Civil and Administrative Tribunal

New South Wales

Case Name:	Sewell v Zvirblis
Medium Neutral Citation:	[2022] NSWCATAP 337
Hearing Date(s):	20 September 2022
Date of Orders:	28 October 2022
Decision Date:	28 October 2022
Jurisdiction:	Appeal Panel
Before:	G Curtin SC, Senior Member D Robertson, Senior Member
Decision:	(1) Time to appeal extended up to and including 8 July 2022. (2) Appeal upheld in part. (3) The appellant's claim for an excessive rent order pursuant to s 44 of the Residential Tenancies Act 2010 (NSW) is dismissed. (4) Leave to appeal otherwise refused. (5) The Tribunal's order of 17 May 2022 dismissing the appellant's claim for compensation is confirmed.
Catchwords:	LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — repairs — landlord's duty – whether common property within definition of "residential premises" in s 62 of the Residential Tenancies Act – held, common property not within the definition of "residential premises" in s 62 of the Residential Tenancies Act LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — rent — excessive rent – whether the need for repairs not caused by the landlord fell within s 44(1)(b) of the Residential Tenancies Act – absent a breach of the landlord's obligation to repair,

	the need for repairs does not amount to the reduction or withdrawal of goods, services or facilities by the landlord
Legislation Cited:	Australian Consumer Law, s 18 Residential Tenancies Act 1987 (NSW), s 47 Residential Tenancies Act 2010 (NSW), ss 3, 26, 44(1)(b), 55(2), 62, 63(1), 64, 65(3)(a), 65(3)(b) Strata Schemes Management Act 2015 (NSW), ss 106, 226, 232 Trade Practices Act 1974 (Cth), s 82(1)
Cases Cited:	Collins v Urban [2014] NSWCATAP 17 Davies-Evans v MacCulloch [2018] NSWCATAP 253 Dimunova v Vega [2017] NSWCATAP 5 Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; 197 ALR 389 Eliezer v Residential Tribunal (2001) 53 NSWLR 657; [2001] NSWSC 1092 Pan v Malveholm [2021] NSWCATAP 101 Project Blue Sky Inc & Ors v Australian Broadcasting Authority [1998] HCA 28; 194 CLR 355 Roberts v NSW Aboriginal Housing Office [2017] NSWCATAP 9 Wardley Australia Ltd v State of Western Australia (1992) 175 CLR 514; [1992] HCA 55
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Samantha Sewell (Appellant) Andrew Zvirblis (Respondent)
Representation:	M Barker (Tenant Advocate) (Appellant) Respondent (Self-represented)
File Number(s):	2022/00211937
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division

Citation:	N/A
Date of Decision:	17 May 2022
Before:	P Zammit, General Member
File Number(s):	RT 22/17050

REASONS FOR DECISION

1 This is an appeal by a tenant, ably assisted by Mr Barker, against the rejection of claims she made against her former landlord for compensation and for an order that rent payable under the residential tenancy agreement was excessive. Other claims were made by the tenant in relation to other matters. Those other claims were also dismissed but were not pursued on appeal.

2 The central point in relation to the compensation claim was whether a security gate on common property fell within the definition of “residential premises” in s 62 of the RTA. No error has been demonstrated in relation to the Tribunal’s holding that it did not, nor otherwise in relation to the dismissal of the tenant’s other claims for compensation and so the appeal in relation to those matters is dismissed.

3 The Tribunal did err in failing to consider the tenant’s claim for an excessive rent order and so erred in law in failing to do so and the appeal in that regard is upheld. We are in as good a position as the Tribunal to consider that claim and so have determined it ourselves.

4 The main point in that claim was the meaning of the words “by the landlord” in s 44(1)(b) of the *Residential Tenancies Act 2010* (NSW) (the “RTA”). On our construction of those words the tenant has not established that any of the matters complained of were caused “by the landlord”. Accordingly, we uphold the appeal on that ground but dismiss the tenant’s claim for a reduction in rent.

5 Our reasons for arriving at those conclusions are set out below.

Background

6 The parties entered into a residential tenancy agreement on 6 October 2020 for premises at Kensington, NSW (the "premises"). The tenant commenced her

proceedings in the Tribunal on 18 December 2021. Vacant possession was provided on 21 December 2021.

