



Civil and Administrative Tribunal  
New South Wales

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Case Name: Rezay v Wang

Medium Neutral Citation: [2021] NSWCATCD 80

Hearing Date(s): 16 July 2021

Date of Orders: 17 August 2021

Decision Date: 17 August 2021

Jurisdiction: Consumer and Commercial Division

Before: P French, Senior Member

Decision: (1) By consent, an oral hearing is dispensed with.  
(2) The application is refused.

Catchwords: LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Retaliatory evictions

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

Cases Cited: Steinbeck v McDonald [2015] NSWCATAP 90

Texts Cited: Coronavirus (COVID 19) Temporary Changes to NCAT Operations procedure (18 March 2020 and as subsequently updated)

Category: Principal judgment

Parties: Khashayar Rezay (Applicant)  
Lijue Wang (Respondent)

Representation: Applicant (in person)  
First National Real Estate (Respondent)

File Number(s): RT 21/22431

Publication Restriction: Nil

## REASONS FOR DECISION

### Introduction

- 1 This is an application by Khashayer Rezay (the tenant) under section 115(1)(a) of the *Residential Tenancies Act 2010* (RT Act) for a declaration that a termination notice issued to him by the Lijue Wang (the landlord) under section 85 of the RT Act is of no effect because it is retaliatory. The application was made to the Tribunal on 24 May 2021 (the application).
- 2 For the reasons set out in greater detail following, the application is refused. Section 115 confers discretion on the Tribunal to deprive a landlord of a right to regain possession of premises in circumstances where the landlord has engaged in disentitling, morally wrongful, conduct. That is not what has occurred in this case. While there can be little doubt that the landlord was motivated, at least in part, to give the termination notice by the tenant's obstruction of his and his agent's attempts to remedy the root cause of water ingress into the premises, this conduct was not 'retaliatory' in the sense contemplated by section 115. It was not an act of reprisal or revenge manifesting an abuse of the landlord's superior title in response to a justifiable exercise of rights vested in the tenant by the residential tenancy agreement, the RT Act, or another law. It was a rational and morally defensible response to the tenant's rude, combative and obstructive behaviour, and the complete breakdown of a relationship between contracting parties.

### Procedural History

- 3 The application was first listed before the Tribunal for Conciliation and Hearing by telephone on 16 June 2021 in accordance with the Tribunal's COVID-19 pandemic revised hearing procedure (Coronavirus (COVID 19) Temporary Changes to NCAT Operations procedure (18 March 2020 and as subsequently updated). The tenant attended that listing of the application in person. Ms Vanessa Laface, who is a Property Manager working with the landlord's agent, attended on the landlord's behalf.
- 4 In accordance with the Tribunal's usual procedure where both parties are present in person at the first listing of an application, the Tribunal, differently constituted, attempted to assist the parties to resolve the dispute cooperatively

in conciliation. Those efforts were not successful. As a consequence, the matter was adjourned to be set down for a Special Fixture hearing.

### **Evidence and hearing**

- 5 Prior to the first listing of the application both parties had filed and served the documentary evidence that they intended to rely on at the Special Fixture Hearing. I marked the tenant's bundle Exhibit A1, and the landlord's bundle Exhibit R1. I note that the documentary evidence was voluminous for a matter of this type, running to several hundred pages in each case.
- 6 The Special Fixture Hearing was set down for 16 July 2021 at 2:45pm. Notices to this effect were sent by email to the tenant and by post to the landlord's agent on 28 June 2021. The notices were sent to the address details for both parties provided in the application and to which previous correspondence of the Tribunal had been sent and received by the parties. There was nothing on the file that would suggest that these notices were not received (such as return mail).
- 7 However, when contacted by telephone for the hearing, the landlord's agent, Ms Laface, stated that she had not received notice of the hearing and was taken by surprise by the call. She was driving to attend a scheduled appointment at the time and could not be available to participate in the hearing.
- 8 In order to avoid the hearing being thrown away, the Tribunal asked if the parties would permit the Tribunal to deal with the matter on the papers without an oral hearing, given the extensive documentary evidence that had been filed by both parties. Both parties consented to Tribunal doing so.

