021, which was marked as exhibit L1. The landlord's documents included:

- (1) a written statement from the landlord, dated 30 March 2021;

- (2) extracted pages from a strata defect report in respect of the building;
 - (3) a bundle of email correspondence between the managing agents and the tenant, dated variously between 2 September 2020 and 10 February 2021;
 - (4) a quote from Sydney City Plumbing Services dated 1 August 2020 in relation to drainage in the shower in the en-suite;
 - (5) an email from the building manager to the managing agent, dated 13 October 2020;
 - (6) a tax invoice from Quick Plumber Plumbing Services addressed to the strata manager, dated 1 October 2020 in respect of investigations in the shower in the en-suite;
 - (7) the invoice from Sydney City Plumbing Services dated 11 November 2020, referred to above; and
 - (8) a bundle of photographs showing a metal step installed in the shower on or about 11 November 2020.
- 17 The landlord's statement expressed the opinion that the bathroom is designed to be modern and minimalist, with an open shower (with no door but instead of glass divider), and that the design means that some water may fall outside shower onto the bathroom floor which is a designated wet area. She asserted that this was not a defect, fault or issue that required a repair. She asserted that she and her husband lived in the apartment for 4 years between 2014 and 2018 and that the en-suite bathroom was used several times today, without this being an issue. She also said that the apartment was leased to a small family between August 2018 and July 2020 and that no complaint was raised by them regarding the operation of the shower. She further expressed the opinion that installing a custom shower screen was a costly exercise that was far from straightforward and that it may not address the tenant's concern about wet tiles outside the shower area. She refuted the tenant's claim that the bathroom was unusable, arguing that the claim was exaggerated and/or untrue.
- 18 The tenant did not object to any of those documents being used in evidence in these proceedings.
- 19 The landlord did not adduce any oral evidence in defence of the application, although her managing agent made extensive oral submissions about the matter. The tenant also did not seek to question the landlord or the managing agent on the evidence.

- 20 I should note at this point that neither party has produced a copy of the ingoing condition report that would have been prepared at the commencement of the tenancy agreement, and which would have contained evidence about the condition of the en-suite bathroom at the commencement of the tenancy agreement.

JURISDICTION

- 21 Section 45 of the RT Act gives the Tribunal power to make an order determining the amount of rent payable if the rent is abated under s 43(2) of the RT Act – including because the premises have become wholly or partly uninhabitable *otherwise* than as a result of a breach of the tenancy agreement.
- 22 Sections 65 and 187(1)(e) of the RT Act gives the Tribunal power to make an order for the landlord to carry out specified repairs to premises that are subject to a residential tenancy agreement that is regulated by the RT Act.
- 23 I am satisfied on the evidence that there was a residential tenancy agreement between the parties that was regulated by the RT Act and that the Tribunal has jurisdiction to hear and determine this dispute. I am also satisfied that the relief claimed by the parties is within the jurisdiction of the Tribunal.

THE APPLICABLE LAW

- 24 Sections 43(2) and 45 of the RT Act contain provisions for the abatement of rent if residential premises under a tenancy agreement (amongst other things) became wholly or partly uninhabitable other than as a result of a breach of an agreement. Those sections relevantly provide:

43 Rent reductions

- (1) ...
- (2) **Premises unusable** The rent payable under a residential tenancy agreement abates if residential premises under a residential tenancy agreement are--
- (a) otherwise than as a result of a breach of an agreement, destroyed or become wholly or partly uninhabitable, or ...
- (3)
- (4) **Effect of section** This section does not limit the rights of landlords and tenants to agree to reduce the rent payable under a residential tenancy agreement.
- (5) This section is a term of every residential tenancy agreement.

and:

45 Remedies for reduction of rent on frustration of residential tenancy agreement

(1) The Tribunal may, on application by the landlord or tenant, make an order determining the amount of rent payable if the rent is abated under section 43(2).

(2) The Tribunal may order that--

(a) from a specified day, the rent for the residential premises must not exceed a specified amount, and

(b) the landlord must repay to the tenant any rent paid by the tenant since the specified day that is in excess of the specified amount.

