Civil and Administrative Tribunal

New South Wales

Case Name:	Anderson v Fimmano
Medium Neutral Citation:	[2023] NSWCATCD 132
Hearing Date(s):	24 October 2023
Date of Orders:	24 October 2023
Decision Date:	24 October 2023
Jurisdiction:	Consumer and Commercial Division
Before:	P French, Senior Member
Decision:	(1) Pursuant to s 115(1) of the Residential Tenancies Act 2010 (NSW) the Tribunal declares that the termination notice dated 20 June 2023 is of no effect because it is a retaliatory notice. (2) The landlords must cause the carrying out of the following work in a proper and work-person-like manner at their own expense by 24 November 2023: (a) replace the Convection Microwave oven with a Microwave and Convection oven that is capable of heating to 200 degrees (or an alternative agreed upon between the parties), (b) reinstate dimmer switches in the bedroom and living area. (3) The rent payable for the premises was excessive from 25 October 2022 to 24 October 2023 and is not to exceed $423.00 for the period 25 October 2022 to 31 March 2023 and $495.00 for the period 1 April 2023 to 24 October 2023. (4) Order 3 is liquidated. The landlords Vince and Patricia Fimmano must pay the tenant, Ryan Anderson, $2,687.27 immediately. (5) Pursuant to s 187(1)(h) of the Residential Tenancies Act 2010 (NSW) LITTLE Real

Estate (Vic & NSW) Pty Ltd t/s LITTLE Rea Estate must immediately comply with ss 36 and 37 of that Act. Specifically, a rent receipt and rent record must record the date the rent payment is received into the Trust Account (not the date of administrative processing or 'clearance'). The paid to date must be calculated from the date of receipt of the payment.

(6) The application is otherwise dismissed.

Catchwords:	LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – rights and obligations of landlords and tenants – landlord's obligation to maintain a rent record – landlord's obligation to maintain premises in a reasonable state of repair – excessive rent due to withdrawal or reduction in goods, services and facilities provided with residential premises – termination notices – retaliatory notice
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), ss 41, 62, 63 Residential Tenancies Act 2010 (NSW), ss 33, 35, 36, 37, 44, 63, 65, 115, 187, 190 Residential Tenancies Regulation 2019 (NSW), s 39
Cases Cited:	Curry v Eftimovski [2023] NSWCATAP 290 Roberts v NSW Aboriginal Housing Office [2017] NSWCATAP 9 Steinbeck v McDonald [2015] NSWCATAP 90
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Ryan Anderson (Applicant) Vince Fimmano (First respondent) Patricia Fimmano (Second respondent)
Representation:	Ryan Anderson (Self-represented) LITTLE Real Estate (Vic & NSW) Pty Ltd t/a LITTLE

	Real Estate (First and Second Respondents)
File Number(s):	2023/00387723 (Previously RT 23/30197)
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 These are reasons for a decision made on 24 October 2023 which have been prepared following a request to the Registrar by a party pursuant to s 62(2) of the *Civil and Administrative Tribunal Act* 2013 (NSW) (NCAT Act). During the preparation of these reasons some slip errors in the orders published on 24 October 2023 have also come to my attention. These have been corrected in accordance with the power conferred by s 63 of the NCAT Act. These corrections are marked in bold type.

2 Before the Tribunal was an application by Ryan Anderson (the tenant) made on 30 June 2023 who sought the following orders:

(a) an order pursuant to s 115(1) of the *Residential Tenancies Act* 2010 (NSW) (the Act) that would declare that a Termination Notice dated 20 June 2023 served on him by the landlord's agent under s 85 of the Act was of no effect because it isa retaliatory notice,

(b) orders pursuant to s 65(1) of the Act that would require the landlords to cause repairs to be carried out to the rented premises to reinstate light dimmer switches which had been removed during electrical work carried out to the premises, and to replace Convection Microwave oven that was incapable of heating to 200 degrees in accordance with its product performance warranty,

