Civil and Administrative Tribunal

New South Wales

Case Name:	Yuwono v Koh
Medium Neutral Citation:	[2022] NSWCATAP 306
Hearing Date(s):	30 August 2022
Date of Orders:	19 September 2022
Decision Date:	19 September 2022
Jurisdiction:	Appeal Panel
Before:	D Robertson, Senior Member D Fairlie, Senior Member
Decision:	(1) Leave to appeal refused, (2) Appeal dismissed.
Catchwords:	LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – s 50 – Quiet enjoyment – Whether service of retaliatory termination notice was a breach of quiet enjoyment LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – s 115 – Retaliatory eviction - Whether notice of termination given after tenant resisted a rent increase was retaliatory LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – Compensation for breach of tenancy agreement – Damages not recoverable in respect of wages lost by third party who provided assistance voluntarily
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW) Residential Tenancies Act 2010 (NSW)
Cases Cited:	Ciesiolka v Department of Housing NSW [2010] NSWCTTT 497 Collins v Urban [2014] NSWCATAP 17 Cominos v di Rico [2016] NSWCATAP 5

	Corcoran v Far [2018] NSWCATAP 13 Kenny v Preen [1963] 1 QB 499 Lewin v Zhou [2018] NSWCATCD 54 Martin's Camera Corner Pty Ltd v Hotel Mayfair Ltd [1976] 2 NSWLR 15 New South Wales v Zreika [2012] NSWCA 37 Pongrass v Small [2021] NSWCATAP 314 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 22) [2019] NSWSC 1657 Shirvington v Commonwealth (No 2) [2015] FCA 522 Spathis v Hanave Pty Ltd [2002] NSWSC 304
Texts Cited:	Halsbury's Laws of England (3rd edition), vol 23 (1964)
Category:	Principal judgment
Parties:	Grace Yuwono and Marc Kay (Appellants) G Y Koh (Respondent)
File Number(s):	2022/00161125
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	NA
Date of Decision:	20 May 2022
Before:	N Kennedy, General Member
File Number(s):	RT 22/08913

REASONS FOR DECISION

Introduction

1 The first named appellant, Dr Grace Yuwono, was the tenant of the respondent, occupying, with her son, a unit in Kingsford pursuant to a

residential tenancy agreement made on 13 October 2020, for a term of 52 weeks commencing on 23 October 2020. The fixed term expired on 21 October 2021 and thereafter Dr Yuwono remained on a periodic tenancy (as provided by s 18 of the *Residential Tenancies Act* 2010 (NSW) (RTA).) The rent payable under the initial lease was $520 per week.

2 The second named appellant, Mr Marc Kay is the first named appellant's husband. He did not reside in the premises, although he visited Dr Yuwono and their son at the premises for various short periods of time.

3 Mr Kay was not identified as a tenant in the residential tenancy agreement.

4 On 5 January 2022 the respondent's agent issued notice of an increase in the rent. Dr Yuwono did not agree to the full increase, responding that she was open to negotiate a smaller increase. The respondent's agent offered a compromise increase, that is a lower increase, on 5 January 2022. Dr Yuwono agreed to the compromise increase in writing on 10 January 2022.

5 The respondent's agent contacted Dr Yuwono via email on 28 January 2022, purporting to indicate that the respondent 'no longer accept[ed]' the agreed rental increase and relied on the original notice served on 5 January 2022. Dr Yuwono disputed the respondent's position in an email sent on 1 February 2022, pointing out that a further increase within 12 months of the initial agreement to a rent increase would breach s 41(1B) of the RTA.

6 The respondent's agent issued a second notice to increase rent on 2 February 2022. Dr Yuwono disputed the second notice to increase rent by email on 3 February 2022.

7 The respondent's agent withdrew the original notice of rental increase issued on 5 January 2022 via an email to Dr Yuwono on 7 February 2022. This email also confirmed that the respondent intended to pursue the second notice issued on 2 February 2022. Dr Yuwono reiterated her position that the negotiated agreement for a rental increase, offered by the respondent on 5 January 2022 and accepted by Dr Yuwono on 10 January 2022, was the valid agreed rental increase.