Note : The residential tenancy agreement may also be terminated in these circumstances (see section 109).

25 Section 52 specifies the minimum requirements that must be met for residential premises to be fit to live in. These include that the premises (my underlining):

(a) are structurally sound, and

(b) have adequate natural light or artificial lighting in each room of the premises other than a room that is intended to be used only for the purposes of storage or a garage, and

(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) have adequate plumbing and drainage, and

(f) are connected to a water supply service or infrastructure that supplies water (including, but not limited to, a water bore or water tank) that is able to supply to the premises hot and cold water for drinking and ablution and cleaning activities, and

(g) contain bathroom facilities, including toilet and washing facilities, that allow privacy for the user.

26 Sections 63 sets out the landlord's obligation to provide and maintain the residential premises in a reasonable state of repair having regard to certain matters. It provides:

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.

27 Section 65 sets out the circumstances in which the Tribunal may order that the landlord carry out repairs to the premises. It relevantly provides:

65 Tenants' remedies for repairs--Tribunal orders

(1) **Orders for which tenant may apply** The Tribunal may, on application by a tenant, make any of the following orders--

(a) an order that the landlord carry out specified repairs,

...

(2) **Orders for repairs** The Tribunal may make an order that the landlord carry out specified repairs only if it determines that the landlord has breached the obligation under this Act to 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.

(3) In deciding whether to make an order under this section, the Tribunal--

(a) must take into consideration the regulations, if any, made under subsection (6), and

(b) may take into consideration whether the landlord failed to act with reasonable diligence to have the repair carried out.

(3A) The Tribunal must not determine that a landlord has breached the obligation unless it is satisfied that the landlord had notice of the need for the repair or ought reasonably to have known of the need for the repair.

...

(6) **Guidelines relating to reasonable time for repairs** The regulations may provide for guidelines relating to reasonable times within which repairs to, and maintenance of, residential premises required to be carried out by the landlord under the residential tenancy agreement, this Act or any other Act or law should be carried out.

28 No guidelines have been made concerning the reasonable times within which repairs (etc) should be carried out. Accordingly, subsections (3)(a) and (6) can be disregarded in this case.

29 I have considered the parties' claims and defences claims in accordance with these principles.

FINDINGS OF FACT

30 Having weighed and considered the competing evidence before the Tribunal, I am satisfied on the balance of probabilities that the facts of the matter are as follows:

- 31 The premises is a residential apartment. By the words used by the parties describe the premises through the proceedings it appears to have 2 bedrooms and 2 bathrooms, including the en-suite bathroom that is the subject of the tenant's claim.
- 32 While no complete copy of the tenancy agreement was produced in evidence I am satisfied that the tenancy agreement between the parties was in the form prescribed under the Residential Tenancies Regulation 2019 (NSW), possibly with the addition of some special conditions. Leaving aside those possible special conditions I am satisfied that the tenancy agreement provided that:
- (1) the term was 52 weeks starting on 24 July 2020 and ending on 22 July 2021;
 - (2) the rent was \$620 per week, payable in advance;
 - (3) the RT Act and the Residential Tenancies Regulation 2019 applied to the agreement and both the landlord and the tenant must comply with those laws;
 - (4) the tenant agreed to pay the rent on time (clause 3.1);
 - (5) the parties agreed that the rent abated if the premises are destroyed, or become wholly or partly uninhabitable, otherwise than as a result of a breach of the tenancy agreement (clause 8);
 - (6) the parties may agree to reduce the rent payable at any time during the agreement (clause 9); and
 - (7) the landlord agreed to:
 - (a) make sure that the premises are reasonably clean and fit to live in (clause 19.1); and
 - (b) keep the premises in a reasonable state of repair, considering the age of, the rent paid for and the prospective life of the premises (clause 19.3).
- 33 The tenant moved into the premises on about 24 July 2020. On 29 July 2020 she wrote to the managing agents asserting that there were drainage issues in the en-suite shower and the shower over the bath in the second bathroom. She asked the managing agent to arrange a plumber to come and inspect those issues at an early convenience. She did not elaborate on what the drainage issue in the en-suite shower was.
- 34 On 2 September 2020 the tenant wrote again to the managing agent, stating that the leak in the shower over the bath and the second bathroom had been