(c) orders pursuant to s 44(1)(b) of the Act that would reduce the rent payable for the premises on the grounds that goods (the Convention Microwave Oven) and services (the lights and dimmer switches) were reduced or withdrawn by the landlords,

(d) an order pursuant to s 187 of the Act that would require the landlords' agent to maintain a rent record that recorded the date he paid rent rather than any later date,

(e) an order pursuant to ss 63, 187 and 190 of the Act that would require the landlords to pay him $15,000.00 in compensation for damage and loss he contended he had incurred (being meal costs) because of the landlords' failure to maintain a fully functioning Convection Microwave oven in the premises.

3 After hearing the case I was satisfied that the tenant was entitled to the orders identified at paragraphs (a) to (d), but not the order sought at paragraph (e), each for the reasons set out below.

Procedural history

4 The application was first listed before the Tribunal, differently constituted, for Conciliation and Hearing in person on 25 July 2023. The tenant attended that listing of the application in person. The landlords were represented at that listing by Ms J Contarino, a Property Manager in the employ of the landlords' Managing Agent, LITTLE Real Estate (Vic & NSW) Pty Ltd t/a LITTLE Real Estate. In accordance with the Tribunal's usual practice where both parties are present at the first listing of an application the Tribunal attempted to assist the parties to resolve the dispute by Conciliation. Those efforts were not successful. Consequently, the application was adjourned to a Special Fixture Hearing. The Tribunal gave directions to the parties for the filing and exchange of the documentary evidence that they intended to rely on at the final hearing.

5 Following the Conciliation and Hearing the tenant successfully applied to the Divisional Registrar to issue two Summons, one to Smeg Australia, and the other to NSW Fair Trading to obtain documents he considered were of apparent relevance to his case. Documents were ultimately produced in response to both Summons.

Evidence and hearing

6 Both parties have complied with the Tribunal's directions for the filing and exchange of evidence. The tenant relied upon bundles of documents filed on 7 August 2023 and 3 October 2023. The latter filing was the material relied upon that had been produced under Summons. These were marked Exhibits A1 and A2 respectively. The respondent relied upon a bundle of documents filed on 22 August 2023.

7 The Special Fixture Hearing was conducted in person. Mr Anderson attended the hearing in person and gave oral evidence in his own cause under oath. Ms J Contarino, Property Manager, attended the hearing on behalf of the landlords and also gave oral evidence under oath. The parties had the opportunity to

present their respective cases, to ask each other questions, and to make final submissions to the Tribunal.

Background facts

8 The dispute arises from a residential tenancy agreement that was first made on 27 March 2015 for a 12 months' fixed term which was expressed to commence on 28 March 2015 and end on 27 March 2016. The tenancy continued upon the expiry of the initial fixed term on the basis of further fixed term agreements and on a periodic basis. At the material time for this dispute the tenancy continued on the basis of a periodic agreement.

9 At the material time for this dispute the rent payable for the premises was $940.00 per fortnight up to and including 31 March 2023 and $1,100.00 per fortnight on and from 1 April 2023.

10 The rented apartment is a studio apartment located in a residential block and strata plan in Pyrmont. The interior of the studio has some internal partitioning to create a 'bedroom', and 'living area'. There is otherwise a kitchen and bathroom.

11 The tenant frequently works from home at the premises.

Orders for repairs

12 A landlord's obligation to maintain premises in a reasonable state of repair is codified in s 63 of the Act, which provides, relevantly:

> **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.
>
> ….

