



Civil and Administrative Tribunal
New South Wales

Case Name: Warland v Huang

Medium Neutral Citation: [2023] NSWCATCD 115

Hearing Date(s): 14 September 2023

Date of Orders: 20 September 2023

Decision Date: 20 September 2023

Jurisdiction: Consumer and Commercial Division

Before: R Alkadamani, Senior Member

Decision:

1. Order pursuant to section 41 of the Civil and Administrative Tribunal Act 2013 that the time for the filing the application be extended to 28 April 2023.
2. Order pursuant to section 44(1)(b) of the Residential Tenancies Act 2010 that the rent for the period from 15 October 2022 until 15 October 2023 not exceed \$200.00 per week.
3. Order that the respondent pay the applicant within 7 days the sum of \$760.00, being the amount referable to the excessive rent referred to in order 1 above paid by the applicant for the period 15 October 2022 to 11 November 2022.
4. Order that the respondent pay the applicant within 7 days the sum of \$1,500.00 in respect of the contravention of section 50 of the Residential Tenancies Act, 2010.
5. Otherwise dismiss the application.

Catchwords: RESIDENTIAL TENANCY – notice of termination – whether retaliatory notice
RESIDENTIAL TENANCY – excessive rent - withdrawal by landlord of part of the facilities provided with residential premises

Legislation Cited: Civil and Administrative Tribunal Act, 2013 (NSW), s. 41
Residential Tenancies Act, 2010 (NSW), ss 43-45, 50, 115

Cases Cited: Jeyarajah v Evans [2023] NSWCATAP 247
Pan v Malveholm [2021] NSWCATAP 101
Parker v Lowe [2022] NSWCATCD183
Roberts v NSW Aboriginal Housing Office [2017] NSWCATAP 9

Texts Cited: None

Category: Principal judgment

Parties: Jeffrey Warland, applicant
Zheng Huang, respondent

Representation: Mr Warland - applicant
Mr Lee - respondent

File Number(s): RT 23/19681

Publication Restriction: None

REASONS FOR DECISION

Introduction

- 1 This is an application brought by Mr Warland, a tenant under a residential tenancy agreement dated 12 February 2021, against Mr Huang, the landlord under that residential tenancy agreement. The residential premises comprise a three bedroom apartment located at Russell Street, Baulkham Hills (**the Premises**).
- 2 The hearing was held on 14 September 2023. At the hearing Mr Warland appeared and represented himself. Mr Lee, real estate agent, represented the landlord. In this decision I will refer to Mr Warland as the applicant. I will refer to Mr Huang as the respondent.

Evidence

- 3 During the hearing the applicant relied on the following evidence:
 - (1) Bundle of documents filed with the Tribunal by the applicant on 16 June 2023 which was exhibit 1;

- (2) Bundle of documents filed with the Tribunal by the applicant on 11 August 2023 which was exhibit 2;
 - (3) Bundle of documents filed with the Tribunal by the applicant on 25 August 2023 which was exhibit 3;
 - (4) An 8 page bundle of documents tendered without objection during the hearing on 14 September 2023 comprising 8 pages which was marked exhibit 4.
- 4 The respondent relied on the following evidence:
- (1) Bundle of documents filed with the Tribunal on behalf of the respondent on 1 August 2023 which was marked exhibit A;
 - (2) Notice of termination to the applicant dated 20 February 2023 which was marked exhibit B.

Procedural History

- 5 The application was filed 28 April 2023. The application sought numerous orders for relief, which will be discussed in more detail below. The application did not identify the provisions of the *Residential Tenancies Act 2010* (**the RTA**) on which the applicant relied.
- 6 At a directions hearing on 31 May 2023 the Tribunal directed that the applicant's application be amended to seek an order that the notice of termination, being the notice dated 20 February 2023, is retaliatory. A retaliatory notice of termination, as defined by the RTA, is proscribed by s 115 of the RTA.
- 7 At a further hearing on 31 July 2023 the Tribunal ordered the applicant to file and serve "*an amended application that clearly sets out the orders sought; the basis for seeking the orders; the provisions of the Residential Tenancies Act 2010 relied upon; and if money orders are sought, the amount sought*". The applicant filed documents setting out the amounts that he claimed but did not file any document setting out the provisions of the RTA on which he relied.
- 8 At the 31 July 2023 hearing the Tribunal also noted that at that stage it appeared that the issues were that applicant was claiming that the notice of termination was retaliatory and that the rent be "fixed" at \$200 per week. The applicant was directed to the provisions of ss 43 and 44 of the RTA.