fixed but the issue in the en-suite shower had not. She asserted that the shower had not been tiled properly and that there was no “fall away” that goes towards the drain, with the consequence that water spills out all over the bathroom floor and out onto the bedroom carpet. She asserted that this was a safety issue, “as I have to walk from the shower to the bedroom over pooling water on slippery tiles”. She asserted that she had not been able to shower in the main bathroom since she moved into the premises due to this issue. She also asserted that the plumber who had visited the premises to fix the other drainage issue said that there were 2 possible solutions: retailing the shower; or installing a door on the shower to prevent water spilling out over the floor and the bedroom carpet. She asked the managing agent to speak to the owner urgently so that the issue could be resolved.

- 35 The tenant has not provided any evidence of water escaping from the en-suite floor onto the carpet in the main bedroom beyond her comment in that email. The photographs produced by the tenant only show water on the tiled floor in the en-suite. In the absence of clearer and more direct more evidence that water from the shower got as far away as the carpet in the main bedroom, I am not satisfied that the water from the shower ran that far.
- 36 The managing agent responded the same day (2 September) at 12:48 PM, stating that the tiles was a major issue which the owners were aware of but were not presently able to address, and that they would try and find an alternative event water from leaking. The tenant responded at 1:04 PM asserting that the shower “could be deemed non-compliant with section 52(1A)(e)(g) of the [RT Act]” – which appears to be a reference to the parts of section 52 that I underlined above in the above quotation.
- 37 On 4 September the managing agent advised the tenant that she had discussed the issue with the strata manager and was waiting for them to confirm if they were responsible for the matter.
- 38 On 1 October 2020 a plumber arranged by the strata manager (Quick Plumb Plumbing Services) attended the premises to investigate the en-suite shower. By his tax invoice, he checked the fall on the floor tiles and found that the fall was correct. He also checked the drain to see if it was blocked, but found that it

was clear. He reported that the small angle on the floor next to the blade shower screen could not withstand the amount of water and overflows and raised the possibility of putting in a bigger angle. He also expressed the opinion that the only fix was to install shower screen door with a plastic card to rectify the issue.

39 The tenant again wrote to the managing agent on 8 October regarding progress of the repairs/solution to the bathroom shower. She noted that it had been over 2 months since she first raised the issue and stated that the Tribunal had suggested that she seek compensation for the past 2 months and a rent reduction of \$150 per week (going forward) until the issue was sorted. The statement is unusual because the Tribunal does not usually give that sort of advice.

40 The managing agent responded to the tenant on 13 October 2020 by providing copies of the building manager's email report of the same date and the Quick Plumb invoice/report referred to above. In his report, the building manager noted that most apartments in the building had the same design en-suite which functioned in the same way.

41 On 14 October 2020, at 7:01 PM, the tenant wrote to the managing agent in response to that email, stating in part:

"Appreciate that update thanks very much.

Given you have tried to sort this for me I shall not be seeking compensation for rent paid during the past 2.5 months.

However, if the shower is not fixed and usable by Wednesday 4th November, I will be formally requesting a rent reduction of \$150 per week until it is fixed.

I hope you understand."

42 On 23 October 2020, at 12:32 PM, the managing agent wrote to the tenant to confirm a conversation held the previous day, that the landlord and the managing agent were looking for an alternative way to rectify the issue in the shower. She indicated that they would try to get it rectified by 4 November and that she had instructed a plumber to re-attend the premises and measure up. She confirmed the tenants advice that the matter was left by the tenant would be seeking a rent reduction of \$150 per week.

- 43 On 11 November, Sydney City Plumbing services re-attended the premises at the request of the managing agent. They installed a water-saving device on the shower head and installed a step made of 25 mm (approximately) square steel tube across the gap between the shower screen in the opposite wall and then used silicon to seal the corners and the internal of the steps to prevent any water from passing through. They advised the tenant not to use the shower for 48 hours so that the silicon could cure to make a water-tight seal. Not long after this the tenant went away for about a month, returning in the second half of December.
- 44 By an email dated 22 December 2020 the tenant confirmed that the plumber had undertaken those works but stated that it had not fixed the problem, adding:

“The water from the shower spills out over small strip (as the drain isn’t effective) and the glass screen is about 40 cm too short to prevent extra flow. The water doesn’t flow into the floor drain and ends up all over the bathroom and takes approximately 24 hours to dry, rendering that bathroom useless.

