Civil and Administrative Tribunal

New South Wales

Case Name:	Campbell v Fazzolari
Medium Neutral Citation:	[2022] NSWCATCD 44
Hearing Date(s):	03 February 2022
Date of Orders:	07 March 2022
Decision Date:	7 March 2022
Jurisdiction:	Consumer and Commercial Division
Before:	K.Timbs, General Member
Decision:	1 By determination of the Tribunal, the rent payable by the applicant to the respondents is excessive from 5 March 2022 and is not to exceed $1,890 per fortnight from that date until 4 March 2023 or until the tenant has access to the balcony of the premises, whichever occurs first. 2 By determination of the Tribunal, the application for an order for repairs is dismissed. 3 The application for compensation is withdrawn by the applicant. 4 By consent, Owners Strata Plan - No. 55035 is removed as a respondent.
Catchwords:	LEASES AND TENANCIES — Rent reduction — No access to balcony
Legislation Cited:	Residential Tenancies Act 2010
Cases Cited:	Nil
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Adam Campbell (Applicant) Ray Fazzolari (First Respondent)

	Marcus Fazzolari (Second Respondent) The Owners – Strata Plan No. 55035 (Other)
Representation:	Mr Mirabella and Ms Christofi (Agent) (First and Second Respondent) Solicitor: Mr McManus (Applicant) Counsel: Mr Thomson (The Owners – Strata Plan No. 55035)
File Number(s):	RT 21/47124
Publication Restriction:	NIL

REASONS FOR DECISION

Background

1 On 30 September 2021, Mr Adam Campbell (the tenant) and Ms Tara Vance entered into a residential tenancy agreement (the agreement) with Ray and Marcus Fazzolari (the landlords) for residential premises in Drummoyne, NSW. The agreement is for a 12 month fixed term starting 30 September 2021 and the rent is $2,700 a fortnight.

2 On 17 November 2021, the tenant applied to the Tribunal for orders:

- for compensation of $15,000;
- reducing the rent for a residential premises because of reduced access to part of the premises; and
- that the landlords carry out repairs.

3 The respondents to the application were the landlords and the Owners Corporation for the premises, Owners Strata Plan – 55035.

4 The Tribunal heard the application on 3 March 2022. The tenant attended in person and was represented with leave of the Tribunal by Mr McManus, Solicitor. The landlords were represented by managing agents, Mr Mirabella and Ms Christofi and Mr Thomson of Counsel represented the Owners Corporation with leave of the Tribunal.

5 At hearing, the tenant withdrew the claim for compensation and all parties consented to the Tribunal removing the Owners Corporation as a respondent to the application.

Relevant law

Claim for rent reduction

6 Section 44(1)(b) of the Residential Tenancies Act 2010 (the RTA) allows the Tribunal to make excessive rent orders, including orders that:

- rent payable 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.

7 The Tribunal may consider matters listed in section 44(5) to determine if rent is excessive, including:

- the general market level of rents for comparable premises in the locality or a similar locality;
- the landlord's outgoings under the residential tenancy agreement or proposed agreement;
- any fittings, appliances or other goods, services or facilities provided with the residential premises;
- the state of repair of the residential premises; and
- the accommodation and amenities provided in the residential premises.

8 To determine the claim for a rent reduction, the Tribunal considered whether these provisions apply and, if so, what maximum rent should apply for a specified period.

Order for repairs

9 Relevantly, section 63 of the RTA provides that it is a term of every residential tenancy agreement that a landlord must maintain premises in a reasonable state of repair. Section 65(1) that the Tribunal may make orders the landlord carry out specified repairs.

10 To determine this part of the application, the Tribunal considered whether the landlords were in breach of its obligation and, if so, whether it should order the landlords to carry out any specified repairs.

CONSIDERATION

Evidence considered

11 The Tribunal considered documents provided by the tenant and the landlords. At hearing it heard oral evidence and submissions from the tenant and the landlords' agents.

Withdrawal of facilities

12 The property is an apartment in a strata complex with a large balcony with water views. There is no dispute that, on 18 October 2021, the tenant was injured when two floating pavers on the balcony of the premises broke while he was standing on them. They are large square ceramic based pavers supported by four pedestals at each corner.

13 In his application, the tenant contended that either the pavers or the pedestal system are not "fit for purpose". A technical report provided to the Owners Corporation states there "is no evidence of a defective installation" and recommends that the relevant pavers "be sent to an accredited lab for tensile testing". At the time of hearing, no further test results were available to the parties and the Tribunal.