- 9 At the 31 July 2023 hearing the Tribunal also noted that “*If the landlord seeks to take possession of the premises (unless the parties have reached an agreement and the tenant has vacated) the landlord must file a termination application with the Tribunal by way of the landlord’s own application*”. No such application was filed by the respondent landlord.
- 10 As stated above, the application was filed 28 April 2023. During the hearing of the matter on 14 September 2023 it became apparent that there were time limitation issues, at least in respect of some of the claimed items. The applicant sought, by oral request, an extension of time. Mr Lee agreed to that course and I made an order under s 41 of the *Civil and Administrative Tribunal Act 2013* extending the time for filing the application to 28 April 2023, being the date the application was filed.

Facts

- 11 The applicant and respondent are parties to a residential tenancy agreement dated 12 February 2021. The term of the residential tenancy agreement was for the period 19 February 2021 until 17 February 2022, and continuing thereafter as a periodic tenancy. The Premises comprise an apartment located in a strata scheme in Russell Street, Baulkham Hills.
- 12 The agreed rent was \$520.00 per week.
- 13 On about 25 and 26 November 2021 there was water penetration into the Premises after significant rain. The water penetration was very significant. Photographs in exhibit 2 show water saturated carpets, damaged flooring under the carpet and mould.
- 14 On 25 January 2022 the applicant recorded in an email to Mr Lee that a third of the apartment is uninhabitable and it had been like that since 25 November 2021 (Ex 2, tab 5). There was no contention to the contrary from the respondent and the Tribunal accepts that about one third of the Premises was affected by water penetration issues and that portions of the Premises, being up to one third, are uninhabitable or at least cannot be used as contemplated. The uninhabitable area includes at least one of the bedrooms.

- 15 The water penetration issues affected other lots in the strata scheme. The rectification or remediation work to address the issues involves work on the common property and will need to be undertaken by the owners corporation.
- 16 In early 2022 the applicant requested that the residential tenancy agreement be terminated and that the respondent contribute \$2,000.00 to moving costs and reduce the rent by one third from 25 November 2021 until the Premises are vacated. The respondent agreed to contribute \$1,000.00 to moving costs and reduce rent by 25% from November 2021 which equated to a reduction of the weekly rent to \$390.00 per week.
- 17 On 26 April 2022 the applicant made an offer to the respondent to “*setup temporary flooring solution*” of the Premises arising from the water penetration (Ex A, p. 18). The cost of was \$341.50 for materials and \$650.00 for labour. On 25 May 2022 the respondent agreed to the proposal and requested that the applicant provide all related receipts for later reimbursement.
- 18 During the hearing the applicant said that he and his son undertook the work and that he did not seek payment for materials but sought \$650.00 as the cost of his labour and his son’s labour.
- 19 In mid-October 2022 there was further significant water penetration. This led to negotiations between the parties as to rent reduction.
- 20 On 14 November 2022 the applicant proposed that the rent be \$200.00 per week (Ex A, p. 22).
- 21 On 21 November 2022 the respondent, through his agent, proposed that the rent be \$200.00 per week starting from 11 November 2022 onward with the following condition:

[the applicant and his son] accept the current condition of the property (leaks issues from balcony to lounge and masterbedroom) and agreed to pay weekly rent of \$200 until the leak issue is resolve (sic). While waiting for the leak issue to be resolved, [the applicant] agreed (sic) to not seek any further rent reduction or lodge any further NCAT application against the landlord as tenants are fully aware it’s beyond the power of the landlord to have the leaks issues fully rectified.”
- 22 The applicant accepted the respondent’s 21 November 2021 proposal.

