Supreme Court

New South Wales

Case Name:	Novelly v Tamqia Pty Ltd
Medium Neutral Citation:	[2022] NSWSC 1607
Hearing Date(s):	7 November 2022 – 9 November 2022
Decision Date:	24 November 2022
Jurisdiction:	Equity
Before:	Peden J
Decision:	(1) The Plaintiff's claims for specific performance are dismissed. (2) Each party to pay their own costs.
Catchwords:	LEASES AND TENANCIES — Repairs, maintenance and alterations — Obligation to repair and maintain — Where expedited proceedings concern three year and one month lease of a residential penthouse — Where substantial parts of the plaintiff's case no longer pressed at the hearing due to defendant's undertakings — Where balance of the case concerned specific performance of landlord's repair covenants in respect of internal lift maintenance, some lights, a pool heater, fridge, barbeque and panel door — Where no breaches established — Where damages would be for loss of amenity — Where damages would be an adequate remedy and specific performance would be refused
Cases Cited:	DH MB Pty Ltd v Manning Motel Pty Ltd [2014] NSWCA 396 Dougan v Ley (1946) 71 CLR 14 John Fairfax & Sons Ltd v Australian Telecommunications Commission (1977) 2 NSWLR 400 Ryan v Mutual Tontine Westminster Chambers Association Ltd [1893] 1 Ch 116

	Wight v Haberdan Pty Ltd [1984] 2 NSWLR 280
Texts Cited:	Meagher, Gummow and Lehane's Equity Doctrines and Remedies (4th ed, 2002, Lawbook Co)
Category:	Principal judgment
Parties:	Jared Novelly (Plaintiff) Tamqia Pty Ltd (Defendant)
Representation:	Counsel: G A Sirtes SC and P Barham (Plaintiff) E A J Hyde (Defendant) Solicitors: Fraser Clancy Lawyers (Plaintiff) John de Mestre & Co (Defendant)
File Number(s):	2021/365919
Publication Restriction:	Nil

JUDGMENT

1 The plaintiff, Mr Jared Novelly, complains that his landlord, Tamqia Pty Ltd (Tamqia), has breached his residential lease (Lease) of premises located at 157 Liverpool Street ("The Hyde"), Sydney (Premises). The Lease's term of 3 years and 1 month commenced on 11 June 2021.

2 The leased Premises comprise a furnished three level penthouse, which Mr Novelly's senior counsel described as "prestige premises" and having "panoramic views". The three levels of the apartment are serviced by an internal lift, and there is an outdoor pool and entertaining area on the top level. Mr Novelly pays rent of $15,000 per week. He also has a right of first refusal, should Tamqia wish to sell "at any time", with conditions attached.

3 Mr Novelly had pleaded over 50 other "repair" issues that were abandoned at the commencement of the hearing or resolved by undertakings given by Tamqia during and after the hearing. He no longer sought, for example, an order that Tamqia "pressure clean whole of upstairs balcony to clear spiders, webs and other insects" and "garden tidy-up".

4 As senior counsel for Mr Novelly observed at the hearing, other allegations pleaded, including misleading or deceptive conduct and damages, may be agitated at another time.

5 Only the following must be determined by the Court:

(1) whether Tamqia breached its obligation to enter into contracts for lift maintenance;

(2) whether Tamqia breached its obligation to "check" all lights to make sure they were in working order within 45 days of commencement of the Lease;

(3) whether Tamqia breached its obligation to keep in reasonable repair (found in clause 19.3 of the standard terms of residential lease):

(a) some lights;

(b) 2 burners on a barbeque;

(c) a fridge/freezer;

(d) the pool heater;

(e) a retractable door; and

(4) if any breaches are found, whether specific performance ought to be ordered, compelling Tamqia to comply with its promises.

Principles concerning specific performance

6 Specific performance will only be ordered where damages are an inadequate remedy, and the Court is persuaded it is an appropriate case in which to exercise its discretion to do so: see eg *Dougan v Ley* (1946) 71 CLR 142 at 150 (Dixon J) and 153 (Williams J).