The plumber provided advice to the owner which has not been followed: “I believe the only fix is to install shower screen door with plastic guard to rectify the issue” I have attached to this email for your reference.

The email attached photographs which showed a thin layer of water which had run on the floor tiles near the toilet and the floor drain that was near the wash basin. The tenant further stated that as the shower was not fixed she had “no choice” but to reduce her rental payments, and would that she would now reduce the payments she made towards rent by \$150 per week from 24 December 2020 “until the shower is fixed in accordance with the plumber’s report”.

- 45 The managing agent responded at 12:33 PM the next day, stating that the landlord was not in a position to install a new shower screen and had exhausted all other possible avenues. She denied the tenant’s request for a rent reduction on the basis that the tenant had full use of the main bathroom. She foreshadowed an application to the Tribunal if the tenant did not pay the rent in full. The tenant and the managing agent then continued to exchange correspondence about the matter over the Christmas-New Year period and into 2021. In doing so, the tenant pressed the point that “adequate drainage” had to

be provided in accordance with the RT Act and that the “independent plumber” had expressed the view that the only fix to rectify the issue was to install a shower screen door with a plastic guard and requested copies of reports from plumbers that certified the en-suite bathroom as safe with the work that had been done.

- 46 On 5 February 2021 the tenant pressed the issue by demanding a rent reduction of \$100 per week until the end of the tenancy agreement or until rectification works were complete, noting that she would lodge an application with the Tribunal if she did not hear back from the managing agent by 11 February. The managing agent continued to deny that the landlord would be reducing the rent or proceeding with further works. She indicated that the landlord would negotiate on termination fees if the tenant was considering breaking the lease in the circumstances. Not happy with the landlord’s position, the tenant lodged her application on 10 February, as stated above.
- 47 I infer from the correspondence and the photographs provided by both parties that the tube that was installed on about 11 November provided a step about 25 mm high, which held back a volume of water in the well of the shower but which did not prevent all the water used in the shower from escaping or being splashed from the shower to the floor of the en-suite. Some water did still escape over the tube step/around the shower screen and form on the tiled floor near the wash basin, the toilet and the floor drain.
- 48 The tenant has not provided any evidence of water escaping from the en-suite floor onto the carpet in the main bedroom beyond her comment in an earlier email. The photographs produced by the tenant only show water on the tiled floor in the en-suite. In the absence of clearer and more direct more evidence that water from the shower got as far away as the carpet in the main bedroom, I am not satisfied that the water from the shower ran that far.

APPLICATION OF THE LAW TO THE FACTS AS FOUND

The claim for a rent reduction

- 49 For the tenant to be entitled to a reduction of rent under s 45 of the RT Act:
- (1) the premises must be (amongst other alternatives) destroyed or become wholly or partly uninhabitable; and

- (2) that destruction (etc) must arise otherwise than as a result of a breach of an agreement: s 43(2)(a)

If the premises become uninhabitable due to a breach on the part of either party, then the innocent party's remedy lies elsewhere in the RT Act: *Mohr v Marks* [1991] NSWRT 172.