- 23 On 20 February 2023 the respondent issued a notice of termination (**the Notice**) relying on s 85 of the RTA, namely, termination of a periodic tenancy without a reason. The applicant was provided with 90 days' notice. The applicant contends the Notice was retaliatory and contravened s 115 of the RTA.
- 24 Recently, the strata scheme has received quotations for the work required to address the water penetration and other issues. Those quotes range from about \$1 million to over \$2 million (see Ex A, p. 25).
- 25 The applicant also seeks further rent reduction from 20 February 2023 (the date of the Notice) to 14 September 2023 (the date of hearing) and then onwards to 31 January 2024 (exhibit, p.4).
- 26 In addition, the applicant seeks \$11,000.00 said to be "*22 weeks additional expenses \$500 per week (increased rent) to the end of June 2024 (conservative work on completion date on balcony*" (Ex 4, p. 3). This is based on an assumption the applicant will depart from the Premises after 31 January 2024 (Ex 4, p. 3) and therefore appears to represent likely alternative rent of about \$500 per week.
- 27 The applicant also seeks compensation for future removalist's costs. These costs have not yet been incurred.

Consideration

Jurisdiction

- 28 I am satisfied that the application relates to a dispute between a tenant and a landlord to which the RTA applies and that as a consequence the Tribunal has jurisdiction to hear and determine the application.

Claim for labour of applicant and his son

- 29 The first issue relates to the applicant's claim for \$650.00 for the "temporary solution" work he and his son undertook. The applicant informed the Tribunal during the hearing that there was no claim for the cost of the materials.
- 30 The provisions in the RTA dealing with a tenant's entitlement to reimbursement from the landlord for carrying out repairs are ss 64 – 65. Those sections provide as follows:

64 Urgent repairs to residential premises

- (1) A landlord must, not later than 14 days after being given a written notice from the tenant, reimburse the tenant for the reasonable costs of making urgent repairs to the residential premises.
- (2) A landlord is required to reimburse the costs only if—
 - (a) the state of disrepair did not result from a breach of the residential tenancy agreement by the tenant, and
 - (b) the tenant gave the landlord or the landlord's agent notice of the state of disrepair or made a reasonable attempt to do so, and
 - (c) the tenant gave the landlord or landlord's agent a reasonable opportunity to make the repairs, if notice was given, and
 - (d) the tenant has made a reasonable attempt to arrange for a licensed or otherwise properly qualified person nominated in the residential tenancy agreement to carry out the repairs, if such a person is so nominated, and
 - (e) the repairs were carried out, if appropriate, by licensed or otherwise properly qualified persons, and
 - (f) as soon as practicable after the repairs were carried out, the tenant gave the landlord or landlord's agent, or made a reasonable attempt to give the landlord or landlord's agent, a written notice setting out details of the repairs and the costs of the repairs, together with the receipts or copies of receipts for costs paid by the tenant.
- (3) The maximum amount that a tenant is entitled to be reimbursed under this section is \$1,000 or such other amount as may be prescribed by the regulations.
- (4) Nothing in this section prevents a tenant, with the consent of the landlord, from making repairs to the residential premises and being reimbursed for the costs of those repairs.
- (5) This section is a term of every residential tenancy agreement.

64A Carrying out repairs to smoke alarms as a matter of urgency

- (1) A landlord must ensure that a smoke alarm installed in the residential premises is repaired or replaced in accordance with the regulations.

Maximum penalty—20 penalty units.

- (2) Without limiting subsection (1), the regulations may prescribe the following—
 - (a) the circumstances in which a particular person, or class of persons, must repair or replace a smoke alarm,
 - (b) the circumstances in which a person, or class of persons, may repair or replace a smoke alarm,
 - (c) the time period within which the person must repair or replace a smoke alarm.
- (3) A tenant who repairs or replaces a smoke alarm installed in the residential premises under this section is entitled to reimbursement in accordance with the regulations.

(4) This section is a term of every residential tenancy agreement.

(5) In this section—

repair a smoke alarm includes maintaining the smoke alarm in working order by installing or replacing a battery in the smoke alarm.

smoke alarm includes a heat alarm.

65 Tenants' remedies for repairs—Tribunal orders

(1) **Orders for which tenant may apply** The Tribunal may, on application by a tenant, make any of the following orders—

(a) an order that the landlord carry out specified repairs,

(b) an order that the landlord reimburse the tenant an amount for urgent repairs carried out by the tenant,

(c) an order that the landlord reimburse the tenant an amount for repairs to a smoke alarm carried out by the tenant under section 64A(3).