8 The respondent's agent sent an email to Dr Yuwono on 9 February 2022:

> "Dear Dr Grace,
>
> We understand your frustration.
>
> The owner is an elderly lady and depends on her rental income who has just lost her husband. The owner dropped the rent due to covid and when you moved into the property last year at a low rent you had the benefit as did so many other tenants. We increased the rent to $590.00 which you did not agree.
>
> Just to let you know, prior to you moving in last year and pre-covid, the rent was $735.00 and we are happy to prove this to you. It is $145.00 difference from the original rents that the owner was getting. The owner is losing money and does not believe this is fair. Unfortunately, after the owner worked out her expenses, paying water rates, council rates and strata levies and taxes, she has realized she cannot afford to keep the rent at $550 and the intention was to raise the rent at $590 at first because you are her current tenant, which is still lower than market rent and yes, we did make an error to be truthful because she did not calculate her expenses and this is the reason for her change of mind.
>
> We understand the Act and you have every right not to agree but we are asking to compromise to $590.00 in lieu of the owner's circumstances. It is still a fair price and cheaper than any other units in the building which are currently rented.
>
> We are happy with you as a tenant. Unfortunately, we cannot agree to $550 because of the costs. Without prejudice our owner has the right to give notice for 90 days- no grounds termination to vacate the property which we will be issuing today as we cannot agree to as per your email and the landlord cannot afford to keep the property at $550.00.
>
> Once you start looking for other properties in this calibre you will realise, we are very fair. I hope you can find something that will suit you better."

9 The respondent's agent issued a "no grounds" termination notice (that is a notice - referred to in s 85 of the RTA - terminating a periodic tenancy which did not specify any ground for termination and provided no less than 90 days notice of the termination date) to Dr Yuwono on 11 February 2022. Dr Yuwono did not challenge the notice of termination and vacated the premises 8 days after the issue of the notice of termination. Accordingly, the tenancy ended on 19 February 2022.

10 Dr Yuwono did not pay any rental increase throughout the tenancy, the rent paid remained at the amount specified in the residential tenancy agreement.

11 Dr Yuwono brought an application in the Tribunal seeking compensation for breach of the residential tenancy agreement and the RTA, including breach of the covenant for quiet enjoyment, which is made a term of every residential tenancy agreement by s 50 of the RTA.

12 The compensation sought included what Dr Yuwono claimed was her economic loss flowing from the breach, including her moving costs and loss of wages for both appellants in respect of the time spent in locating new premises and moving Dr Yuwono's goods to her new residence.

13 Dr Yuwono also claimed compensation for non-economic loss claimed to arise from the alleged breach of her quiet enjoyment, and aggravated and exemplary damages.

14 Dr Yuwono asserted that the respondent breached her quiet enjoyment through the issue of multiple notices of rent increase contrary to s 41(1B) of the RTA, and through the issue of the notice of termination, which Dr Yuwono submitted was a retaliatory notice within the meaning of s 115 of the RTA.

15 Section 115 of the RTA provides:

> **115 Retaliatory evictions**
>
> (1) The Tribunal may, on application by a tenant or when considering an application for a termination order or in relation to a termination notice—
>
> (a) declare that a termination notice has no effect, or
>
> (b) refuse to make a termination order,
>
> if it is satisfied that a termination notice given or application made by the landlord was a retaliatory notice or a retaliatory application.
>
> (2) The Tribunal may find that a termination notice is a retaliatory notice or that an application is a retaliatory application if it is satisfied that the landlord was wholly or partly motivated to give the notice or make the application 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, this Act or any other law,
>
> (c) an order of the Tribunal was in force in relation to the landlord and tenant.
>
> (3) A tenant may make an application to the Tribunal for a declaration under this section before the termination date and within the period prescribed by the regulations after the termination notice is given to the tenant.

16 Dr Yuwono also sought an order that Mr Kay be recognised as a tenant pursuant to s 77 of the RTA. That section provides:

> **77 Recognition of certain persons as tenants**
>
> (1) The Tribunal may, on application by a person who is occupying residential premises, make an order recognising the person as a tenant under a

residential tenancy agreement or join the person as a party to any proceedings relating to the premises, or both.

(2) The Tribunal may make an order if—

(a) the sole tenant under the residential tenancy agreement to which the premises are subject has died, or

(b) the tenant no longer occupies the premises.