- 50 Importantly, ss 43(2)(a) and 45 operate where there has been a change in the condition of premises already under a tenancy agreement, during the term of the tenancy agreement that results in the premises being destroyed or becoming wholly or partly uninhabitable – when they were previously sufficiently habitable. If the premises were not habitable at the start of the tenancy agreement, ss 43(2)(a) and 45 do not apply. Again, the tenant's remedy lies elsewhere in the RT Act as that may have constituted a breach of the landlord's obligation under s 50 of the RT Act, to provide premises that are habitable.
- 51 As set out in *De Soleil v Palmhide Pty Ltd* [2010] NSWCTTT 464, the test of uninhabitability is a difficult one to satisfy and it should not be lightly found by the Tribunal that premises are not fit for habitation.
- 52 Since March 2020 the RT Act has prescribed 7 minimum standards of habitation that all rented premises must have when they are provided to a tenant. The tenant relies on subsections 52(1A)(e) and (g), and asserts that the premises are not fit for habitation because the en-suite bathroom does not have – in her assertion – adequate plumbing and drainage, or bathroom facilities that allow privacy for the user. The tenant asserts that the premises are partly uninhabitable in this way because water from the en-suite shower settles on the tiled floor in the en-suite outside the shower itself. The tenant has not explained how this means that the bathroom facilities in the en-suite do not allow privacy for the user.
- 53 Those minimum standards are only part of the enquiry into whether the premises are fit for habitation. As the opening words in subsection 52(1A) make clear, those minimum standards do not limit the circumstances in which premises may not be fit for habitation. "Fit for habitation" or "habitable" are

terms that have been used in leases and tenancy agreements, and interpreted accordingly for over 150 years.

- 54 For example, it was said in *Proudfoot v Hart* (1890) 25 QBD 42 that “The habitability standard would be concerned with the minimum safety standards echoed in the above cases [not reproduced here], going to both structural and health issues”. Separately, it was also held that premises are habitable where that the state of the premises does not represent a threat to life, limb or health of the tenant: *Morgan v Liverpool Corporation* [1927] 2 KB 131 at 145. Elsewhere, it was held that the term habitable “[imported] some reference to what we call humanity or humaneness” and is of “wide and elastic” meaning to take account “the needs and circumstances of poor people living in confined quarters”: *Summers v Salford Corporation* [1943] AC 283 at 292. In more recent times, the Queensland Supreme Court concluded in *Gray v Queensland Housing Commission* [2004] QSC 276 that “if the state of repair is such that injury is to be expected, or will naturally occur, from the ordinary use of the premises, they cannot be regarded as fit for human habitation.
- 55 In *Finn v Finato* [2004] NSWCTTT 179 the Tribunal held that the requirement for “fit for habitation must import such a state of repair that the premises might be used and dwelt in, not only for safety, but for reasonable comfort, by the class of persons by whom and for the sort of purpose for which, they were to be occupied”. Similarly, Milsteed J stated in *Hampel v South Australian Housing Trust* [2007] SADC 64 at [63]:
- "In my opinion, a house is unfit for human habitation if an occupier could be expected to suffer physical injury or injury to health from the ordinary use of the premises. It may be so unfit for any reason. The risk to health or safety may arise because the premises are in a state of disrepair or dilapidation or because of a lack of facilities such as the provision of adequate water, light, ventilation, and so on."
- 56 The tenant has not persuaded me on the balance of probabilities that the premises were fully habitable at the start of the tenancy agreement (so as to comply with the landlord’s duty under s 50) and that they became partly uninhabitable only days later, when she began to use the shower in the en-suite. On the evidence, the state or condition of the en-suite has not changed since the start of the tenancy agreement except by the addition of the metal

tube step in early November 2020. The tenant does not assert that this step rendered the room uninhabitable. Rather, is the surface water pooling on the floor generated by use of the shower that is said to render the room uninhabitable.

- 57 On the evidence produced by the tenant the degree of pooling of water on the floor in the en-suite is extremely mild. It could easily be sopped up by a floor mat or by a towel each time the shower is used. The tenant has not persuaded on the balance of probabilities that the water that gathers on the floor in the en-suite is sufficiently large, deep or unsafe if those measures are taken for the room to become uninhabitable.
- 58 In my assessment the tenant's evidence is not sufficient for me to conclude that the en-suite bathroom had inadequate drainage within the meaning of s 52(1A)(e) or that it did not allow privacy for the user within the meaning of s 52(1A)(g) of the RT Act. Further, the evidence does not persuade me that the premises became uninhabitable within the general law principles described above. In my view the en-suite is not inherently unsafe or uncomfortable to a level that would render the room uninhabitable.
- 59 Accordingly, this part of the tenant's application must fail.