(2) **Orders for repairs** The Tribunal may make an order that the landlord carry out specified repairs only if it determines that the landlord has breached the obligation under this Act to maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.

(3) In deciding whether to make an order under this section, the Tribunal—

(a) must take into consideration the regulations, if any, made under subsection (6), and

(b) may take into consideration whether the landlord failed to act with reasonable diligence to have the repair carried out.

(3A) The Tribunal must not determine that a landlord has breached the obligation unless it 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.

(4) **Reimbursement for urgent repairs** The Tribunal may order that the landlord reimburse the tenant an amount for urgent repairs carried out by the tenant if it is satisfied that the landlord has failed to reimburse the tenant for the costs in accordance with this Division.

(5) **Payment of rent into Tribunal** The Tribunal may order that all or part of the rent payable under a residential tenancy agreement be paid into the Tribunal until an order under this section has been complied with.

(6) **Guidelines relating to reasonable time for repairs** The regulations may provide for guidelines relating to reasonable times within which repairs to, and maintenance of, residential premises required to be carried out by the landlord under the residential tenancy agreement, this Act or any other Act or law should be carried out.

31 Insofar as the remedy relates to reimbursement by the landlord to the tenant, ss. 64 - 65 require that the repairs undertaken were urgent repairs or repairs to a smoke alarm. The work undertaken by the applicant did not fall within the

meaning of urgent repairs in s 64 and was not work that related to smoke alarms.

- 32 It follows that the applicant cannot recover in the Tribunal under the RTA pursuant to the agreement recorded in the emails between the applicant and the respondent's agent.

Retaliatory notice

- 33 Section 115 of the RTA provides as follows:

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.

- 34 The applicant claims that the Notice was a retaliatory notice.

- 35 For a notice or application to be characterised as retaliatory the Tribunal must be satisfied that the landlord was motivated in giving the notice or making the application, either wholly or partly, by 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.

- 36 At the time the Notice was served the applicant had not filed the application herein and there is no evidence of any other application having been filed prior to the date of the Notice.
- 37 In these proceedings the applicant relied on s 115(2)(b). In other words, the applicant contended the respondent's motivation, wholly or in part, for giving the Notice was because the applicant "*had taken or proposed to take any other action to enforce a right of the tenant under the residential tenancy agreement, [the RTA] or any other law*". Analogous reasoning applies to s 115(2)(a).
- 38 The email from the agent dated 21 November 2022 makes clear that the respondent was, at least to some extent, concerned that the applicant could bring an application in the Tribunal. However, the applicant agreed that in return for not bringing any application in the Tribunal he would only be required to pay rent of 200.00 per week. Consequently, as at 20 February 2023, when the Notice was served, there was a subsisting agreement between the parties which on its face meant that the applicant had committed to not bringing any complaints to the Tribunal.
- 39 During the hearing Mr Lee on behalf of the respondent said that the respondent "*just want to take back the property*" and that the respondent wanted "*the property to be vacant*". Mr Lee also said that the property was not suitable for anyone to live in, presumably until the repairs are undertaken by the strata scheme. However, when queried by the Tribunal as to whether the respondent was not intending to rent out the Premises before the repair work was completed, Mr Lee's response was equivocal.
- 40 Although the respondent's intentions as to the future in terms of renting out the Premises appeared equivocal, I am not satisfied on the balance of probabilities that respondent's motivation, whether wholly or in part, in serving the Notice was that the applicant "*proposed to apply to the Tribunal for an order*" or that the applicant "*proposed to take any other action to enforce a right of the tenant under the residential tenancy agreement, [the RTA] or any other law*". No such steps had in fact been taken. Further, there is no evidence that any such steps were proposed to be taken by the applicant. Finally, the applicant had come to

an agreement or understanding with the respondent to not take any such steps.

41 It follows that the applicant's retaliatory notice claim has not been established.

42 For the purposes of completeness, I note that as at the date of hearing the respondent had not filed an application for an order for possession. Furthermore, a further notice of termination was served after the filing of these proceedings. That notice of termination was not tendered by any party. Mr Lee informed the Tribunal that the respondent intended to rely on that subsequent notice of termination in due course to seek an order an order for possession. These reasons for decision do not engage with the the efficacy of the subsequent notice, or the extent to which the subsequent notice can be relied on for an order for possession.