### **Material facts**

- 9 The dispute arises from a residential tenancy agreement that was made on 14 August 2021. The agreement was originally a fixed term agreement of 52 weeks duration, which was expressed to commence on 14 August 2019 and end on 11 August 2020. The agreement has continued as a periodic agreement since the lapse of the fixed term.
- 10 There are two tenant parties to the residential tenancy agreement: Mr Rezay and Mr Lindsay Smith. It appears that Mr Smith is Mr Rezay's parent and has

never lived at the property. His participation in the agreement appears to be the equivalent of a guarantor.

- 11 The residential tenancy agreement is in standard form. It includes in clause 23 provisions concerning the landlord's right of access to the premises during the term of the tenancy, which relevantly include the following:

Landlord's access to the premises

23. The landlord agrees that the landlord, the landlord's agent or any person authorised in writing by the landlord, during the currency of this agreement, may only enter the residential premises in the following circumstances:

23.1 in an emergency (including entry for the purpose of carrying out repairs),

23.2 if the NSW Civil and Administrative Tribunal so orders,

23.3 ...

23.6 to carry out, or assess the need for, necessary repairs, if the tenant is given at least 2 days notice each time

...

24. The landlord agrees that a person who enters the residential premises under clause ... 23.6 ... of this agreement:

24.1 must not enter the premises on a Sunday or a public holiday, unless the tenant agrees and

24.2 may enter the premises only between the hours of 8:00am and 8:0pm, unless the tenant agrees to another time, and

24.3 must, if practicable, notify the tenant of the proposed day and time of entry.

25. The landlord agrees that, except in an emergency (including to carry out urgent repairs), a person other than the landlord or the landlord's agent must produce to the tenant the landlord's or the landlord's agent's written permission to enter the residential premises..

26. The tenant agrees to give access to the residential premises to the landlord, the landlord's agent or any person, if they are exercising a right to enter the residential premises in accordance with this agreement.

I note that these clauses are founded upon section 55 and 58 of the RT Act.

- 12 The residential premises is a one bedroom apartment in a strata scheme at Waitara. The bedroom is carpeted and has glass doors that open onto a balcony.
- 13 On 22 March 2021, during heavy rain, water blew onto the balcony and seeped through the base of the balcony doors drenching the bedroom carpet. The tenant notified the landlord's agent of the water penetration by telephone in the late afternoon of that day. Because the balcony and doors are common property, the landlord's agent referred the issue to the strata scheme's Strata Managing agent by email and telephone message shortly after being notified by the tenant. However, it appears the Strata Manager's office was closed by this time.
- 14 On 23 March 2021 the landlord's agent was in communication with a Strata Managing Agent and confirmed that a plumber had been engaged to investigate and remediate the water ingress. The Strata Scheme's plumber telephoned the tenant in the course of that day and made an arrangement to attend the premises to inspect the water ingress on 24 March 2021. There is a dispute as to what the arrangement was. The tenant contends the appointment was for 9:30am. The plumber claims it was for between 10am and 11am. In any event, the plumber failed to attend at either time or to notify the tenant that they would not be attending as planned.
- 15 Mid-morning on 24 March 2021 the tenant complained about this to the landlord's agent, who again referred the matter to the Strata Manager. This did not result in the immediate attendance of the plumber. At approximately mid-day the plumber contacted the Strata Manager, landlord's agent and tenant to advise that they had been caught up and would now attend the premises on 26 March 2021 between 9am and 10am.
- 16 In response to this information the tenant contacted the landlord's agent by telephone and email to complain about the delay in the attendance of the plumber. In his submission the landlord states that the tenant told his agent that he refused to permit the Strata Scheme's plumber to attend again, and demanded that the landlord immediately arrange another plumber. That submission is consistent with the tenant's email which is in evidence:

(sent at 12:25pm on 24 March 2021)

Hi All

This plumber is a liar and unreliable. Find someone else suitable to perform the job.

I won't be waiting till Friday

- 17 At some time in the course of his communications with the landlord's agent on 24 May 2021 the tenant requested the landlord to replace the wet carpets. This is confirmed in an email he sent to the landlord's agent during the afternoon of that day:

As you are aware the strata plumber has not attended their appointment and they are unwilling to source a different plumber. In addition to this you have mentioned the carpet can't be replaced for at least 2 weeks. This is unacceptable as this unit is currently unliveable.

Either 1. Organise alternative accommodation until this issue has been resolved or 2. Pay for any costs associated with me moving out and to a different unit.