7 The premises consisted of a ground floor unit in a multi-unit property (the "property").

8 During the tenancy the tenant complained about the following matters which are relevant to this appeal:

(1) a faulty security gate which provided access to the unit block containing the premises and which was located on common property;

(2) a water leak in the garage which originated from the shower in the premises;

(3) a problem with the air conditioner in the premises which resulted in the tenant being unable to heat the premises;

(4) an advertisement for the premises which was said to be misleading.

The Tribunal's Decision

The Security Gate

9 The Tribunal dismissed the tenant's claim for compensation in relation to the security gate because the Tribunal said that the security gate was the gate for the common area of the property and not the access door for the premises. The Tribunal said that repairs to the security gate were required to be undertaken by the body corporate and that it was not the responsibility of the landlord to undertake those repairs. The Tribunal said that the landlord was required to notify the body corporate, and the Tribunal was satisfied that this occurred.

10 The Tribunal said that in accordance with the RTA the landlord was obliged to ensure that the premises were reasonably secure and, based on the evidence before it, the Tribunal said it was satisfied that the landlord had met his obligations under the RTA and had provided premises which were reasonably secure.

The Water Leak

11 The Tribunal said that there was a water leak in the garage which originated from the shower in the premises, the leak was reported sometime in June 2021 and was repaired on 3 August 2021.

12 The Tribunal said that the landlord gave evidence (which appears to have been accepted by the Tribunal) that the water leak was reported to the landlord's agent by the plumber associated with the body corporate. To repair the leak the plumber required access to the premises and the landlord submitted that the parties had difficulties in arranging access to the premises. The landlord submitted that they were repairs that would be deemed as urgent repairs and they could have used their keys to gain access, however out of respect to the tenant they did not do this.

13 The Tribunal said that a landlord breaches his, her or its obligation to maintain premises in a reasonable state of repair [s 63(1) of the RTA] if the landlord had had notice of the need for repair, or ought reasonably to have known of the need for the repair and had failed to act with reasonable diligence to have the repair carried out.

14 The Tribunal said that it was satisfied that the landlord had acted with reasonable diligence to have the repairs conducted in relation to the water leak.

The Air Conditioner

15 The Tribunal said that the tenant gave evidence that on 8 April 2021 she reported a problem with the air conditioner in the premises. The tenant contacted the agent again in August 2021 regarding the air conditioner as she was not able to heat the premises. The tenant confirmed that someone attended the premises on 13 August 2021 to have a look at the air conditioner however needed access to the roof of the property to undertake repairs and was not able to obtain access. The tenant provided written evidence that she then re-contacted the agent in November 2021 to inform them the air conditioner had not been repaired.

16 The Tribunal said that the landlord agreed that notification had been provided on 8 April 2021 however stated that following the notification the agent had emailed the tenant and tried to call her to ascertain the problem. The first reply the agent received from the tenant was on 4 August 2021. In November 2021 when the problem was again notified to the agent, the agent arranged for a technician to attend the property. However, the technician informed the agent

that they had made attempts to contact the tenant and had not received a return telephone call. The agent confirmed that they had attempted to have the repairs done but claimed that the tenant would not reply to emails or return calls to arrange for those repairs to be done.

17 The Tribunal said that it was satisfied that the delays in having the repairs undertaken were contributed to by the tenant failing to provide access. The Tribunal also said that even if it had found that the landlord had not acted with due diligence, which it had not, the tenant had not provided any evidence to the Tribunal showing any damage or loss suffered as a result of the air conditioner not being repaired at an earlier point in time.

The Allegation of Misleading Conduct

18 The Tribunal said that the tenant submitted that the managing agent had mislead her which caused her to sign the tenancy agreement by stating that the premises was only 12 months old and would have no issues. The tenant relied upon a screen shot taken on her phone of an advertisement for the premises from the agent's webpage.

19 The Tribunal said that the landlord's agent submitted that the advertisement tendered by the tenant was actually a 2017 advertisement for the property that was on their website under "leased properties". The agent submitted that the correct advertisement used at the time of the tenant entering into the tenancy was in a different form and did not contain the representations complained of.