7 Whether specific performance of covenants to repair will be granted involves a consideration of whether such an order would require the constant supervision of the Court. For this proposition, the learned authors of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, 2002, Lawbook Co) at [20-065] cite *Ryan v Mutual Tontine Westminster Chambers Association Ltd* [1893] 1 Ch 116 at 123, where Lord Esher MR said when refusing specific performance that a landlord provide an attendant porter during the lease:

> The contract is that those services shall be performed during the whole term of the tenancy; it is therefore a long-continuing contract, to be performed from day to day and under which the circumstances of non-performance might vary from day to day. I apprehend, therefore, that the execution of it would require

> that constant superintendence by the Court, which the Court in such cases has always declined to give.

8 The authors go on at [20-080]:

> … A building agreement is, par excellence, one the performance of which requires continual supervision. But if certain conditions are satisfied a court of equity may compel performance of such a contract. In *Wolverhampton Corp v Emmons* [1901] 1 KB 515 at 524-5 Romer LJ stated those conditions as follows:
>
> > It has, I think, for some time been held that, in order to bring himself within that exception, a plaintiff must establish three things. The first is that the building work, of which he seeks to enforce the performance, is defined by the contract, that is to say, that the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done.
>
> The same conditions apply in relation to covenants to keep leased premises in repair.

9 Therefore, as there is no issue as to possession of the land, the relevant inquiry for each of the alleged breaches of clause 19.3 is as follows:

(1) Has a breach of the covenant been established?

(2) Is the contractual obligation sufficiently precise for an order for specific performance, or has a sufficiently precise order been sought that accords with the contract, such that constant supervision will not be required?

(3) Are damages an adequate remedy for the breaches of covenants to repair?

10 In terms of adequacy of damages, the ordinary measure of damages for a breach of covenants to repair is the difference between the value of the premises to the lessee in their present state of repair and the value to the lessee if the landlord had fulfilled the obligation to repair: *DH MB Pty Ltd v Manning Motel Pty Ltd* [2014] NSWCA 396 at [25] (Meagher JA, with whom Barrett JA and Gleeson JA agreed).

11 However, Mr Sirtes SC submitted that in this case the measure of loss would be loss of amenity. He submitted that damages were not an adequate remedy, because they may not be very large and would be difficult to quantify, referring

to *Wight v Haberdan Pty Ltd* [1984] 2 NSWLR 280 at 290, where Kearney J stated:

> In relation to the question of whether damages are an adequate remedy the true rule requires in my view consideration of the circumstances of the particular case in hand. The test is, in my view, whether by leaving a plaintiff to a remedy in damages justice is done. In other words, the question to be determined is whether such a remedy in damages is adequate to satisfy the demands of justice. In the present instance it is obvious that if the plaintiff is left to pursue common law claims for damages the most complex questions will arise. There will be necessarily difficult questions as to the measure of damages and the remoteness of damages. There will be obviously great delay and expense and at the end of the day the question of what damages could be awarded would, in my view, be extremely difficult if not virtually impossible to assess with reasonable accuracy.

12 I do not accept that *Wight v Haberdan* has any particular relevance to this case. That case concerned whether specific performance of a loan agreement in the context of a purchase of land ought to be ordered and whether damages would be an adequate remedy.

13 That is not the case here, where the issue is whether loss of amenity damages are an adequate remedy. I do not accept that courts experience difficulties in assessing damages for loss of amenity.

14 Mr Sirtes SC nevertheless submitted that, if the likely damages would be nominal, that provided a further reason why specific performance was the appropriate remedy for any breach. I do not accept that submission. The question is whether damages are an adequate remedy, and whether specific performance is required to do justice between the parties. I do not accept that specific performance should be ordered in circumstances where a plaintiff cannot in fact identify any real negative impact of a breach of contract or the negative impact is very small; instead, that is the very situation where nominal damages are the appropriate remedy.

15 Further, possible delay in Mr Novelly obtaining a remedy for breach raised by Kearney J is not an issue, because the parties do not require me to quantify damages if breaches are found.

Alleged breaches of Lease requiring orders for specific performance

16 I deal with each alleged breach below and whether specific performance ought to be ordered. There is no photographic evidence in relation to the alleged

breaches, nor was any view of the premises undertaken. The plaintiff's case primarily rested on the affidavit and oral evidence of Mr Novelly.