13 The Tribunal's power to make orders related to the repair of rented premises is found in s 65 of the Act, which provides, relevantly:

> **65 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,
>
> …

(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 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 –

…

(b) may take into consideration whether the landlord has 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,

…

14 There is very little, if any, factual dispute between the parties in relation to this element of the claim. In any event, I make the following findings on the evidence before me:

(i) when the residential tenancy agreement was made on 27 March 2015 the rented premises that was subject to that agreement incorporated a Convection Microwave oven which had a capacity to heat to 200 degrees, and therefore was capable of cooking meat. This oven was a Smeg Microwave/Convection/Grill oven SA-985CX (the original oven),

(ii) the rented premises also incorporated at that time downlights over the ‘bedroom’ and ‘living area’ which could be regulated in intensity by dimmer switches,

(iii) On or about 3 December 2019 the original oven experienced a power malfunction and was unable to be used. The tenant notified the landlords’ agent of this on that date requesting its urgent repair. The original oven was replaced with a Smeg Microwave Oven SAM34CXI (the second Smeg oven). The manufacturer’s instruction manual for that oven is in evidence at Exhibit A1, pages 49 and 50. At page 50 of the manual it is stated in relation to ‘convection cooking’ that the ‘temperature can be chosen from 150 degrees to 200 degrees’,

(iv) Despite what is stated in the instruction manual the tenant was unable to heat the convection oven to 200 degrees. He made several complaints to the landlords’ agent about this during 2020, including by emails on 10 November 2020 and 25 November 2020 in which he states in part:

[10 November 2020]

… The maintenance issues are listed below….

…

4. Since being installed, the new Smeg convection oven does not become hot enough to cook anything. Even frozen pizza will not cook using the convection oven function. The microwave works fine though.

[25 November 2020]

… Just following up on the requested repairs I mentioned in the email below on the 10th November 2020. The repair that is urgent is the Smeg convection oven, as the convection function is unable to be used to cook anything. I spoke to Smeg on the 19th November and they informed me they are able to send out a technician within a couple of days free of charge as the oven is still under the 2 year warranty. Could you please organise this as they informed me the landlord or agent has to request it …

(v) the second Smeg oven was replaced in accordance with the warranty on 20 January 2021. However, the replacement oven was also unable to reach a cooking temperature. The tenant notified the landlords' agent of this by email on 28 January 2021. He made further complaints about the oven in communications with the landlords' agent after that date. It appears that a Smeg technician inspected the replacement oven at some time after 28 January 2021 and confirmed that the oven was not heating to 200 degrees. On 3 November 2021 the tenant emailed the landlords' agent, relevantly, as follows:

I refer to my numerous requests regarding repairs to this apartment that have not been attended to for 12 months …

Also, the new Smeg convection oven is not suitable as an oven due to the temperature not reaching the stated temperature as measured by the Smeg technician. This limits cooking as there are only 2 gas cooktops and I can only use the convection oven as a microwave.

Please advise when these repairs will be carried out.

(vi) It does not appear that the landlords' agent took any action in relation to the tenant's email of 3 November 2021. On 17 October 2022 the tenant emailed the landlord's agent again about repairs, stating, relevantly:

Could you please organise the following repairs as they have been requested almost 2 years ago with follow up reminders, however nothing has been completed.

…

5. Since being installed, the new Smeg convection oven does not become hot enough to cook anything. Even a frozen pizza will not cook using the convection oven function. The microwave function works fine though. The kitchen only consists of a two-burner gas stove top and this convection microwave, so it is difficult to cook in the apartment with the convection oven not functioning properly. Can you please find a solution to this issue?

(vii) On 19 October 2022 the landlords' agent notified the tenant by email that the landlords had agreed to arrange a technician to attend to inspect the replacement oven. She stated, however, that if this was found to be a "user issue" that he would be responsible for payment of the cost of the technician's attendance. The tenant replied to this email on 21 October 2022 denying the problem with the oven was a user issue and refusing to pay the technician's call out fee. In any event, because the replacement oven remained under warranty, there was no call-out fee payable to Smeg.