Rent abatement or adjustment

43 Sections 43 - 45 of the RTA provide as follows:

43 Rent reductions

(1) **Reduction in goods, services or facilities** The tenant may make a written request to the landlord at any time for a reduction in rent if the landlord reduces or withdraws any goods, services or facilities provided with the residential premises, even if those goods, services or facilities are provided under a separate or a previous contract, agreement or arrangement.

(2) **Premises unusable** The rent payable under a residential tenancy agreement abates if residential premises under a residential tenancy agreement are—

(a) otherwise than as a result of a breach of an agreement, destroyed or become wholly or partly uninhabitable, or

(b) cease to be lawfully usable as a residence, or

(c) appropriated or acquired by any authority by compulsory process.

(3) **Access to purchasers** The landlord and tenant may agree to reduce the rent payable for premises during periods when access to the residential premises is required to be given to prospective purchasers of the premises.

(4) **Effect of section** This section does not limit the rights of landlords and tenants to agree to reduce the rent payable under a residential tenancy agreement.

(5) This section is a term of every residential tenancy agreement.

44 Tenant's remedies for excessive rent

(1) **Excessive rent orders** The Tribunal may, on the application of a tenant, make any of the following orders—

(a) an order that a rent increase under an existing or proposed residential tenancy agreement is excessive and that, from a specified day, the rent for residential premises must not exceed a specified amount,

(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.

(2) **Time limit for excessive rent increase applications** An application for an order that a rent increase is excessive must be made within the period prescribed by the regulations after notice of the increase is given.

(3) **Applications on withdrawal of goods or services** A tenant may, before the end of a tenancy, make an application that the rent is excessive, having regard to the reduction or withdrawal of any goods, services or facilities provided with the residential premises, even if those goods, services or facilities were provided under a separate or a previous contract, agreement or arrangement.

(4) **Determination of excessive rent** For the purposes of making an order under this section, the Tribunal may declare that amounts payable under a contract, agreement or arrangement under which goods, services or facilities are provided to the tenant are rent.

(5) The Tribunal may have regard to the following in determining whether a rent increase or rent is excessive—

(a) the general market level of rents for comparable premises in the locality or a similar locality,

(b) the landlord's outgoings under the residential tenancy agreement or proposed agreement,

(c) any fittings, appliances or other goods, services or facilities provided with the residential premises,

(d) the state of repair of the residential premises,

(e) the accommodation and amenities provided in the residential premises,

(f) any work done to the residential premises by or on behalf of the tenant,

(g) when the last increase occurred,

(h) any other matter it considers relevant (other than the income of the tenant or the tenant's ability to afford the rent increase or rent).

(6) **Effect of excessive rent order** An order by the Tribunal specifying a maximum amount of rent—

(a) has effect for the period (of not more than 12 months) specified by the Tribunal, and

(b) binds only the landlord and tenant under the residential tenancy agreement or proposed residential tenancy agreement under which the rent is payable.

Note—

A tenant under a social housing tenancy agreement may also apply for an order that rent is excessive if a rent rebate is cancelled (see section 141(1)).

45 Remedies for reduction of rent on frustration of residential tenancy agreement

(1) The Tribunal may, on application by the landlord or tenant, make an order determining the amount of rent payable if the rent is abated under section 43(2).

(2) The Tribunal may order that—

(a) from a specified day, the rent for the residential premises must not exceed a specified amount, and

(b) the landlord must repay to the tenant any rent paid by the tenant since the specified day that is in excess of the specified amount.

44 Sections 52 and 63 of the RTA are also relevant.

45 Section 52 relevantly provides:

52 Landlord's general obligations for residential premises

(1) A landlord must provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant.

(1A) Without limiting the circumstances in which residential premises are not fit for habitation, residential premises are not fit for habitation unless the residential premises—

(a) are structurally sound, and

(b) – (g) ...

(1B) For the purposes of subsection (1A)(a), residential premises are structurally sound only if the floors, ceilings, walls, supporting structures (including foundations), doors, windows, roof, stairs, balconies, balustrades and railings—

(a) are in a reasonable state of repair, and

(b) with respect to the floors, ceilings, walls and supporting structures—are not subject to significant dampness, and

(c) with respect to the roof, ceilings and windows—do not allow water penetration into the premises, and

(d) are not liable to collapse because they are rotted or otherwise defective.