I expect a response today.

- 18 The landlord's agent replied to this email immediately stating that they would obtain instructions from the landlord. Shortly afterwards the landlord's agent sent the tenant another email requesting access to inspect the water damaged carpets which led to the following exchanges:

Agent: (sent at 4:44pm 24 March 2021)

Good afternoon Kash

May I attend at 7-730am tomorrow to view the damages, take photos on behalf of owner?

Kind regards

Vanessa Leface

Tenant: (sent at 4:49pm 24 March 2021)

Hi Vanessa

Have you been in contact with the owner?

Kash

Agent: (sent at 4:53pm 24 March 2021)

Kash

We formally request to attend to inspect the damaged areas as per Vanessa's email.

Please see below Fair Trading guidelines regarding urgent repairs

(NSW Fair Trading web-link and Extract concerning "Natural disasters" set out)

Kind regards

David Bokor

Tenant: (sent at 5:03pm 24 March 2021)

And which part of what you sent me stops you from answering my question.

Have you or have you not had contact with the owner.

Agent: (sent at 5:04pm 24 March 2021)

The landlord has requested that prior to making a decision on what they want to do, they wish us to inspect and take photos and report to them so they can make an informed decision accordingly.

Can Vanessa attend tomorrow morning first thing 7-7:30am to inspect to extradiate for you?

Kind regards

David Bokor

It appears there was then an intervening phone call from the landlord's agent to the tenant. It is not clear in the evidence if there was a direct conversation or a message was left

Agent: (5:04pm 24 March 2021)

Hi Kash

Yes as per our call. The owner has requested that I attend ASAP.

Is early morning suitable?

Kind regards

Vanessa Leface

Tenant: (5:20pm 24 March 2021)

Sure

Agent: (7:18pm 24 March 2021)

Thanks Kash

Vanessa will see you in the morning.

- 19 The landlord's agent visited the premises in the early morning of 25 March 2021 and inspected the water ingress. Later that day the landlord's agent engaged a carpet contractor to dry the carpet and arranged with the tenant for the contractor to attend the next day, which the contractor did, peeling back the carpet to dry the underlay, deodorising and then reinstalling the carpet leaving the drying equipment operating in situ.
- 20 By email to the tenant dated 25 March 2021 confirming the arrangements concerning the carpet contractor the landlord's agent also offered the tenant a reduction in rent of 15% per week from 22 March 2021 "until the time that the carpet is dry and intact".
- 21 The tenant replied to this email shortly afterwards, stating with respect to the rent reduction offer:

...

Please respond to the owner advising that till the room is repaired my counter offer is zero rent. If he disagrees tell him to live her and I'll live at their house till its fixed.

This led to the following email exchange (insofar as it concerns the rent reduction issue):

Agent (25 March 2021 at 12:53pm)

...

I will pass on your comments to the owner, but please be mindful that you can still utilise a major portion of the rental apartment.

I will come back to you once the owner responds ...

Tenant (25 March 2021 at 1:03pm)

Hi Vanessa

Which major portion is this exactly? My one bedroom apartment has no bedroom. The smell is so strong if I don't constantly glen 20 I can't even stay in this portion. I have no access to use my computer or move my clothes and belongings trapped in that room.

Honestly how heartless are you people, you wouldn't live like this. How dare you ask me to.

- 22 The Strata Scheme's plumber also attended the premises as scheduled on 26 March 2021 to inspect the water ingress.



- 23 On 30 March 2021 the landlord's agent contacted the tenant and requested permission for the landlord to attend the premises to inspect the water damage. This was subsequently arranged for 3 April 2021. At this inspection it appears that the landlord and tenant discussed a rent reduction due to the impact of the flooding but nothing specific was agreed. The landlord also requested, and the tenant agreed, that the landlord could return with a plumber on 6 April 2021 to investigate the cause of the water ingress.
- 24 The landlord and his plumber attended the premises on 6 April 2021 and agreed on remedial work to be done, which had to be approved by the Strata Manager, as the affected area was common property.
- 25 On 8 April 2021 the landlord and the tenant had a conversation via text where it was agreed landlord's plumber would return to the property at 7am on 12 April 2021 to carry out remedial work. In the same conversation the tenant and the landlord discussed the rent that would be payable until the remedial work was completed. The salient parts of that conversation are set out following:

8 April 2021

Tenant: ... Have you notified the agency not to expect rent?