(3) An order under this section may—

(a) vest a tenancy over the residential premises in the occupant on such of the terms of the previous residential tenancy agreement as the Tribunal thinks appropriate, having regard to the circumstances of the case, and

(b) vest the tenancy from a date that is earlier than the order.

(4) An application for an order under this section may be made at the same time as any other application or during proceedings before the Tribunal or independently of any such other application or proceedings.

(5) This section does not apply if the landlord is a social housing provider.

17 At some point prior to the hearing of the application brought by Dr Yuwono, Mr Kay was joined as a party to the application.

The decision

18 The Tribunal delivered reasons for decision on 20 May 2022 by which it made orders requiring the respondent to pay Dr Yuwono $550 damages for loss of quiet enjoyment, dismissed the application for recognition of Mr Kay as a tenant and dismissed the application by Mr Kay for compensation.

19 In the Tribunal's reasons for decision the Tribunal found:

(1) That the respondent breached s 41(1B) of the RTA;

(2) That it was not satisfied on the evidence before it that it should make a declaration under s 115 that the notice of termination was retaliatory "because the tenant has failed to establish any of the grounds in s 115(2) of the RTA";

(3) That:

"The email evidence supplied by both parties shows the tenant was suffering distress, disappointment and anxiety as a result of the landlords service of a second rental increase in breach of s41(1B) of the RT Act and the landlords purported rescinding of the reduced rental increase. Whilst there is no direct medical evidence from any practitioner that the tenant's mental or physical health was affected by distress and anxiety caused by the landlord's breach of s41(1B) of the RT Act, I accept the tenant's oral evidence and submissions that she has experienced distress and anxiety.

I am satisfied on the evidence before the tribunal that the landlord has breached s50 of the RT Act. The issuing of notices (either for rent increase or

termination of the tenancy) which do not comply with the RT Act can, depending on all the surrounding circumstances, constitute a breach of s 50 of the RT Act.

(4) That the respondent had not "breached" s 115 of the RTA and that for that reason Dr Yuwono was not entitled to damages for economic losses arising as a result of vacating the premises.

(5) That:

> "compensation for … non-economic loss for distress, anxiety and disappointment as a result of the breach of quiet enjoyment … is recoverable as the RT Act [sic] is a contract for enjoyment pleasure and relaxation and therefore falls under the exception to the general rule that damages for distress and disappointment are not recoverable. …
>
> Taking into consideration the period of time over which the breach occurred and the landlord rescinded the agreed reduce rental increase agreement, and the oral evidence and submissions on the level of distress, disappointment and anxiety the tenant suffered over this period, I find, in the circumstances of the matter, that compensation for the tenant due to a breach of s50 of the RT Act by the landlord is $550."

20 In relation to Dr Yuwono's claim for exemplary damages the Tribunal held:

> "The landlord has given oral evidence and entered submissions into evidence indicating that a mistake was made by the landlord's agent and the landlord that resulted in the breach of s41(1B) of the RT Act. The landlord's agency had many staff away with COVID at the time the breach of s41(1B) occurred and the agreement for the reduced rental increase was purportedly rescinded that resulted in their mistake. The landlord, an elderly woman, had recently lost her husband and was grieving, had made an error that also contributed to the breach of s41(1B) of the RT Act and the purported rescinding of the agreed reduced rental increase. I am not satisfied on the evidence before the tribunal that the landlord acted with malice in their actions that resulted in the breach of s41(1B) of the RT Act.
>
> For the reasons discussed in the above the claims for exemplary damages and contempt are dismissed."

21 The Tribunal dismissed an application for costs by the appellants.

22 The appellants have appealed against the decision of the Tribunal.

The scope and nature of internal appeals

23 By virtue of s 80(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act), internal appeals from decisions of the Tribunal may be made as of right on a question of law, and otherwise with leave of the Appeal Panel.

24 In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 (*Prendergast*) the Appeal Panel set out at [13] a non-exclusive list of questions of law:

(1) Whether there has been a failure to provide proper reasons;

(2) Whether the Tribunal identified the wrong issue or asked the wrong question.