Internal lift maintenance

17 There is an express term of the Lease that Tamqia agrees to:

> Enters [sic] into one or more maintenance contracts so that an appropriately qualified contract [sic] attends the premises at least once every 3 months throughout the term and maintains in good working order and condition the internal lift, including without limitation, the telephone service to the lift to facilitate emergency calls.

18 Somewhat oddly, Tamqia defended the pleading of breach of that obligation (as at 28 March 2022) by admitting that it had not entered into any such contracts, but adding that it had "procured Easy Living Services Pty Ltd to attend the Premises in July 2021 and December 2021 to maintain in good working order and condition the internal lift, including without limitation the emergency telephone service in the lift."

19 It may be that Tamqia construed the contractual obligation to have one ongoing contract with a maintenance company. However, the language of the clause permits multiple contracts ("one or more"), providing the one or more contracts include a promise by a qualified person to attend "at least once every 3 months". I consider the natural and ordinary meaning of those words allows Tamqia to enter into a separate contract every few months, should it wish, providing the effect is that a qualified person attends once every 3 months to maintain or service the lift.

20 In evidence was an invoice from a lift maintenance service provider who attended the Premises on 2 November 2022 and recorded "run the lift for over 30 minutes with no issues". That was the same lift maintenance service provider who had serviced the lift on other occasions also.

21 I do not accept that there is a current breach of the Lease requirement.

22 Mr Novelly also conceded in cross-examination that the lift has always been serviced when there is a problem, although he complained that repairs sometimes take "months". His affidavit stated that the lift "was fixed" in late December 2021. I do not accept that Mr Novelly's gratuitous comments in cross-examination that the lift was not compliant with Australian standards

need be considered when that issue is not pleaded, and Mr Novelly does not profess to have any Australian expertise in lift maintenance or installation.

23 While historically there may have been a breach, there is no demonstrated ongoing breach. It is not apparent to me that any loss has been suffered by reason of any historical breach, but in any case, any loss would at most be loss of amenity, which could be adequately compensated with damages rather than an order for specific performance.

Lights

24 Tamqia promised to carry out certain works within 45 days of the commencement of the Lease. One matter listed was: "can all lights be checked to make sure they are in working order". I do not consider a breach of that obligation has been established.

25 Mr Novelly's evidence was that, on 7 June 2021, "approximately one-half of the lights at the Premises were not working". However, Mr Daniel McDonough, builder, deposed in an affidavit that Mr Novelly's evidence in this regard was not accurate as he had replaced many light globes in June 2021. He was not required for cross-examination, and I accept his evidence in preference to Mr Novelly's, which was inconsistent as outlined below. I consider Mr McDonough's work satisfied clause 19.2, which required Tamqia to ensure all the light globes were working at the commencement of the Lease, and the obligation to "check" the lights were in working order.

26 Tamqia was also obliged to maintain the lighting pursuant to clause 19.3, which provides:

> The landlord agrees to keep the residential premises in a reasonable state of repair, considering the age of, the rent paid for and the prospective life of the premises.

27 I accept that there is an obligation on Tamqia to provide lighting in the Premises. However, it is not an obligation that all lighting must be working perfectly at all times. An obligation to maintain is "not absolute in the sense that whenever and for whatever reason the services be not in operating condition the defendant is in breach": *John Fairfax & Sons Ltd v Australian Telecommunications Commission* (1977) 2 NSWLR 400 at 413 (Mahoney JA).

28 Mr Novelly's evidence about lighting was inconsistent. He stated:

(1) That, as at 5 October 2021, "many of the lights were then working with the exception of the outdoor lights and pool lights on Level 36, and the staircase low level lights, and there were 6 lights which I could not turn off". However, tradesmen attended that day and Mr Novelly's evidence was that after they left:

> I walked around the Premises and flicked or pressed all light switches in the Premises to see which lights were working. I saw that all lights were working with the exception of the outdoor lights and the pool lights on Level 36 and the low-level lights on the stair case.

(2) On 20 October 2022, according to Mr Novelly, various lights were not operating properly:

(a) Pool lights and outdoor lights on Level 36 and low-level lights in the walls of the internal staircase "haver never worked". There is no evidence of how many of these lights have never worked.