(viii) A Smeg technician inspected the replacement oven on 30 November 2022. The tenant contends, however, that he did not measure the temperature capacity of the oven. The technician subsequently provided a report to the landlords' agent. In response to repeated enquiries by the tenant about the outcome of the inspection, the landlords' agent emailed the tenant on 20 February 2023 stating as follows:

…

We have followed up with Smeg in regards to the microwave oven issue you reported where you state the microwave oven wasn't reaching correct heating temperatures

Smeg advised from their onsite inspection on 30/11/22, where they reviewed the microwave oven:

'the 34L unit only reaches 200 degrees at the temp probe, the national technician advised that the unit only reaches 200 degrees at the temp probe and that he also confirmed the unit is operational'.

Therefore, the appliance is in working order and we will not be actioning anything further. If any further issues are reported and it is found the appliance is in working order, the costs will be yours to cover.

…

(ix) in response to the tenant's complaint that the Smeg technician did not actually measure the temperature capacity of the convection oven, a further inspection was carried out on or about 27 February 2023. A temperature

probe was inserted into the oven and recorded a maximum temperature of 141 degrees. A photograph of that temperature reading appears at page 48 of Exhibit A1. In response to this finding the tenant requested the replacement of the oven,

(x) By email to the tenant dated 4 May 2023 the landlords' agent stated with respect to the replacement oven:

As per previous discussions regarding the microwave oven, Smeg reattended to install the temperature probe and recorded a temperature of 141 degrees, usually they don't install this. They have advised that it is reaching the correct temperature for its purpose of the item. We have been advised by Smeg not to pass this onto the tenant as it is relating to the owner of the property. We are acting in your best interests by attending this repair and have a diligence in organising repairs from tenants when advised. When Smeg replaced the microwave oven, they replaced it for a similar model, therefore we have upheld the same quality appliances in the apartment.

(xi) The foregoing quotation includes a reference to requests made by the tenant to be provided with copies of the Smeg technician's actual reports as to the functioning of the replacement oven. The landlords' agent refused to do this stating that Smeg refused to allow this. The tenant made enquires directly of Smeg customer service, which advised that it had no such objection.

(xii) In an email to the landlords' agent dated 3 April 2023 (a copy of which was provided to the tenant), a Smeg customer service officer states:

…

Please be advised the tenant has again called to advise he is not happy with how the appliance cooks. This appliance is not generally used for cooking, mainly heating. Can you please correspond with the tenant directly to see how best to proceed as it is not up to us what kind of appliances the tenant is provided with by an owner.

(xiii) the tenant first complained about problems with the lights in the premises on 10 November 2020. He complained that the downlight in the bedroom flicks on and off at random. The malfunctioning of various lights throughout the premises was the subject of repeated complaint by the tenant from that date (the original lights),

(xiv) By email to the landlords' agent dated 17 October 2022 the tenant sought the repair of the lights in the premises, stating, relevantly:

Could you please organise the following repairs as they have been requested almost 2 years ago with follow up reminders, however nothing has been completed.

1. A number of downlights in the apartment are out, however I am afraid to change the bulbs due to the other downlight in the bedroom flickering on and off randomly which could indicate an electrical fault. There are 15 downlights with 5 currently not working.

…

(xv) the landlords caused the original lights to be replaced with LED lights on 17 November 2022. On 18 November 2022 the tenant emailed the landlords agent, stating as follows:

the electrician came to replace with lights with LED lights yesterday. He did a good job, but he informed me the dimmer switch is not compatible with the LED lights he installed. Therefore, I am unable to dim the lights properly and one light is humming constantly. The 3 lights over the kitchen bench could also not as he advised that Energy Makeovers do not provide that type of LED. Also, the larger single light in the living room was not replaced as he advised that it would an additional cost. Could you please discuss this with the landlord as I understand he was dealing directly with Energy Makeovers.