(3) Whether a wrong principle of law had been applied;

(4) Whether there was a failure to afford procedural fairness;

(5) Whether the Tribunal failed to take into account relevant (i.e., mandatory) considerations;

(6) Whether the Tribunal took into account an irrelevant consideration;

(7) Whether there was no evidence to support a finding of fact; and

(8) Whether the decision is so unreasonable that no reasonable decision-maker would make it.

25 The circumstances in which the Appeal Panel may grant leave to appeal from decisions made in the Consumer and Commercial Division are limited to those set out in cl 12(1) of Schedule 4 of the NCAT Act. In such cases, the Appeal Panel must be satisfied that the appellant may have suffered a substantial miscarriage of justice because:

(a) The decision of the Tribunal under appeal was not fair and equitable; or

(b) The decision of the Tribunal under appeal was against the weight of evidence; or

(c) Significant new evidence has arisen (being evidence that was not reasonably available at the time the proceedings under appeal were being dealt with).

26 In *Collins v Urban* [2014] NSWCATAP 17, the Appeal Panel stated at [76] that a substantial miscarriage of justice for the purposes of cl 12(1) of Schedule 4 may have been suffered where:

> … there was a "significant possibility" or a "chance which was fairly open" that a different and more favourable result would have been achieved for the appellant had the relevant circumstance in para (a) or (b) not occurred or if the fresh evidence under para (c) had been before the Tribunal at first instance.

27 Even if an appellant from a decision of the Consumer and Commercial Division has satisfied the requirements of cl 12(1) of Schedule 4, the Appeal Panel must still consider whether it should exercise its discretion to grant leave to appeal under s 80(2)(b).

28 In *Collins v Urban*, the Appeal Panel stated at [84(2)] that ordinarily it is appropriate to grant leave to appeal only in matters that involve:

(a) issues of principle;

(b) questions of public importance or matters of administration or policy which might have general application; or

(c) an injustice which is reasonably clear, in the sense of going beyond merely what is arguable, or an error that is plain and readily apparent which is central to the Tribunal's decision and not merely peripheral, so that it would be unjust to allow the finding to stand;

(d) a factual error that was unreasonably arrived at and clearly mistaken; or

(e) the Tribunal having gone about the fact finding process in such an unorthodox manner or in such a way that it was likely to produce an unfair result so that it would be in the interests of justice for it to be reviewed.

Grounds of appeal

29 As maintained at the hearing of the appeal, the appellants' grounds of appeal were:

> (ii) Marc's claims were dismissed only in reference to s.77. Despite this, as explained in the application and as a direct result of the unconscionable and admitted breaches of the RT Act by the agent, Marc was economically and non-economically adversely affected by their illegal acts.
>
> …
>
> (v) Despite presumably being told by the agent she had breached s.41(1B) on several occasions and repudiated a contract, the landlord then evicted me and searched for another tenant willing to pay a higher rent. (See documents supplied by respondent in original response.)
>
> (vi) The compensation for Quiet Enjoyment loss inadequately reflected the degree the agent's and landlord's illegal actions disturbed my life. The egregious and blatant disregard the respondents showed for my rights was ignored in the Tribunal's decision.

30 At the hearing of the appeal, the appellants did not press challenges to the rejection of Mr Kay's application for recognition as a tenant and to what was said to be the Tribunal's failure to join the respondent's agent to the proceedings and hold them liable to compensate the appellants. We note that the grounds of appeal relating to the failure to join the agent were in any event foreclosed to the appellants by a decision of the Appeal Panel, constituted by Principal Member Suthers, delivered on 22 July 2022.

31 We note that none of the three grounds maintained by the appellants raise an apparent question of law.

32 We note the approach to the appeal grounds of unrepresented litigants set out in *Cominos v di Rico* [2016] NSWCATAP 5 at [12]-[13]:

> 12 The Appeal Panel must give effect to the guiding principle when exercising functions under the CAT Act, which is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 36(1)). …
>
> 13 It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal. …

33 Even adopting that approach, the only question of law which we have been able to identify is whether the Tribunal correctly understood and applied s 115 of the RTA, which we consider is a question raised by appeal ground (v). We will consider the remaining grounds of appeal as part of our consideration whether to grant leave to appeal.

34 The appellants sought leave to appeal on each of the bases set out in clause 12 of schedule 4 to the NCAT Act.

35 The basis upon which the Notice of Appeal asserted that the decision was not fair and equitable effectively raises the same issues as the grounds of appeal which we have extracted above.