20 The Tribunal said that s 26 of the RTA provided that a landlord or landlord's agent must not induce a tenant to enter into a residential tenancy agreement by any statement, representation or promise that the landlord or agent knows to be false, misleading or deceptive or by knowingly concealing a material fact of a kind prescribed by the regulations.

21 The Tribunal said that based on the evidence provided to the Tribunal, it accepted the evidence of the landlord that the advertisement referred to by the tenant was a 2017 advertisement and that the advertisement (tendered by the landlord) was available at the time the premises were leased to the tenant.

The Appeal

22 The tenant appealed (Grounds 1–3) or sought leave to appeal (Grounds 4–5) on five grounds. They were:

(1) The Tribunal erred in finding that the landlord's repair obligation did not extend to the lock/security device on the common property.

(2) The Tribunal erred in taking into account an irrelevant consideration, being the tenant's engagement with the landlord or agent regarding organising a time for access.

(3) The Tribunal erred by failing to determine the appellant's request for an order that rent was excessive under section 44(1)(b) of the RTA.

(4) The Tribunal's conclusion that the respondent had not breached s 26 of the RTA was against the weight of evidence.

(5) The Tribunal's conclusion that the appellant had provided no evidence of damage or loss suffered as a result of the air conditioner not being repaired at an earlier point in time was not fair and equitable or, in the alternative, was against the weight of evidence.

Extension of Time to Appeal

23 The appeal was filed approximately 38 days out of time (as conceded by the tenant).

24 The tenant submitted that the principal reason for the delay in filing the appeal was that she had been suffering from a number of significant medical conditions and tendered evidence to support that contention. She said that the incapacity resulting from these conditions meant that it was difficult for her to obtain advice about an appeal and then carry out the administrative tasks necessary to file that appeal. In addition, at the time the appellant was coping with issues in her new property and had misunderstood the appeal timeframe to be 28 days.

25 The respondent, to his credit, did not oppose an order extending time to appeal.

26 In the absence of any prejudice to the respondent, the relatively short time involved and the tenant’s explanation for not filing her appeal in time we consider it appropriate to extend the time to appeal.

Ground 1

27 The tenant submitted that the Tribunal erred in finding that the landlord's repair obligation did not extend to the lock/security device on the common property.

28 The tenant submitted that s 63(1) of the RTA imposes an obligation on a landlord to ensure that "residential premises" are in a reasonable state of repair. "Residential premises" for the purposes of that provision (contained within Division 5 of Part 3 of the RTA) are defined by s 62 of the RTA which says that (for the purposes of Division 5 of Part 3 of the RTA) "residential premises":

> … includes everything provided with the premises (whether under the residential tenancy agreement or not) for use by the tenant.

29 The tenant says that the security gate in question was provided with the premises and so fell within s 62 and was therefore subject to s 63.

30 In support of her submission the tenant cited *Dimunova v Vega* [2017] NSWCATAP 5 at [31]-[32] wherein the Appeal Panel said:

> "31 However, in our view, it was necessary for the Tribunal to consider whether the respondent had breached the obligations set out in s 63 to provide and maintain the residential premises in a reasonable state of repair. The Tribunal found that the burst water pipe did not occur through any act or omission of the respondent and therefore there was no breach of the residential tenancy agreement. In our view that analysis discloses an error of law. In our view, the obligation set out in s 63 is mandatory (subject to s 65(3)), and is not conditional upon the landlord having it within the landlord's own power the ability to take steps to provide and maintain the residential premises. The fact that another unit owner or the strata committee of the body corporate must take steps to fix the burst pipe does not excuse the landlord of his or her obligations under s 63. The only qualification to these statements is that the duty set out in s 63 is, in our view, modified by s 65(3) which provides that the Tribunal must not determine that a landlord has breached the obligation (that is the obligation which, by virtue of s 65(2), refers back to s 63(1)), unless the Tribunal is satisfied of two matters. The first matter is that the landlord had notice of the need for repair or ought reasonably to have known of the need for repair. The second matter is that the landlord failed to act with reasonable diligence to have the repair carried out (s 63(3)(b)).
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> 32 In the context of residential premises in a strata scheme, what constitutes a failure to act with reasonable diligence will involve a consideration of what steps the landlord is able to take to encourage or force the strata committee to take appropriate practical steps having regard to the fact that the common property is not property owned by the landlord and generally the other lot properties will not be owned by the landlord. This view is supported by the fact that the landlord's obligation to reimburse the tenant for urgent repairs excludes, by the way "urgent repairs" is defined, work needed to repair premises that are owned by a person other than the landlord (see s 62)."