(b) Five lights are "not working in the sense that they cannot be turned off" and Mr Novelly's evidence in cross-examination was that he has removed those globes.

(c) "Many lights… flicker or pulse, including without limitation the light in the Level 36 bathroom". However, in cross-examination, Mr Novelly indicated that there are six lights in the bathroom and he did not identify anywhere which light he claims is faulty, nor what "flicker or pulse" means, including whether it is sporadic or constant. The specific "flickering lights" were not identified with any precision, though Mr Novelly stated under cross-examination that "*One* is flickering non-stop. Intermittently, the C-Bus system will turn on lights or will not turn them on" (emphasis added).

29 During cross-examination, Mr Novelly described his affidavit evidence concerning the lighting as "too general" and "vague". He went on to say:

> Well, to a degree I'm getting some light but I'm not getting the level of light that's expected, or the level of lights that are there.

30 Later, Mr Novelly said:

> Q. Do you accept that your affidavit then is not complete and truthful?
>
> A. No, I think it's completely truthful. I think that you're taking an overly broad determination of the term "lights". There's, there's three storeys there, there's 11 hundred square metres, there's probably 2,000 lights.

31 Mr Novelly also said there was nothing wrong with the lighting and the globes, and instead, the problem was with the reliability of the C-Bus system, which was a "smart system" to centrally control lighting and some other electrical fixtures and devices. For instance, Mr Novelly variously said:

> The truth is that the C-Bus system is the problem, it's not the light.
>
> …
>
> I think it's important to talk about it not being lights and talking [sic] about it being the control system, and the control system is faulty.

32 On the final day of the hearing, Mr Novelly abandoned a previous claim that the C-Bus system must be upgraded because of an alleged representation by the second defendant.

33 Mr Hyde submitted that Mr Novelly's statements about the C-Bus system being the cause of the lighting issues were admissions against interest that meant his claim concerning the lighting must fail. However, I accept Mr Sirtes SC's submission that Mr Novelly merely needed to prove that there were faults with the lights, irrespective of whether the cause was the C-Bus system or something else and Mr Novelly's statements could not be taken as admissions.

34 Taking Mr Novelly's evidence on this issue at its highest, there is no evidence that most of the "probably 2,000" lights are defective or not "working" constantly. The only evidence of lights not working as at October 2022 concerns an unknown number of outdoor, pool and stair lights.

35 I accept that Tamqia must provide lighting to a "reasonable state of repair" under clause 19.3 and there may be a minor breach in terms of the lights Mr Novelly says have "never worked".

36 However, I will not order specific performance because:

(1) While in some circumstances it is possible to make an order to achieve a particular outcome (see eg *Blue Manchester Ltd v North West Ground Rents Ltd* [2019] EWHC 142), for example in relation to the lights that do not work, I am not prepared to make an order concerning the outdoor lights, where the negative impact of that lack of lighting is not apparent. At most, I consider it is de minimis and damages for loss of amenity would be an adequate remedy. For example, the alleged want of lighting did not impact on Mr Novelly holding a New Year's Eve party on the outside balcony.

(2) In relation to other lights "flickering" or not turning off, there is insufficient precision as to presently which lights are involved, so that any order is likely to require continual supervision. Mr Novelly could have provided clear evidence of the location of the problematic lights and the exact nature of the problems, including by way of expert evidence, but he did not. Further, and in any event, I consider damages an adequate remedy for any loss of amenity, particularly in circumstances where Mr Novelly

> accepted the lighting does not create an "emergency" that would entitle him to call an electrician to remedy the issue and he gives no evidence about any negative impact of the lights not working perfectly other than, in his words, "aggravation".

Pool heater

37 The complaint in relation to the heating of the pool is unclear, beyond the assertions by Mr Novelly:

> The pool heater worked continuously from when it was on 25 August 2021 up until 3 March 2022.
>
> … I felt the water and it was not heated … [by 17 March 2022] the water temperature still feels cooler than it felt before about 3 March 2022.

38 Tamqia did admit, "[t]he heater for the Level 36 pool stopped heating the pool on about 3 March 2022". However, Tamqia did not admit that the reason for the heater not heating was because it was defective or there was a breach of clause 19.3.