36 The basis upon which the appellants submitted that the decision was against the weight of evidence involved a challenge to the Tribunal's conclusion that the respondent and her agent were not actuated by malice.

37 This finding was relevant to the Tribunal's rejection of Dr Yuwono's claim for exemplary damages.

38 We note that the Appeal Panel in *Corcoran v Far* [2018] NSWCATAP 13 appears to have accepted that the Tribunal has the power to award aggravated damages. At [72] the Appeal Panel said:

> 72 The appellant also claimed aggravated damages. As Windeyer J said of aggravated and exemplary damages in *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 149:
>
> > The formal distinction is, I take it, that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the

> defendant, and presumably to serve one or more of the objects of punishment - moral retribution or deterrence.

39 We need not for the purposes of this appeal consider whether the Tribunal has the power to award exemplary damages, as we consider there was no occasion for the award of either aggravated or exemplary damages in this case.

40 We note the statement of Sackville AJA (with whom Macfarlan and Whealy JJA agreed) in *New South Wales v Zreika* [2012] NSWCA 37 at [75]:

> "The conduct of DC Ryder [maintaining a prosecution knowing that it is bound to fail and knowing that the accused person is in custody], …, involved an egregious failure to act in the manner expected of a police officer where the liberty of an individual is at stake. The conduct was sufficiently egregious to warrant an award of exemplary damages not only to mark the Court's disapprobation, but to act as a deterrent and a spur to the State to ensure that police officers are properly trained and understand their heavy responsibilities."

41 The appellants' submission to the Tribunal had been that the conduct of the respondent and her agent was an "egregious and blatant disregard" of Dr Yuwono's rights.

42 The appellants point out that, contrary to the Tribunal's statement which we have set out above (at [20]), the respondent had not given oral evidence at the hearing, rather the evidence in question was given by the respondent's agent. The appellants submitted in oral submissions to the Appeal Panel that the inference of malice should be drawn by reason of the contents of the email of 9 February 2022.

43 It is appropriate to state immediately that we do not accept this submission. An inference of malice is not to be drawn lightly. We do not accept that the email of 9 February 2022 discloses even a hint of malice or contumacious conduct on the part of the respondent or her agent. There was no other evidence on which such a conclusion could be based.

44 The new evidence which the appellants sought to rely upon as "significant new evidence which was not reasonably available" at the time of the hearing, was evidence relating to the appellants' loss of wages. As such it is only potentially relevant if we were to accept that Dr Yuwono was entitled to compensation in

respect of the cost of moving from the premises, and we will address it, if necessary, in that context.

45 We turn to address the appellants' grounds of appeal.

46 It is convenient to address the question of law we have identified as raised by ground (v) before turning to grounds (ii) and (vi) which both relate to the assessment of compensation and would require the leave of the Appeal Panel.

Ground (v)

47 The appellants submitted that:

(1) The termination notice was retaliatory; and

(2) The service of a retaliatory termination notice was a breach of the residential tenancy agreement, either in itself, or as a breach of the covenant for quiet enjoyment.

48 The Tribunal's findings in relation to s 115 were as follows:

> "There were no orders of the Tribunal in force in relation to the landlord and tenant at the time the notice of termination was issued, nor had the tenant made any applications to the Tribunal. The tenant had raised landlord breaches of the RT Act with the landlord and had indicated the tenant reserved her legal rights.
>
> The landlord's representative indicated in their email notifying the tenant of the landlord's intention to serve a no grounds termination notice, that the landlord was happy with the tenant and should the tenant wish to consent to a reduced rental increase the landlord would continue the tenancy. The landlord's representative stated the reason for the notice of termination was the lack of an agreement on the rental increase amount.
>
> I am not satisfied on the evidence before the Tribunal that the Tribunal should make a declaration under s 115(1)(a) of the RT Act that the 'no grounds' notice of termination under s 85 of the RT Act was a retaliatory notice, because the tenant has failed to establish any of the grounds in s 115(2) of the RT Act."

49 We are satisfied that, contrary to the conclusion reached by the Tribunal, the termination notice was properly characterised as retaliatory within the meaning of s 115(2)(b) of the RTA. In our view, the Tribunal has clearly misapplied or misunderstood s 115(2)(b).