31 However, we do not agree that *Dimunova* is applicable. In *Dimunova* the premises themselves, or rather part thereof, required repair because of a burst water pipe on common property. The point in that case was whether the landlord's obligation to repair the rented premises was removed or diminished or altered by reason of the fact that the cause of the damage was on common property. In other words, there was no dispute that what needed repair included the rented premises. The water pipe also required repair to prevent future damage, but the question in the case was not whether the water pipe was part of the residential premises, but whether the obligation to repair the premises extended to taking or encouraging or forcing the strata committee to take appropriate steps to repair the water pipe, it being the cause of the damage.

32 In the present case the item requiring repair was itself on, and formed part of, the common property. This is quite different from *Dimunova* in that it was not part of the issues arising for decision in *Dimunova* whether common property (or part thereof) was provided with the premises for use by the tenant within the meaning of "residential premises" in s 62 of the RTA.

33 Our research has not revealed any authority on the point raised by the tenant.

34 In our view s 62, on its proper construction, does not extend to the security gate in question in this case.

35 The principles we are to apply in determining what s 62 RTA means, and whether its meaning extends to include items such as the security gate, were summarised by the High Court in *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355. At [69]-[71], the Court said (citations omitted):

> "[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court 'to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
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> [71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'."

36 The RTA, as it says at its commencement, is:

> "An Act with respect to the rights and obligations of landlords and tenants, rents, rental bonds and other matters relating to residential tenancy agreements; and for other purposes."

37 In other words, it exists to govern the relationship between, and the respective rights and obligations of, landlords and tenants and which concerns the property and other things which landlords provide to tenants in exchange for rent.

38 Thus, s 3 says that "residential premises":

> … means any premises or part of premises (including any land occupied with the premises) used or intended to be used as a residence.

39 "(T)enancy":

> … means the right to occupy residential premises under a residential tenancy agreement.

40 And "rent" is:

> … an amount payable by a tenant under a residential tenancy agreement for the right to occupy premises for a period of the agreement.

41 Those sections indicate that the focus of the RTA is on premises or part of premises provided as (and with) a residence for tenants to reside in with exclusive possession. In that sense we do not agree that a security gate on

common property was "provided with" the premises for use by the tenant within the meaning of s 62.

42 "(P)rovided with" in s 62 has the sense of being provided *by the landlord* or provided by someone else with the permission of or tacit acceptance by the landlord, although the words "by the landlord" do not appear in s 62.

43 The tenant's argument was necessarily based on the proposition that if the tenant used any part of common property, then that common property was "provided with" her premises within the meaning of "residential premises" in s 62. But we do not think s 62 is so wide because if the tenant's argument was accepted all common property which the tenant was permitted to access would fall within s 62, and the landlord's obligation to repair under s 63 would extend to all that common property. We do not consider that that was the intention of Parliament. Taken to its extreme the tenant's argument would extend to asserting that the footpath and roadway outside the unit block had been "provided with" the premises for the use of the tenant.

44 In our view it strains the language of "provided with" to say that any part of common property used by the tenant was therefore "provided with" the premises.

45 The word "provided" involves, in its ordinary meaning, the concept of active supply or making available, and in the RTA – which governs the relationship between landlords and tenants – the sense is that the source of the supply or availability is the landlord. In our view "provided" does not extend to the passive and incidental right to use common property which is a necessary incident of a tenancy of a lot in a strata scheme.

46 We note that Parliament provided tenants with rights against body corporates in relation to the maintenance of common property. Parliament enacted the *Strata Schemes Management Act 2015* (NSW) (the "SSMA") and its predecessors to govern the relationship between lot owners (including landlords) and body corporates. Under the SSMA body corporates have obligations toward lot owners for the maintenance of common property. But tenants also have rights against body corporates under the SSMA in relation to common property.