14 The landlords firstly placed a metal sheet over the two tiles and asserted the balcony was safe. However, given two tiles had broken without significant weight being placed on them, the tenant refused to use the balcony. The landlords' evidence is that stoppers were placed on the balcony doors on 22 December 2021 and, at hearing, the landlords' agents agreed that the balcony could not be used safely until the cause of the problem was determined and rectified. Both parties told the Tribunal that the tenant did not have access to the balcony and would not have access until that happened. Both parties said the responsibility for repair was with the Owners Corporation and they did not know when repairs would be complete.

15 It was unclear whether access to the balcony was originally withdrawn by the Owners Corporation or the landlord. However, at hearing, the landlords' representative agreed that the landlords would not allow access unless satisfied that it was safe to do so and that is not the case at the moment. In that case, the Tribunal finds that the landlord has withdrawn access to the balcony

or the landlord and the owners corporation have jointly withdrawn access. That is sufficient for section 44 to apply.

16 Both parties agreed that the rent was above average or median rents for the area and the landlord did not dispute the assertion of the tenant that this was because of the large balcony with expansive views. The landlord waived the rent for two weeks after the incident and the tenant and landlord then agreed to a reduction in rent of 30% to $1,890 per fortnight to 4 March 2022 on the basis that the tenant did not have access to the balcony. The landlord did not suggest that the rent should revert to the rent in the residential tenancy agreement from that date but argued that the reduction should not be as much as 30%. In that case, the Tribunal finds on the evidence of both parties that the rent is excessive from 5 March 2022 because of the withdrawal of facilities. The Tribunal must then determine the maximum rent that is to be payable from that date.

17 The landlords' submission is that the reduction should be no more than 20% because that is closer to the proportion of space taken up by the balcony in the floor plan of the rented apartment. The tenant argued that the rent reduction should continue to be 30% because the balcony space is more important and of greater benefit than the other parts of the premises. He said that it was the only drawcard for the apartment which was otherwise in poor condition.

18 The landlords' agents made relatively detailed submissions about the proportion of floor space taken up by the balcony, including submissions that the amount of space available to the tenant on the balcony was more limited than it might be because of a row of planter boxes and that the uncovered balcony was of less benefit during the tenancy because of generally poor weather. The tenant gave evidence, disputed by the agents, that the bottom level of the apartment was not liveable and that they used it only for storage.

19 In the Tribunal's view, a detailed argument about the amount of space available to the tenant in the apartment and on the balcony is not helpful. It is satisfied that any landlord and tenant would place a very significant premium on the balcony space because it has water views and is large enough for

entertaining. That the weather has not been conducive to entertaining is not relevant.

20 The Tribunal has no evidence of the general market rents for premises without water views in Drummoyne or any similar locality. However, a large balcony with water views would increase the rent of the apartment by significantly more that the percentage of the floor space it takes up. It accepts it was a drawcard for the tenant and that would be the case for any reasonable prospective tenant.

21 The Tribunal has no evidence of the landlords' outgoings under the residential tenancy agreement and, while the tenant claims the premises are not otherwise in good condition, there is no evidence that it is not in a good state of repair. The Tribunal takes the tenant's evidence to mean that it has not recently been renovated.

22 The Tribunal takes into account that the parties valued the benefit to the tenant of the balcony at 30% of the rent when they made their agreement to reduce the rent. It accepts that the landlord agreed to this amount without knowing that the repairs would take more than a few months. It is not determinative but the Tribunal gives it some weight.

23 In all the circumstances, the Tribunal is satisfied that a 30% reduction in rent reflects the value of the withdrawal of the facility of the balcony by the landlord or the landlord and owners corporation jointly. It will make a determination that is consistent with the previous agreement to apply from 5 March 2022 that the maximum rent is $1,890 per fortnight which is 70% of the rent of $2,700 payable under the agreement.

Repairs

24 There is no dispute that the owners corporation has responsibility for repair of the paving on the balcony. There is no evidence that the landlord has failed to take action to ensure that the owners corporation was aware of the need for repair or has delayed the owners corporation in any way. Both parties seemed unhappy that the Owners Corporation had not taken more action by the date of hearing.

25 It might be that the Owners Corporation has not acted with reasonable diligence to make the necessary repairs. However, the landlords have satisfied their obligations. In those circumstances, the Tribunal does not find that the landlords are in breach of the obligation in section 63(1) to maintain the premises in a reasonable state and it will dismiss the application for orders for repair for that reason.

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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