50 The email of 9 February 2022 is unequivocally to the effect that, unless Dr Yuwono was prepared to waive her right to object to a further rent increase as being contrary to s 41(1B) of the RTA, the respondent would issue a termination notice.

51 It is clear that Dr Yuwono had forcefully asserted her right not to pay rent greater than the agreed rent increase. In our view, even if that was not in itself action to enforce a right of Dr Yuwono, it was implicit in Dr Yuwono's correspondence, which repeatedly referred to s 41(1B) of the RTA, that she intended to stand on her rights and refuse to pay the further increased rent demanded by the respondent. That also would have constituted action to enforce Dr Yuwono's right not to pay the further increased rent.

52 Given the terms of the email of 9 February 2022, it is clear that the respondent was "wholly or partly motivated to issue the notice of termination" by the fact that Dr Yuwono had made plain her position, that she intended to maintain her right to reject any further rent increase within the 12-month period.

53 Nevertheless, we do not consider that the Tribunal's error in the interpretation or application of s 115 has the result that the Tribunal's decision was wrong or should be set aside.

54 The Tribunal declined to award compensation in respect of the removal costs on the basis that the issue of the termination notice was not a breach of the covenant for quiet enjoyment or any other term of the residential tenancy agreement. In our view that conclusion was correct.

55 Section 115 does not prohibit the issue of a retaliatory termination notice. It confers upon the Tribunal jurisdiction to declare a notice retaliatory and to decline to enforce it.

56 There is no provision in s 115 such as appears in other sections of the RTA (for example, ss 48 - 59) which makes those sections a term of any residential tenancy agreement.

57 The remedy provided against the issue of a retaliatory termination notice is to make an application to the Tribunal. As Dr Yuwono had already vacated the premises voluntarily there was no foundation for any such application in this case, and no occasion for or utility in the Tribunal making any declaration concerning the termination notice.

58 We accept that the harassment of a tenant by unwarranted threats of eviction may constitute a breach of the covenant of quiet enjoyment. Direct physical

interference is not essential to a finding of breach of the covenant: *Spathis v Hanave Pty Ltd* [2002] NSWSC 304 per Campbell J at [152]. However, more is required than the mere sending of a notice of termination, even one which might be characterised as retaliatory.

59 In *Martin's Camera Corner Pty Ltd v Hotel Mayfair Ltd* [1976] 2 NSWLR 15, Yeldham J referred to the definition of the covenant for quiet enjoyment as set out in *Halsbury's Laws of England* (3rd edition), vol 23 (1964) at [1298]-[1299] as follows:

> "The covenant for quiet enjoyment operates according to its terms to secure the tenant, not merely in the possession, but in the enjoyment of the premises for all usual purposes; and where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts or omissions of the landlord or those lawfully claiming under him, the covenant is broken, although neither the title to, nor the possession of the land may be otherwise affected..."

60 In *Kenny v Preen* [1963] 1 QB 499 at 512-3 Lord Justice Pearson said:

> "I would decide on two grounds in favour of the tenant's contention that there was, in this case, a breach of the covenant for quiet enjoyment. First, there was a deliberate and persistent attempt by the landlord to drive the tenant out of her possession of the premises by persecution and intimidation, and intimidation included threats of physical eviction of the tenant and removal of her belongings. In my view that course of conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession, and tended to deprive her of the full benefit of it, and was an invasion of her rights as tenant to remain in possession undisturbed, and so would in itself constitute a breach of covenant, even if there were no direct physical interference with the tenant's possession and enjoyment... "

61 In *Ciesiolka v Department of Housing NSW* [2010] NSWCTTT 497 a member of the Consumer Trader and Tenancy Tribunal held that the sending of three rental arrears letters, three water rates arrears letters and a notice of termination was not a breach of the tenant's right to quiet enjoyment.

62 In *Shirvington v Commonwealth (No 2)* [2015] FCA 522, Perram J held that the sending by the Commonwealth to its tenant, Mr Shirvington, of three letters which stated that the Commonwealth proposed to take the lawful (as his Honour noted) step of suing Mr Shirvington in the Federal Circuit Court (which has jurisdiction under the RTA in respect of leases by the Commonwealth) to get orders for possession was not a breach of the covenant for quiet enjoyment. His Honour stated, at [17]:

> "17 I do not think that there is any evidence of a threatened breach of s 50. The best that might possibly be said is that the three letters which were sent amounted to such a breach. However, I do not think that a written threat to commence proceedings which are designed to obtain possession can amount to an interference with the current possessor's right to quiet enjoyment."