39 Tamqia tendered a letter from the strata manager of the scheme, which stated the reason why the heater is not heating is because what is required is that:

> … [Tamqia] or her tenant, as the case may be, [open] an account with an energy provider for the penthouse pool meter …

It was accepted that Mr Novelly bears the obligation of paying for electricity under the Lease.

40 I am therefore not persuaded that Mr Novelly has demonstrated that the pool heater is defective and there is any breach of an obligation to repair. Even if the heater was defective, I would not be prepared to order specific performance, where damages for loss of amenity would be an adequate remedy in circumstances where Mr Novelly has not given any evidence of a negative impact of the pool not being heated since March 2022.

Miele fridge/freezer

41 Mr Novelly complained that the fridge/freezer provided at the start of the Lease "ices up" and then "warms" and, as at March 2022, he only uses the fridge "when [he] need[s] to and then only to store vegetables".

42 It appears he complained about the fridge/freezer in September 2021 and a technician attended and gave an opinion that a gas leak could not be repaired, but did not conclude that the fridge/freezer does not work at all.

43 Mr Sirtes SC stated that, "I don't think [the fridge/freezer has] largely been used". Mr Novelly did not give evidence about how else he stores his food (if he stores any). However, I accept that Tamqia must maintain the fridge/freezer to a reasonable standard in accordance with clause 19.3, and therefore regard may be had to the age of the premises.

44 Mr Novelly has not demonstrated that there is currently a breach of the obligation to repair. For example, there is no evidence of the fridge/freezer having deteriorated during the Lease term, to amount to a failure by Tamqia to reasonably maintain it.

45 Even if I am wrong, I am not prepared to order specific performance about repairing a fridge/freezer, where there is no evidence of any detrimental impact on Mr Novelly and damages for loss of amenity would be an adequate remedy.

Barbeque

46 Mr Novelly complained that when he inspected the barbeque before he entered into the Lease it "looked very dishevelled… the barbecue grill looked rusty and as if it hadn't been cleaned since it was last used and had mould growing over it".

47 He said in his affidavit:

> I was hosting a New Years Eve party at the end of 2021 and as the party would be held on the Level 36 balcony, I decided to try and use the barbecue as it would then be easier to serve out the food from there rather than having to carry it up the stairs or in the lift from Level 34. However, at least 2 of the burners on the barbecue would not ignite and the barbecue did not get hot enough to enable it to be used for cooking and consequently all the cooking ended up being done in the Level 34 kitchen for the New Years Eve party. I have not tried to use the barbecue on Level 36 since News Years Eve.

48 However, in fact, a chef engaged by Mr Novelly was the one who attempted to use the barbecue, not Mr Novelly:

> … on that day my chef attempted to start the barbecue and found that not all gas jets were igniting and as a result insufficient heat was generated for cooking.

49 The chef did not give evidence and therefore the hearsay evidence of the chef relayed through Mr Novelly has not been tested. There is no evidence of any expert concerning the operation of the barbecue. Mr Novelly does not give evidence of any other attempt to light the burners.

50 I will not order specific performance to have two burners on a barbecue repaired because:

(1) I do not consider a breach of the obligation to repair has been established on the evidence. There may well be other reasons why two burners may not have ignited when the chef attempted to light them on one occasion, other than the burners being defective.

(2) Even if there was a breach, damages for loss of amenity are an adequate remedy.

Retractable panel door

51 An alleged defect was notified by Mr Novelly to Tamqia on 7 February 2022 seeking "repair or replace panel and connection to eastern side slide track". Tamqia did not deny this failure to repair and therefore it is taken as admitted.

52 Mr Hyde gave an oral undertaking that the panel will be rectified:

> Honestly, if it's broken we'll get it repaired but, in saying that, we reserve our rights to claim for costs from the plaintiff because our contention will be that it was caused by him or his agent. I'm not going to bore your Honour with some debate about why specific performance or not should be done. We'll just get it done. I'm not going to trouble your Honour to write a judgment about a broken garage door.