(xvi) the tenant contends that two electricians attended the premises to inspect the problems with the lighting and that both told him words to the effect of 'there are issues with the wiring in the ceiling of the living room'. He contends on this basis that the wiring is not safe. He requested the landlords' agent to provide him with copies of each electrician's report, but this was refused. On 8 August 2023 he approached one electrician directly for his report. He received from the electrician a copy of the following email the electrician sent to the landlords' Property Manager (undated, but apparently sent on or about 17 November 2022):

I've been out to Pyrmont and swapped over 1 x dimmer and disconnected 1 x dimmer. There seems to me a wiring issue internally as previous electricians installed a fan mech instead of a dimmer on the bull head downlights. There must be something connected in the roof somewhere (e.g. capacitor) that's affecting using a normal dimmer causing lights to flicker. This is why previous electrician used a fan mechanism.

Lights are all working like normal at the moment as I've disconnected the dimmer.

Just giving you an update on the situation. If a dimmer is to be connected an electrician would have to resolve the wiring issue first before anything else commences.

…

(xvii) The tenant continued to complain to the landlord's agent about the safety of the electrical wiring in the premises and the disconnection of the dimmer switches. In her email to the tenant dated 4 May 2023, the Property Manager states with respect to this:

For the lights in the property, I am aware you had dimmer switches in the property, however we have followed the electrician advice in replacing those with normal working lights as it can be more cost effective for the landlord in the future and legislation requires you to have working lights and I can confirm that the property has working lights.

(xviii) The landlords rely upon an email to their Property Manager from their electrical contractor dated 20 July 2023 in relation to this element of the claim. That email, which is from a "service coordinator", not the electrician, states:

Attended to site to replace faulty dimmer but upon investigation we have come across more issues with redundant old transformers still connected to lights which were causing the dimmer to not function they way it should and thought it is the problem but after disconnecting them we found that there may be more which we were unable to locate so therefore we have had to disconnect the dimmer and just have the lights turn on and off.

Replaced a 6gang switch to a 5gang switch.

Test and commission all lights working.

No hazards detected. All safe.

15 A landlord's obligation to maintain premises in a reasonable state of repair includes the maintenance of appliances, services and facilities that are incorporated into the rented premises by the residential tenancy agreement. The concept of 'maintenance' extends both to the repair and to the replacement of rental assets where they cannot be repaired, or where it is not reasonable to do so. The concept of maintenance also requires a landlord to maintain at least an equivalence with a rental asset being replaced, so as not to derogate from the consideration owed to the tenant in return for the rent payable. Where an appliance is superseded, its replacement must be capable of at least the level of performance of the superseded asset.

16 I am satisfied on the evidence that the landlords breached their obligation to maintain the premises in a reasonable state of repair by ensuring that there is a

Convection Microwave oven available for the tenant's use which is capable of heating to at least 200 degrees. There was a such an appliance incorporated into the premises when the residential tenancy was made, and the landlords were therefore obliged to maintain at least an equivalent capacity appliance in the premises. It is clear on the facts I have set out above they have not done so.

17 I am also satisfied on the evidence that the landlords breached their obligation to maintain the premises in a reasonable state of repair by maintaining dimmer switches on the lights in the premises to allow the intensity of light to be regulated. There is no issue that such facilities were provided with the rented premises when the residential tenancy agreement was made. There is no issue that they were disconnected on or about 18 November 2022.

18 In determining whether it is appropriate to make an order for repair I am bound to consider the age of, rent payable for, and prospective life of the premises. Each of these considerations weighs in favour of repair (or maintenance) orders being made in this case. There is no suggestion that the rented premises is of such an age that it is likely to cease to be used for occupation as a residence in the foreseeable future. The tenant is paying a market rent for the premises, which has been subject to an almost 15% increase from 1 April 2023.

19 It might be cheaper for the landlords to disconnect the dimmer switches so as to avoid dealing with whatever upstream wiring issues there may be in the ceiling. However, the fact that it is cheaper does not mean that it is reasonable having regard to the market rent the tenant continues to be obliged to pay. Maintenance of any residential dwelling will sometimes require significant expense. In any event, the landlords have filed no evidence of what it would cost to reinstate the dimmer switches. It is thus not open to me to conclude that this would be financially prohibitive.