63 In *Lewin v Zhou* [2018] NSWCATCD 54, after referring to *Ciesiolka v Department of Housing* and *Shirvington v Commonwealth (No 2),* the Tribunal held that "a demand for the payment of arrears, or the provision of letters foreshadowing termination" would not amount to a breach of quiet enjoyment.

64 These decisions were referred to by the Appeal Panel in *Pongrass v Small* [2021] NSWCATAP 314 in upholding a decision of the Tribunal that there had been a breach of the covenant of quiet enjoyment by a landlord: taking potential purchasers through the premises without having given the required notice; publishing online photographs of the premises including the tenant's personal possessions contrary to the tenant's request and without the tenant's permission; and having their solicitors write letters to the tenant containing "inappropriate and incorrect statements" including unwarranted threats to involve the police.

65 In our view there is no breach of the covenant for quiet enjoyment in s 50 of the RTA in issuing a notice of termination which, unless it becomes the subject of a successful application to the Tribunal under s 115, is a valid notice of termination.

66 We note that there was no challenge to the conclusion of the Tribunal that the issue of further notices of rent increase less than 12 months after the agreed rent increase of 10 January 2022 constituted a breach of the covenant of quiet enjoyment. We do not make any comment regarding whether that conclusion was correct.

Leave to Appeal and grounds (ii) and (vi)

67 To the extent that the appellants challenge the amount of the compensation awarded for the breach constituted by the issue of further notices of rent increase, the appellants would require leave to appeal against the assessment of the compensation. In considering whether the award was not fair and equitable or against the weight of evidence, it must be borne in mind that the assessment of an amount for non-economic loss, that is, distress,

disappointment and anxiety, is largely a matter of judgment, in respect of which minds may differ, and which can be challenged on appeal only if a wrong principle has been applied, irrelevant considerations have been taken into account, mandatory considerations have been ignored, or there is an obvious error in the assessment in the sense that the amount awarded is so far outside the bounds of what is reasonable that there must have been an error.

68 It is also necessary to bear in mind that the breach for which compensation was awarded was the sending of a number of notices by the respondent's agent purporting to notify an increase in rent notwithstanding the terms of s 41(1B) of the RTA. Dr Yuwono did not suggest, and the Tribunal did not find, that Dr Yuwono's decision to terminate her tenancy and vacate the premises was caused by the sending of the notices of rent increase.

69 We are not persuaded that Dr Yuwono may have suffered a substantial miscarriage of justice, either because the assessment of compensation by the Tribunal for the respondent's breach of contract was not fair and equitable or because it was against the weight of evidence.

70 Our conclusion that the issue of the termination notice was not a breach of the residential tenancy agreement is sufficient to dispose of each of the appellants' challenges to the rejection of Dr Yuwono's claims to compensation for moving costs and lost wages, including Mr Kay's lost wages, and renders irrelevant the documentation which Dr Yuwono relies upon as new evidence which was not reasonably available at the time of the original hearing.

71 However, we note with respect to the claim for compensation for Mr Kay's lost wages (that is the issue raised by ground (ii)) that, as Mr Kay was not a party to the tenancy agreement, he has no direct cause of action against the respondent for breach of contract.

72 We understand that the appellants put the claim for Mr Kay's lost wages in the alternative as compensation recoverable by Dr Yuwono as being losses she sustained by reason of the respondent's breach of the residential tenancy agreement.

73 We note that any claim by Dr Yuwono to recover damages in respect of services voluntarily provided for her benefit would be precluded on the basis set out by Beech-Jones J in *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 22)* [2019] NSWSC 1657, chapter 14 at [78] – [80]; see also *Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd* [2021] NSWCA 206 at [711] – [730].

Conclusion

74 For the foregoing reasons leave to appeal will be refused and the appeal will be dismissed

ORDERS

75 Our orders are:

(1) Leave to appeal refused.

(2) Appeal dismissed.

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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