The claim for a repair order

- 60 As noted above, s 65(2) and (3A) provide that:
- (1) the Tribunal may only make a fair order if it determines that the landlord has breached the obligation under the Act to maintain the premises in a reasonable state of repair, having regard to the age of, the rent payable for and the prospective life of the premises; and
 - (2) the Tribunal must not make that determination unless it is satisfied that the landlord had notice of the need for the repair or ought reasonably to have known of the need for the repair.
- 61 The repair work which the Tribunal may order are limited to those works that restore the premises to a "reasonable" state of repair, having regard to those matters. The landlord is effectively directed to undertake specified repairs that will cause him or her to comply with his or her obligation under s 63. The Tribunal has no jurisdiction to direct the landlord to improve the property

beyond its original state of repair if that original state of repair was reasonable having regard to those matters.

62 Consequently the tenant's rights to have reasonable repairs undertaken stands to the repair and maintenance of the premises with the services and facilities that were provided as part of the tenancy agreement. They do not extend to the provision of new parts to the premises or new facilities and services that did not form part of the tenancy agreement. However, the tenant's right extends to everything that was in the objective contemplation of the parties at the start of the tenancy whether they were functional or not.

63 For example, in *Beerby v NSW Department of Housing* [1996] NSWRT 216 the Tribunal declined to order the department to erect a front fence where none had previously been. The Tribunal took the view that the erection of the fence would be characterised as a capital improvement and said that the 1987 equivalent of s 63 did not extend that far. Similarly, in *Tabert v NSW Land and Housing Corporation* [2001] NSWCA 182 Court held that there was no breach of duty by a landlord in failing to tall handrail on a flight of steps where none previously existed.

64 Chief Justice Higgins of the Supreme Court of the Australian Capital Territory similarly held that the corresponding duty in the *Residential Tenancies Act 1997* (ACT) did not extend to widening narrow staircases through which tenants had difficulty moving furniture: *Re Newal* [2003] ACTSC 31. His Honour wrote at [17]-[18]:

17. The ordinary meaning of the term "repairs" is that of restoration of the relevant thing "to good condition by renewal or replacement of decayed or damaged parts, or by refixing what has given way; to mend" (Shorter Oxford Dictionary). It will come as no surprise that such is the meaning courts have afforded the term when considering an obligation to repair premises. Thus, in *Ex parte Foote* [1933] SASR 142, repairs were held to include replacement of broken or worn-out parts where necessary.

18. Conversely, making good structural deficiencies for the purpose of facilitating use by a tenant, not being other than a design shortcoming, is not within the meaning of the term "repairs" - see *Lazar v Williamson* (1886) 7 LR (NSW) 98.

65 The tenant has not persuaded me on her evidence that the works she requires the landlord to do are repairs within the meaning distilled in those authorities. She has not satisfied me that the design of the en-suite to include a narrow

shower screen of 30-40 cm in width is a design shortcoming that requires repair by installing a shower screen with a door and a plastic guard. The other evidence in the matter suggests that it is not – that it was an intentional design feature that was used in many apartments in the building and that the levels and falls to which the tiling has been constructed comply with applicable standards.

66 Absent proof that the shower screen and tiling design in the en-suite was a design shortcoming that requires repair, I am satisfied that the works that she requests the Tribunal to order amount to capital improvements that are outside the scope of the landlord repair obligation and the Tribunal's power.

67 For these reasons I am not satisfied that the landlord has breached her obligation to maintain the premises in a reasonable state of repair under s 63 of the RT Act and clause 19.3 of the tenancy agreement. On that basis it is not appropriate for the Tribunal to make the order sought by the tenant under s 65. This part of the tenant's application therefore fails also.

CONCLUSION AND ORDERS

68 I make the following orders for these reasons:

The application is dismissed because, having considered the material placed before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established.

The block contains a handwritten signature in black ink, which appears to be 'J.R.', written over a circular official seal. The seal is for the NSW Civil & Administrative Tribunal, featuring the text 'NSW CIVIL & ADMINISTRATIVE TRIBUNAL' around the perimeter and a central emblem with a sun and a shield.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.