20 As I discuss further following an application in relation to a breach of a residential tenancy agreement must be made within 3 months of the applicant becoming aware of the breach. The tenant clearly became aware of the oven and dimmer switch issues long before his application was made. However,

both concern a continuing obligation which is breach recurs each day the state of disrepair persists. Both have been the subject of persistent complaint by the tenant to the landlords' agent. It was not until the landlords' property manager's email to the tenant on 4 May 2023 that it was stated unequivocally that the landlords refused to carry out any further repairs in relation to these items. This application was made within 3 months of that date. I thus conclude that there is no limitation issue affecting this element of the claim.

21 For the foregoing reasons I made a repair order that requires the landlords to replace the Convection Microwave oven with an oven capable of heating to at least 200 degrees, and to reinstate the dimmer switches. In relation to the oven, if it is difficult for some reason to reinstate a Convection Microwave oven that complies with the heating performance requirement, the parties may agree on an alternative so as to comply with the order. In relation to the dimmer switches, it would appear that this will require some upstream work on the electrical wiring system in the ceiling. However, there is insufficient evidence to enable me to know precisely what is required so I do not make any specific order in relation to that work. Nevertheless, the landlords will need to carry out whatever upstream work may be required to the electrical wiring so as to reinstate functional dimmer switches.

Excessive rent order

22 The Tribunal's power to declare that rent is excessive is found in s 44 of the Act, which provides, relevantly:

> **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 –
>
> …
>
> (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 mount.
>
> …
>
> (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.

…

(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,

…

23 At the outset I note that the application insofar as it sought an order pursuant to s 44(1)(b) of the Act was made before the end of the tenancy as required by s 44(3). The Tribunal therefore has jurisdiction to make the order sought.

24 The tenant applied for excessive rent orders reducing the rent payable for the premises due to the reduction in use of the lights in lights, the withdrawal of the dimmer switches, and the withdrawal of a Convection Microwave oven capable of heating to 200 degrees from 3 December 2019 up to the date of the hearing, being a period of 3 years and 6 months. Section 44(6)(a) of the Act does not permit the Tribunal to make an excessive rent order in respect of a period greater than 12 months. This required the tenant to limit himself and to specify the 12 month period in relation to which he sought the order. He settled on the

12 month period up to the date of the hearing (that is 25 October 2022 to 24 October 2023).

25 In determining if the rent payable for the premises was excessive, I must have regard to the relevant considerations contained in s 44(5) of the Act and any other relevant considerations.

26 The rent payable during this period was $940.00 per fortnight up to 31 March 2023 and then $1,100.00 per fortnight from 1 April 2023. I did not understand it to be in issue between the parties that the rent payable for the premises was a market rent. In any event, I make that finding. In this respect, there was an almost 15% rent increase from 1 April 2023, which I am satisfied maintained the market rent value. It follows from this that any material withdrawal or reduction by the landlord of the goods, services and facilities provided to the tenant with the rented premises is a factor of the rent he paid, rather than any under market value he already had the benefit of. I give this consideration significant weight pursuant to s 44(5)(a) and (g) of the Act.

27 I am satisfied on the evidence set out above that electric lights, dimmer switches, and a Convection Microwave Oven capable of heating to 200 degrees were provided to the tenant by the landlords as part of the rented premises. I give this consideration significant weight pursuant to s 44(5)(c) and (e) of the Act.

28 I am also satisfied that the electric lights were the subject of significant malfunction on and from 25 October 2022 to on or about 18 November 2022. Various downlights were blown, others flickered and hummed. This was the result of electrical malfunction which was confirmed by two electricians that attended the premises on behalf of the landlord to inspect the lights. The malfunctioning lights thus constituted a state of disrepair for which the landlords were responsible. For the purposes of s 44(1)(b) the tenant' use of the lights was thus reduced by the landlords.