(1C) ...

(2) ...

(3) A landlord must comply with the landlord's statutory obligations relating to the health or safety of the residential premises.

Note—

Such obligations include obligations relating to swimming pools under the Swimming Pools Act 1992.

(4) This section is a term of every residential tenancy agreement.

46 Section 63 provides:

63 Landlord's general obligation

(1) A landlord must provide and maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.

(2) A landlord's obligation to provide and maintain the residential premises in a reasonable state of repair applies even though the tenant had notice of the state of disrepair before entering into occupation of the residential premises.

(3) A landlord is not in breach of the obligation to provide and maintain the residential premises in a reasonable state of repair if the state of disrepair is caused by the tenant's breach of this Part.

(4) This section is a term of every residential tenancy agreement.

- 47 There is significant overlap between sections 52 and 63 of the RT Act: *Pan v Malveholm* [2021] NSWCATAP 101 at [26].
- 48 The first issue under s 44 of the RTA is whether there has been any "*reduction or withdrawal by the landlord of any goods, services or facilities provided with the residential premises*" within the meaning of that section. This issue in turn has two elements. The first element is whether there has been a "*reduction or withdrawal ... of goods, services or facilities provided with the residential premises*". The second element is whether any such "*reduction or withdrawal*" was "*by the landlord*".
- 49 The Tribunal finds that there has been a "*reduction or withdrawal ... of ...services or facilities provided with the residential premises*" because of the extent to which the Premises have become uninhabitable due to water penetration, water damage and mould.
- 50 The next element is whether the "*reduction or withdrawal*" was "*by the landlord*".
- 51 A failure or omission by a landlord to carry out necessary repairs and maintain the premises, of which the landlord is aware or ought reasonably be aware, can amount to a reduction or withdrawal of goods, services or facilities: see *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 at [113] – [115]. In those circumstances, the reduction or withdrawal of goods, services or facilities is properly attributable to the landlord's failure or omission and consequently properly characterised as "*by the landlord*".

- 52 The respondent in these proceedings has not taken the steps necessary to address the mould issues and remediate the Premises. A long term solution appears to require work by the owners corporation. Nevertheless, there was no evidence that, for example, the presence of mould could not be addressed in the meantime and, if necessary, from time to time. Consequently, the Tribunal finds there has been a “*reduction or withdrawal*” of facilities “*by the landlord*”.
- 53 The applicant seeks that the rent be reduced so that he pays no rent at all from the date of the Notice.
- 54 I do not accept that reducing the rent to nil properly reflects the withdrawal of services or facilities or the extent to which the Premises are uninhabitable.
- 55 It is clear that there is value to the applicant in residing at the Premises. The applicant still wants to reside there. That is inconsistent with a contention that the withdrawal of services or facilities, or the extent to which the Premises are uninhabitable, is to such an extent that the proper rent is nil. Although the water penetration affects about one third of the Premises that has not made the whole Premises uninhabitable.
- 56 After the further water penetration issues in mid-October 2022 the parties agreed in November 2022 that an appropriate rent was \$200.00 per week. That amount was initially proposed by the applicant.
- 57 I consider that \$200.00 per week is an appropriate sum for rent for the period since the further water penetration in mid-October 2022 and there will be an order to that effect. The order will be for a period from mid-October 2022 until mid-October 2023. From 11 November 2022 the parties agreed on a rent of \$200.00 per week and that is the amount that the applicant has been paying. During the period mid-October 2022 until 11 November 2022 the applicant paid \$390.00 per week. The monetary compensation referable to the excessive rent paid to date is therefore 4 weeks multiplied by \$190.00 per week (being the difference between \$390.00 per week and \$200.00 per week) which equates to \$760.00.

- 58 For the period from when water damage occurred for the first time to mid-October 2022 the parties agreed to a reduction in rent of \$130.00 per week. At the hearing, the applicant did not seek to re-visit rent paid for that period.
- 59 As recorded above, the applicant seeks \$11,000.00 said to be “22 weeks additional expenses \$500 per week (increased rent) to the end of June 2024 (conservative work on completion date on balcony” (Ex 4, p. 3). There is no basis in the RTA for this claim.