Landlord: Just ignore them, just talk to me.

Tenant: If they expect rent and I don't pay them they'll ruin my renting ledger. Can you mail me on [...] regarding the rent and agency.

9 April 2021

Landlord: Hi, will get Vanessa to send you an email about the rent free period so you won't need to worry about your renting ledger.

- 26 It appears that later on 9 April 2021 the tenant sent another text message to the landlord requesting an email confirming that he was not liable to pay rent. The landlord made no response to this text message. In his submissions, the landlord says that he wanted to discuss the matter with his agent first, and that he intended to convey his decision to the tenant when he attended the premises with his plumber on 12 April 2021.
- 27 At about 2:00pm on 9 April 2021 the tenant telephoned the landlord to complain that the landlord had not responded to his request for an email

confirming a waiver of rent. The tenant and landlord give different accounts of this call each alleging verbal abuse by the other. On either version this was an acrimonious conversation. It is also not in dispute that during this call the tenant told the landlord that if he did not receive a rent reduction the tenant would make an application to this Tribunal for an order reducing rent.

- 28 The landlord lives nearby to the tenant. On 10 April 2021 they happened to meet in a local park. The tenant and the landlord give different accounts of this meeting. The tenant contends that he was threatened and abused by the landlord. Later that day the tenant reported the incident to NSW Police. He has submitted an email to him from a Police Constable attached to the Ku-ring-gai Police Area Command which confirms that a report has been lodged in relation to a “landlord incident” and providing an event number for that report. The landlord contends that he and the tenant and his partner with whom he was walking had a brief conversation confirming arrangements for the plumber to attend the premises on 12 April 2021.
- 29 On 12 April 2021 the landlord and his agent attempted to attend the premises with the plumber. However, the tenant refused to admit them to the premises stating through the intercom system that their presence was “unannounced and without approval” and that he had called the Police. The landlord and agent did not further attempt to gain access to the premises on that date and the plumber’s attendance was also cancelled.
- 30 On 14 April 2021 the landlord’s agent telephoned and emailed the tenant to notify him that the Owners Corporation’s plumber would be attending the premises to carry out a dye test to the balcony doors and that an Access Notice would be served on him specifying the time and date this would occur. In the same email the agent notified the tenant that he would receive one week’s rent credit in response to his request for a waiver of rent. The agent also had a conversation on that date with Mr Lindsay who apparently stated to her that the tenant intended to move out, and requested that any remedial work to the balcony be carried out after the tenant had moved. This led to the following email exchange:

15 April 2021 12:17pm

Agent: Good afternoon

In reference to our conversation late yesterday, I have put forward your request not to have any trade attend until after you vacate, your request was denied, the owner would like to stress that he needs the strata plumber to attend and carry out a dye test to be certain that the balcony is repaired, should it rain again we do not want this issue to occur again.

Please take this email as 7 days written notice for the plumber to attend next Thursday, time to be advised shortly

Feel free to ask me any questions.

12:37pm

Tenant: I'm tired of this situation. I'm only going to say this once.

Have you as the managing agent every (sic) organised for this balcony to be repaired? Has strata? No. So what are you checking has been done? Why are you sending strata plumbers to do a second dye test when NOTHING has been done since the first dye test. I have mentioned this countless times that the balcony has NOT been repaired and no one has organised any such repairs.

Take this as written notice that your request for access has been denied.

1:32pm

Agent: Hi Kash

You are unable to deny access, we are providing 7 days' notice, we have the right to enter and repair the owners property. Entry notice attached, we are required to provide 24 hours notice and in good faith providing 7.

[link to Fair Trading website "access and entry to a rental property"]

I suggest that you call fair trading, you denying access is preventing the property from being repaired, if it rains again the same issue could occur and therefore you would be held responsible. I will advise a time frame as to when the plumber will attend Next Thursday, you're welcome to be present OR we will use our office set of keys.

Kash we would really like to work together here, the owner want to repair the issue should it happen again, we understand from your Mothers call that you are vacating, this repair can't wait

Thank you

1:52pm

Tenant: I'm denying access to unwarranted tests you want performed to ensure repairs that haven't been done are done. I've already communicated with both fair trading and the tribunal regarding your unreasonable requests and the aggressive behaviour of the owner.