53 Mr Sirtes SC did not suggest the undertaking was insufficient. I accept that undertaking as resolving this issue.

Other matters resolved by undertakings

54 Many other matters were resolved by Tamqia providing undertakings to the Court in a form agreeable to Mr Novelly. I accept the following undertakings as disposing of the issues:

> The First Defendant (by itself it and its servants and agents) and the Second Defendant (by herself and her servants and agents) undertake to the Court that they will:
>
> > 1. not park in any of the Plaintiff's leased car parking spaces on Level P3 of Strata Plan No 83861 at the property known as Apartment 3401, The Hyde, 157 Liverpool Street, Sydney NSW (**the Premises**) whilst the Plaintiff is the tenant of the Premises pursuant to the residential tenancy agreement dated 6 May 2021;

2. within 28 days, remove all items belonging to either of them from the storeroom, the pool plant and sub-plant rooms on Level 35 of the Premises (**the Excluded Areas**), with access for such purpose to be limited to 10 occasions;

3. within 28 days, approach the Owners Corporation for approval to supply and install a Toto Neorest XH II toilet in each of the master bedroom ensuite on Level 34 of the Premises and the shower / steam room adjacent to and behind the kitchen on Level 36 of the Premises and, if such approval is given, undertake and, once commenced, complete the approved work as soon as is reasonably practicable; and

4. within 28 days, provide to the Plaintiff (or his lawyers):

a. a copy of each key or opening device which is in their possession for each of the doors referred to in each of prayer 9 and prayer 18AC of the Amended Statement of Claim, and

b. for those keys or opening devices which they do not have, use all reasonable endeavours to cause the Owners Corporation or locksmith or other tradesman or technician to provide to the Plaintiff (or his lawyers) a key or opening device for each of the doors referred to in each of prayer 9 and prayer 18AC of the Amended Statement of Claim.

This undertaking is subject to the Plaintiff (by himself and his servants and agents) undertaking to the Court to provide (during business hours and subject to the Plaintiff (or his lawyers) having been given 24 hours' written notice) to:

1. the First Defendant (by itself it and its servants and agents) and the Second Defendant (by herself and her servants and agents) such access to the Premises as they (or either of them) may reasonably require to remove any items belonging to either of them from the Excluded Area; and

2. the Owners Corporation (by itself it and its servants and agents) or any locksmith or other tradesman or technician retained by or behalf of the Defendants (or either of them) such access to the premises (including without limitation the car parking area forming part of the Premises) as may be required to obtain or make keys or opening devices for the doors referred to in each of prayer 9 and prayer 18AC of the Amended Statement of Claim.

Costs

55 This matter was given a 4-day hearing. Mr Novelly's whole claim originally traversed 634 paragraphs of factual background in his affidavit. There were close to 3,000 pages in the court book.

56 At the conclusion of the hearing, all that I have been asked to resolve are trivial alleged breaches of the Lease.

57 There was no evidence of the cost of the works, should specific performance have been ordered. I was informed by Mr Sirtes SC that NCAT did not have

jurisdiction to award compensation over $15,000: see *Residential Tenancies Regulation* 2019 (NSW) r 40(b); *Residential Tenancies Act 2010* (NSW) s 187(1)(d). However, the cost of the work that would be necessary to remedy any of the alleged defects is likely to be negligible, particularly in comparison to the legal costs that must have been incurred by the parties.

58 Consistently with this view, Mr Sirtes SC also submitted that, should quantification of damages be necessary, it would not be a task that the Court would be asked to carry out because any sum is likely to be "small" and it could be dealt with elsewhere.

59 While some of the issues between the parties were resolved by undertakings, those undertakings were only proffered a few days before the hearing, during the hearing, and after the hearing when judgment was reserved.

60 I do not consider that the parties ought to have required the Court to determine the trivial matters that were finally pressed. The parties to civil proceedings have a duty to further the overriding purpose of civil litigation in s 56 of the *Civil Procedure Act 2005* (NSW) and consider the proportionality of costs relative to the matters in dispute. Those considerations are relevant to the exercise of my costs discretion under s 56(5).

Orders

61 In the circumstances the appropriate orders are:

(1) The Plaintiff's claims for specific performance are dismissed.

(2) Each party to pay their own costs.

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