Stress and anxiety and tenant’s right to quiet enjoyment

- 60 The applicant also claimed that he had experienced a great deal of stress of stress and anxiety. He said that this had been caused by the issues with the Premises and the serving of the Notice.
- 61 The applicant gave evidence that the extent of the mould in the room where his son had resided meant his son could no longer reside with him and had to reside solely with his mother (the applicant and the mother of their child do not reside together).
- 62 The applicant also gave evidence that the stress had caused him to see a psychologist for treatment. He said he had attended 5 sessions but as further sessions were not covered by Medicare he did not attend any further sessions. The applicant also said that he benefited from those sessions.
- 63 No psychologist’s report was tendered to demonstrate the cause or extent of the stress and anxiety.
- 64 The Tribunal finds that the applicant did suffer from stress and anxiety and that this was at least in part caused by the living conditions arising from the water penetration issues at the Premises. Those issues included the fact that the applicant’s son ceased residing with him due to the extent of mould in the Premises and in particular the extent of mould in one of the bedrooms.
- 65 Section 50 of the RTA provides:

50 Tenant’s right to quiet enjoyment

(1) A tenant is entitled to quiet enjoyment of the residential premises without interruption by the landlord or any person claiming by, through or under the landlord or having superior title (such as a head landlord) to that of the landlord.

(2) A landlord or landlord's agent must not interfere with, or cause or permit any interference with, the reasonable peace, comfort or privacy of the tenant in using the residential premises.

66 In *Parker v Lowe* [2022] NSWCATCD183 the Tribunal said at [33]:

An order under s 44(1)(b) is referable to the rent paid by the tenant. It therefore involves a form of economic loss suffered by the tenant, being the loss of consideration of possession of the premises relative to the rent paid. Distress and disappointment are distinct heads of non-economic loss that are not duplicative of the remedy provided by s 44(1)(b): *Makowska v St George Community Housing Ltd* [2021] NSWSC 287 at [46].

67 This statement was recently cited with approval by the Appeal Panel in *Jeyarajah v Evans* [2023] NSWCATAP 247 at [50].

68 I consider that it is appropriate that the applicant be compensated for the loss of quiet enjoyment. The stress and anxiety caused by the applicant's son not being able to reside at the Premises and living with the mould and damage to flooring and carpets were significant. I consider that a sum of \$1,500.00 would be appropriate.

69 During submissions the applicant also contended that the Notice had caused him stress and anxiety. That may well be correct. However, I have not found that the Notice was retaliatory. It follows that serving the Notice cannot be a basis for any remedy.

70 The applicant also sought reimbursement for about one third of the costs of a trip to Europe which he undertook with his son. He claimed this he arose because his son could not reside at the Premises when his son was due to spend some time with the applicant. I do not accept this claim. Compensation by way of economic loss because the applicant's son could not reside with the applicant at the Premises is addressed within the relief claimed under ss 43 – 45. The basis on which the relief was claimed, namely, reimbursements of part of the cost of a European holiday is not referable to any entitlement founded in the RTA.

71 Furthermore, to provide relief for economic loss in addition to any amounts ordered to be paid pursuant to ss 43 – 45 would amount to double recovery.

Future removalists costs

72 The applicant also claimed future costs relating to removalists. These costs have not yet been incurred. Indeed, at this stage there is no application for a possession order. In any event, the applicant has not articulated any basis on which those 'anticipated' costs are recoverable.

Orders

73 The Tribunal makes the following orders:

- (1) Order pursuant to section 41 of the *Civil and Administrative Tribunal Act* 2013 that the time for the filing the application be extended to 28 April 2023.
- (2) Order pursuant to section 44(1)(b) of the *Residential Tenancies Act* 2010 that the rent for the period from 15 October 2022 until 15 October 2023 not exceed \$200.00 per week.
- (3) Order that the respondent to pay the applicant within 7 days the sum of \$760.00, being the amount referable to the excessive rent referred to in order 1 above paid by the applicant for the period 15 October 2022 to 11 November 2022.
- (4) Order that the respondent to pay the applicant within 7 days the sum of \$1,500.00 in respect of the contravention of section 50 of the *Residential Tenancies Act, 2010*.
- (5) Otherwise dismiss the application.

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

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