As you are also well aware I've already contacted the police regarding the owners threats and your attending without request or invitation. I'll happily add this demand in there also in the off chance this results in me being forced to defend myself and place of residence against intruders.

Is this the same owner that threatened me, cancelled plumbers, harassed me while out for a walk, reneged the rent free period and hasn't even thought of repairing the problem over the last three weeks? He's the one want to work with me? Forgive me for laughing my ass off.

1:59pm

Agent: Hello Kash

You cannot deny access we will be attending next Thursday as per my earlier email, I will not be emailing anymore about this matter Kash, you as a tenants are permitted (sic) to allow access.

Thank you

2:02pm

Tenant: I can and will deny access. Don't threaten me again.

- 31 On 19 April 2021 the landlord's agent served the tenant with a Notice of Access/Inspection/Entry under section 55(2)(b) of the RT Act (to carry out, or assess the need for necessary (but not urgent) repairs or to carry out maintenance). The Notice specified the time and date of entry as between 7am and 11:30am on 22 April 2021. The following email exchanges surrounded the issue of that Notice:

19 April 2021

Agent: 8:05am

Good morning Kash

As discussed Thursday last week, the plumber does need to gain access to repair the leak.

The owner has paid for the carpet to be dried and if it rains again there is a high chance that it can be damaged again, we have requested that the plumber attend twice now, you cancelled the last visit when the owner and myself were at the property.

Plumbers advise that they can be there at 7am this Thursday and it can take up to 4 hours. We are requesting access again?

Lastly we have been advised that you have a dog residing at the unit ..., this dog has not been approved by the owner or our office therefore you are in breach of your lease. Your parents mentioned that you are vacating, may I have a vacate date by COB today so that I may update the owner.

Tenant: 8:30am

The owner cancelled the plumber for the one millionth time.

You never announced you were coming for a plumber that day and arrived unannounced.

My girlfriends dog came for a single walk when the owner harassed us in the park there is no pet residing here.

Finally without written notice from the tribunal you will be denied access to the property. If you attempt entry police will be notified. They have already been advised of the threats, harassment and attempts to intimidate by you and the owner.

No date will be provided today.

Anything else?

Agent: 8:53am

Hello and thank you for your reply.

This was arranged between yourself and the owner, the owner asked me to attend as his managing agent

The owner advised that he was attending along with the plumber over the phone with yourself.

Kash I saw the white fluffy dog in the foyer when I attended the first inspection, we will write to strata and also see what they advised on the unapproved dog.

Please be advised if heavy rain occurs again and the internals of the property are damaged, you will be held liable for the repair.

I will update you once I hear back from Fair Trade, again are you vacating, the owner welcomes you to vacate with 7 days notice

Thank you

Tenant: 9:16am

He cancelled on the phone while threatening me. Interesting you made no mention of you arriving at 7am to the tenant.

Read above.

Contact whomever you like about this dog you say you saw in a foyer once.

Don't make me laugh. Surely you have something better to do with your day than entertain me with your jokes.

Agent: 9:19am

Hi Kash

I have called Fair trade, we will be attending under section 56 of the residential tenancy act at 7am this Thursday, we have written to Strata about the dog and shall await the reply, please be advised that you can NOT deny access under your signed contract.

Thank you

Tenant: 9:26am

Without a written order from the tribunal you will be denied access to the property. Section 56 is regarding entering the premises with consent from the tenant, which you do not have. Anything else my little comedian?

Agent: 9:27am

Kash

I don't need a written order from NCAT, read your lease please section 56, we will be there at 7am this Thursday

Tenant: 9:32am

Hahahaha good one. Good luck for Thursday, you'll need it as without a written order from the Tribunal you'll be denied entry.

Agent: 9:39am

Sorry section 55, thank you see you at 7am this Thursday.

Agent: 11:37am

Good afternoon

Please see attached notice, as discussed last Thursday we will require access, myself and a plumber will enter Thursday the 22/4/2021.

If you can't be home, we have a set of keys.

Tenant: 11:58am

As a result of the constant harassment, attempts at intimidation and threats by you and the owner, including but not limited to the threats of entering my premises without my consent, I will be advising ncat of my decision to change the locks of this property to ensure the safety of myself and my possessions. I will leave it up to ncat to determine who a spare set of keys will be given to.