47 A person having an estate or interest in a lot (which would include a tenant under a residential tenancy agreement) or an occupier of a lot (which would also include a tenant) is an "interested person" as defined in s 226 of the SSMA.

48 An "interested person" is entitled to commence proceedings against the body corporate in the Tribunal under s 232 of the SSMA and ask the Tribunal to make an order to settle a complaint or dispute about a number of matters including the operation, administration or management of a strata scheme under the SSMA and the exercise of, or failure to exercise, a function conferred or imposed by or under SSMA, either of which would extend to a body corporate's statutory obligation under s 106 of the SSMA to properly maintain and keep in a state of good and serviceable repair the common property.

49 In all of those circumstances we consider that s 62 is confined to things expressly or tacitly provided, supplied or made available by a landlord "with the premises" and for the use of the tenant. An example might be a car space or storage locker which was not included in the residential tenancy agreement, or things like washing machines and dryers, either in the leased premises or perhaps provided for the exclusive use of the tenant by the landlord but located on common property (in a shared laundry room). Common property, in our view, does not fall within the definition of "residential premises" in s 62 of the RTA.

50 Our conclusion is fortified by the fact that, given the definition of "urgent repairs" in s 62 – which excludes work needed to repair premises that are owned by a person other than the landlord or a person having superior title (such as a head landlord) to the landlord - a landlord is not required under s 64 to reimburse a tenant for the reasonable costs of making urgent repairs to, amongst other things, common property. It would seem incongruous to exclude a landlord from liability for urgent repairs to common property and yet include such a liability for landlords in relation to non-urgent repairs in s 63.

51 We do not accept ground 1.

Ground 2

52 The tenant submitted that the Tribunal erred in taking into account an irrelevant consideration, being the tenant's engagement with the landlord or agent regarding organising a time for access.

53 The tenant directed our attention to paragraphs 14 and 16 of the Tribunal's decision in which the Tribunal referred to evidence to the effect that the tenant had not co-operated in granting access to tradesmen to attend to repair the items about which she complained.

54 The tenant submitted that s 55(2) of the RTA provided that a landlord, the landlord's agent or any other person authorised by the landlord may enter residential premises during a residential tenancy agreement without the consent of the tenant, after giving notice to the tenant, in certain applicable circumstances, and thus her refusal to co-operate in granting access by consent was irrelevant to the question whether the landlord had breached his obligation to repair.

55 We disagree.

56 Although landlords have the power to gain access in the absence of the tenant's consent, as the tenant correctly submitted, that does not mean that the tenant's lack of co-operation was completely irrelevant to the question whether the landlord had been reasonably diligent in having repairs carried out (as is required to be considered – see *Dimunova* at [31]).

57 If reasonableness is the touchstone, then any fact that impinges on the assessment of reasonableness would be relevant for the Tribunal to consider, and the tenant's co-operation (or lack thereof) is such a factor to be considered.

58 We do not accept ground 2.

Ground 3

59 The tenant submitted that the Tribunal erred by failing to determine the appellant's request for an order that rent was excessive under section 44 (1)(b) of the RTA.

60 In the tenant's Application Form she sought an order pursuant to s 44(1)(b) of the RTA that the rent payable was excessive due to the reduction or withdrawal of certain goods, services or facilities provided with the residential premises.

61 During the hearing before the Tribunal the tenant's request for a reduction in rent was mentioned. Some of the tenant's written evidence before the Tribunal consisted of contemporaneous requests for reduced rental (for example, due to the security gate being defective – p 9 of the tenant's evidence bundle). On at least one occasion the Tribunal asked the tenant what she was claiming in relation to the security gate (for example) and the tenant said she was seeking a 50% reduction in rental for all defects (sound recording at around 24.00 minutes).

62 Notwithstanding that evidence and the matter being expressly mentioned, the Tribunal did not consider or determine that claim, and its failure to do so was an error of law entitling the tenant to appeal as the Tribunal is required to consider all claims made by someone such as the tenant - *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389.