21 April 2021

Agent: 8:03am

Good morning

This is a reminder that the plumber and I will arrive tomorrow at 7am, as per the entry notice and all email correspondence.

22 April 2021

Agent: 7:58am

Good morning Lindsay and Kash

Firstly I would like to thank you for access so we can finally resolve the leak that occurred and finally letting the plumber attend.

Kash I would like to document what occurred today in relating to yourself and I conversing Kash.

I rang the door bell, plumber collected keys to access the building at scheduled time

Plumber and myself walked into building rang lift button, and Kash was waiting in the lift

Plumber and myself stepped into the lift Kash said "you said you were not coming up?" I responded "no I said that I would ensure at (sic) the plumber got inside the unit, therefore I am making sure he does"

Kash responded "you want to play games, lets go" I respond "stop talking to me please"

Kash you have advised the (sic) you have been threatened and intimidated, at no time have I spoken to you like that, nor would I. If we can just get this repair finalised for the owner and yourself, the plumber should have been able to do it weeks ago. In any case he is there now, as you made such a fuss about me entering, I would appreciate some photos sent to my email.

Thank you and I look forward to the photos

Kind regards.

- 32 On 26 April 2021, after first telephoning Mr Lindsay, the landlord's agent issued the tenant and Mr Lindsay with a 90 day no grounds notice of termination under section 85 of the RT Act which requires the tenant to give the landlord possession of the premises on 31 August 2021. That notice was served by email.

### **Applicable law**

- 33 Section 115(1)(a) provides that the Tribunal may, on the application of a tenant declare that a termination notice has no effect if it is satisfied that a termination notice given the landlord was a retaliatory notice. Section 115(2) provides that

the Tribunal may find that a termination notice is a retaliatory notice if it is satisfied that the landlord was wholly or partly motivated to give the notice for any of the following reasons: (a) the tenant had applied or proposed to apply to the Tribunal for an order; (b) the tenant had taken or proposed to take any other action to enforce a right of the tenant under the residential tenancy agreement, the RT Act, or any other law; or, an order of the Tribunal was in force in relation to the landlord and tenant. Section 115(3) provides that the tenant may make such an application to the Tribunal before the termination date and within the period prescribed by the regulations after the termination notice is given to the tenant. The applicable time period is found in Regulation 39(4)(a) of the *Residential Tenancies Regulation 2019* (NSW) . It is within 30 days of the termination notice being given.

- 34 As has already been stated, the landlord's agent gave the termination notice to the tenant on 26 April 2021 and his application was made to the Tribunal on 24 May 2021. The application has thus been made within the time period permitted.
- 35 In *Steinbeck v McDonald* [2015] NSWCATAP 90 at [26], an Appeal Panel of the Tribunal described the exercise of the discretion conferred by section 115(1) as a "two-step process". The Tribunal must first determine having regard to the terms of section 115(2) if the termination notice is a retaliatory notice. If that is not found the application must be refused and step 2 is not reached. If the termination notice is found to be retaliatory the Tribunal must then consider in its discretion if it ought to declare it of no effect. If it does so, the tenant will not be obliged to give up possession of the premises in accordance with that notice and the landlord will be prevented from making any application to the Tribunal for a termination order on the basis of that notice.

### **Consideration**

- 36 In his application the tenant appears to state three grounds upon which the termination notice is retaliatory. First, because it was given in response to his statement to the landlord on 9 April 2021 that he would make an application to the Tribunal for an order that would abate the rent if the landlord did not waive all rent due while water ingress to the bedroom was remedied. Second,



because it was given in response to his reporting to NSW Police of the landlord's allegedly abusive behaviour towards him on 10 April 2021 and in response to him reporting to NSW Police the landlord and agent's alleged "illegal" attempt to gain access to the premises on 12 April 2021. Third, because the tenant was asserting his "right" under the residential tenancy agreement and RT Act to refuse the landlord access to the premises. The first ground falls within the scope of section 115(2)(a) and the second and third grounds fall within the scope of section 115(2)(b).