63 Pursuant to s 81 of the *Civil and Administrative Tribunal Act 2013* (NSW) (the "NCAT Act") we are able to decide that issue ourselves and we shall do so given we have all of the evidence and no issues of credit arise.

64 The difficulty facing the tenant in relation to this claim is that a tenant is only able to claim a reduction of rent if the reduction or withdrawal of the goods, services or facilities alleged was "by the landlord".

65 Section 44(1)(b) of the RTA says:

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

66 In short, in our opinion none of the alleged reduction or withdrawal of goods, services or facilities in this case was "by the landlord" and so the tenant's case for a reduction of rent under s 44 cannot succeed.

67 What "by the landlord" means in s 44 is that it must be *the landlord*, and not a third party, whose act or omission results in the reduction or withdrawal of goods, services or facilities.

68 In *Eliezer v Residential Tribunal* (2001) 53 NSWLR 657; [2001] NSWSC 1092 McLellan J said the following about s 47 of the *Residential Tenancies Act 1987* (NSW) (a similar provision to s 44 of the RTA):

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

69 In *Pan v Malveholm* [2021] NSWCATAP 101 the Appeal Panel said at [35] that it could see no reason why s 44(1)(b) of the RTA should be interpreted any differently.

70 There is no dispute that the landlord himself, in this case, did not, by his actions, reduce or withdraw any goods, services or facilities. That is, the landlord did not, by his actions, cause the security gate to be in disrepair, or damage the air conditioning so that it did not heat or cause the leak into the garage.

71 A breach of the obligation to maintain premises in a reasonable state of repair may amount to a withdrawal or reduction of services by the landlord by reason of the landlord's omission to comply with the obligation – see *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 at [113]-[114]. But the tenant failed to prove that the landlord breached that obligation in this case.

72 That leaves the tenant's submission that the mere fact that items fell into disrepair was sufficient to satisfy s 44, impliedly submitting that repairs that

arose due to the passage of time, or fair wear and tear for example, amounted to a reduction or withdrawal of goods, services or facilities by the landlord.

73 In our view the words of the section do not have such a wide meaning when we apply the relevant principles of statutory construction mentioned earlier in this decision. This conclusion is consistent with the decision of the Appeal Panel in *Davies-Evans v MacCulloch* [2018] NSWCATAP 253 at [15], [19].

74 In our opinion an item which falls into disrepair simply through the effluxion of time or fair wear and tear, for example, is not a reduction or withdrawal of goods, services or facilities "by the landlord" within s 44(1)(b).

75 The word "by" found in s 44(1)(b) has been used in other statutory contexts. Perhaps the most examined "by" was that found in s 82(1) of the now repealed *Trade Practices Act 1974* (Cth). That section said that:

> .. [a] person who suffers loss or damage by conduct of another person that was done in contravention of [s 52] may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

76 In *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514; [1992] HCA 55 Mason CJ, Dawson, Gaudron and McHugh JJ said of the word "by" in s 82(1):

> "'By' is a curious word to use. One might have expected 'by means of', 'by reason of', 'in consequence of' or 'as a result of'. But the word clearly expresses the notion of causation without defining or elucidating it. In this situation, s 82(1) should be understood as taking up the common law practical or common sense concept of causation recently discussed by this court in *March v Stramare (E & MH) Pty Ltd*, except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act. Had Parliament intended to say something else, it would have been natural and easy to have said so."

77 There is nothing in the RTA, by way of language, context, purpose, policy, consistency or fairness which is apparent to us which leads us to think any different meaning should be applied to the word "by" in s 44(1)(b) of the RTA. That is, it expresses the notion of causation or, put another way, that a landlord must cause (by act or omission) the reduction or withdrawal of goods, services or facilities.

78 The RTA provides tenants with remedies if landlords fail to maintain premises in a reasonable state of repair, and remedies if landlords, by their acts or

omissions, reduce or withdraw any goods, services or facilities provided with the residential premises. Tenants also have rights to attend to urgent repairs and be reimbursed for the costs of doing so by landlords pursuant to s 64 of the RTA.