- 37 It must be accepted that there was a direct causal connection between the tenant's conduct in purporting to refuse access to the premises to the landlord, the landlord's agent, and the landlord's plumbing contractor, and the landlord issuing the tenant with a termination notice. This conduct clearly frustrated and annoyed the landlord and the landlord's agent. The termination notice was issued shortly following the culmination of the access dispute on 22 April 2021 when the landlord's plumbing contractor gained access pursuant to a formal access notice issued to the tenant on 19 April 2021 by the landlord's agent.
- 38 However, I am not satisfied on the evidence that there was any direct causal relationship between the tenant's demand for rent abatement, his statements to the landlord that he would apply to the Tribunal for an order abating rent, and the issue of the termination notice. Neither the landlord nor his agent refused to entertain the prospect of some abatement of rent due to the tenant's loss of amenity. Nor is there any evidence of animosity towards the tenant by the landlord or agent regarding this issue. The delay in the resolution of this issue was the result of the tenant's insistence that rent be abated in its entirety, rather than reduced. It was not unreasonable for the landlord and agent to consider that demand excessive in the circumstances. A credit equivalent of one-week's rent was ultimately provided by the tenant to the landlord. The hostility the tenant expressed to the landlord and agent regarding rent abatement may in a general way have contributed to the deterioration in the relationship, but it was not directly causative of the landlord issuing the termination notice.

- 39 In the same way the tenant's conduct in reporting the landlord and agent to NSW Police contributed to the deterioration in the relationship, but it was not directly causative of the landlord issuing the termination notice except insofar as it was related to the tenant refusing access on 12 April 2021. The landlord claims he never heard from NSW Police in relation any complaint or report about him made by the tenant. Further, he denies that there was any adverse incident between him and the tenant on 10 April 2021. The only objective evidence in relation to the report the tenant made to NSW Police is an event no. and an email exchange between the tenant and a Police Officer. It does not appear that any statement was taken from the tenant or any investigation initiated. It is clear that the landlord knew on 12 April 2021 that the tenant claimed to be in contact with NSW Police about him. But apart from that it is difficult to see how whatever the tenant reported to NSW Police would be sufficiently in the mind of the landlord to affect his motivation.
- 40 It does not follow that because a causative relationship between the tenant's conduct in purporting to refuse the landlord, his agent, and his plumbing contractor access to the premises and the landlord issuing the termination notice has been established that the notice is a retaliatory notice for the purposes of section 115. Section 115 confers discretion on the Tribunal to deprive a landlord of a right to regain possession of premises in circumstances where the landlord has engaged in disentitling, morally wrongful, conduct. It falls to the tenant to establish on the balance of probabilities that the issuing of the termination notice was an act of reprisal or revenge manifesting an abuse of the landlord's superior title in response to a justifiable exercise of rights vested in the tenant by the residential tenancy agreement, the RT Act, or another law.
- 41 In this case the landlord and his agent were properly asserting a right to access the premises to inspect for and carry out repairs. The landlord had a right to do so under clause 23 of the residential tenancy agreement (section 55(1)(b) and 55(2)(b) of the RT Act) (as well as an obligation to do so) and the tenant had a duty to provide access in accordance with clause 23 (section 58 of the RT Act). The tenant's apprehension of his right to refuse access and to dictate to the landlord who might attend the premises, including which plumber the landlord

was entitled to retain, was quite misconceived. From an objective point of view the tenant's conduct was repeatedly rude, combative, and obstructive. By contrast, the landlord and his agent's conduct was courteous, patient and proportionate to the escalating obstruction with which they were confronted.

- 42 Against this background there is nothing morally indefensible in the landlord issuing the termination notice to the tenant. It is a "no-grounds" termination notice for a periodic tenancy that complies with the requirements for such a notice. The landlord does not require a reason to issue such a notice. The termination notice does not constitute a reprisal or an acute of revenge. It is a normative response to a complete breakdown in a relationship between contracting parties. The law does not require a landlord to suffer such behaviour from a tenant.

### **Conclusion**

- 43 For the foregoing reasons I conclude that the termination notice is not a retaliatory notice. I therefore refuse to make the declaration sought by the tenant.

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The image shows a handwritten signature in black ink, consisting of a stylized 'R' and 'J' followed by a horizontal line. To the right of the signature is the official seal of the NSW Civil & Administrative Tribunal. The seal is circular with a double border. The outer border contains the text 'NSW CIVIL & ADMINISTRATIVE' at the top and 'TRIBUNAL' at the bottom, separated by two small stars. The inner circle features the coat of arms of New South Wales, which depicts a shield supported by a kangaroo and an emu, with a sun rising over mountains in the background.

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

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