79 But there is nothing in the RTA which suggest to us that, absent a breach of the obligation to maintain premises in a reasonable state of repair, the rent agreed upon should be reduced whenever any goods, services or facilities provided with the residential premises fall into disrepair simply because of the effluxion of time or wear and tear for example. There must be something more for s 44(1)(b) to apply, and that is that the landlord must cause the matter complained of.

80 Further, to allow such a rent reduction for repairs under s 44 as the tenant suggests would derogate from the preconditions necessary to establish liability against a landlord for breach of the obligation under s 63 to maintain premises in a reasonable state of repair (liability for such a breach only arises where the Tribunal 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 per s 65(3)(a) of the RTA) and the precondition for an order against a landlord to effect repairs (where, before making such an order, the Tribunal may consider whether the landlord failed to act with reasonable diligence to have the repair carried out per s 65(3)(b) of the RTA).

81 Therefore, in our opinion, the reduction or withdrawal of goods, services or facilities alleged by the tenant – the faulty security gate, the non-heating air conditioning system and the water leak – were not brought about “by the landlord” within the meaning of s 44 of the RTA.

82 We do not accept ground 3.

Ground 4

83 The tenant sought leave to appeal on the basis that the Tribunal's conclusion that the landlord had not breached s 26 of the RTA was against the weight of evidence.

84 The Tribunal said that the tenant submitted to the Tribunal that the managing agent had misled her which caused her to sign the tenancy agreement, by stating that the premises was only 12 months old and would have no issues. The misleading representation was allegedly contained in a written advertisement, but the Tribunal found that the advertisement used at the time of the tenant entering into the tenancy was in a different form and did not contain the representations complained of. The advertisement complained of was dated approximately three years prior to the entry into the residential tenancy agreement.

85 The tenant challenges these factual findings by submitting that they were against the weight of evidence.

86 The expression "against the weight of evidence" means that the evidence in its totality preponderates so strongly against the conclusion found by the Tribunal that it can be said that the conclusion was not one that a reasonable tribunal member could reach - *Collins v Urban* [2014] NSWCATAP 17 at [77].

87 That test is not satisfied in this case. The tenant's submissions did not suggest that the *totality* of the evidence on the issue *preponderated so strongly* against the conclusion found by the Tribunal. Rather, the tenant submitted that her evidence should have been *preferred* to that tendered by the landlord.

88 Further, the tenant relied upon s 26 of the RTA which provides that a landlord or landlord's agent must not induce a tenant to enter into a residential tenancy agreement by any statement, representation or promise that the landlord or agent knows to be false, misleading or deceptive or by knowingly concealing a material fact of a kind prescribed by the regulations.

89 A breach of s 26 exposes the perpetrator to a penalty but does not provide a remedy in damages.

90 Perhaps the tenant might also have relied on s 18 of the Australian Consumer Law, but there is no evidence of loss or damage being caused by any breach (assuming one occurred). The tenant submitted that, but for the misrepresentation, she would not have rented this unit, but how would the tenant have been worse off? She would have rented somewhere else (perhaps

at a higher rent) and the hypothetical alternative unit may also have needed repairs from time to time. It is impossible to say whether the tenant would have been any better off in completely hypothetical alternative accommodation.

91 Therefore, we are not persuaded, as required by cl 12 of Schedule 4 of the NCAT Act, that the tenant may have suffered a substantial miscarriage of justice because the decision of the Tribunal on this point was against the weight of evidence and accordingly refuse leave to appeal in relation to ground 4.

Ground 5

92 The tenant sought leave to appeal on the basis that the Tribunal's conclusion that the appellant had provided no evidence of damage or loss suffered as a result of the air conditioner not being repaired at an earlier point in time was not fair and equitable or, in the alternative, against the weight of evidence.

93 The tenant accepted that this ground for leave depended upon the success of ground 2. As we have dismissed ground 2 we need not consider this ground.

Orders

94 We make the following orders:

(1) Time to appeal extended up to and including 8 July 2022.

(2) Appeal upheld in part.

(3) The appellant's claim for an excessive rent order pursuant to s 44 of the *Residential Tenancies Act 2010* (NSW) is dismissed.

(4) Leave to appeal otherwise refused.

(5) The Tribunal's order of 17 May 2022 dismissing the appellant's claim for compensation is confirmed.

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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