29 On or about 18 October 2022 the landlords' electrician carried out work to the electrician wiring system and replaced most downlights with LED lights. He disconnected the dimmer switches because they were incompatible with the new lights. In response to the tenant's complaint about this the landlords

determined not to authorise any further electrical work that would enable the reinstatement of the dimmer switches. I am thus satisfied that the dimmer switches were withdrawn from the tenant by the landlords on and from on or about 18 November 2022 up to the date of the hearing.

30 I have set out the facts in relation to the Convection Microwave oven above. I am satisfied that the replacement oven was never capable of heating to 200 degrees in accordance with the manufacturer's specifications for that model. An oven with this capacity was thus withdrawn from the tenant's use for the whole of the period 25 October 2022 to 24 October 2023.

31 I give each of these matters (pars 28 t0 30) significant weight pursuant to s 44(5)(d) of the Act.

32 I also give significant weight to the following considerations:

(i) the rented premises is a studio apartment of limited size. The tenant occupies the apartment as a residence, but also works from home. Working from home is now commonplace as a result of the COVIC-19 pandemic. It is an expected and reasonable use of rented premises. The ability to cook and regulate light within the premises must be understood in the context of the tenant occupying the premises for all or most of each day, every day,

(ii) cooking facilities for meal preparation are essential for the habitation of a dwelling as a home. In this case, the cooking facilities were limited to two gas ring burners and the Convection Microwave Oven, the Convection Oven component to which did not work. I am satisfied that this constituted a significant restriction on the tenant's ability to prepare a variety of meals.

33 For the foregoing reasons I am satisfied that the malfunctioning lights, the disconnection of the dimmer switches and the absence of a functioning Convection oven had a significant impact on the tenant's comfort and amenity.

34 In determining to what extent rent was excessive having regard to the reduction and withdrawal of these goods and facilities, I must consider them in the context of the totality of the goods, services and facilities provided with the rented premises. In that regard, it is important to bear in mind that this is a studio apartment with limited goods, services, and facilities.

35 Weighing these considerations in the balance I will allow that rent was excessive by 5% due to the reduction in use of the lights and then the withdrawal of the dimmer switches, and by a further 5% in relation to the withdrawal of a Convection oven capable of heating to 200 degrees. Rent was thus excessive by $94.00 per fortnight between 25 October 2022 and 31 March 2023 and by $110.00 per fortnight from 1 April 2023 up to 24 October 2023. I will therefore make excessive rent orders to this effect.

36 It was not in issue that the tenant has paid all rent owing in relation to these periods at the rate of $940.00 and $1,100.00 per week respectively. It is therefore appropriate to liquidate the excessive rent orders to a money order that will require the landlords to pay the tenant the excessive rent he has paid by operation of those orders which is $2,687.27.

Rent record

37 Section 33 of the Act concerns the obligations of a tenant and landlord with respect to the payment of rent. It provides, relevantly:

> **33 Payment of rent by tenant**
>
> (1) A tenant must pay the rent under a residential tenancy agreement on or before the day set out in the agreement.
>
> …

38 Section 36 of the Act concerns the obligations of a landlord, or landlord's agent with respect to the receipt of rent payments. It provides, relevantly:

> **36 Rent receipts**
>
> (1) If rent under a residential tenancy agreement is paid in person (other than by cheque), the person who receives the payment must, when the payment is made, give the person making the payment a rent receipt.
>
> …
>
> (3) **"rent receipt"** is a receipt that contains the following matters –
>
> (a) the name of the person who receives the rent or on whose behalf the rent is received,
>
> (b) the name of the person paying the rent or on whose behalf the rent is paid,
>
> (c) the address of the residential premises for the rent is paid,

(d) the period for which the rent is paid and the date up to which the rent is paid,

(e) the date on which the rent is paid,

…

39 Section 37 of the Act concerns the obligation of a landlord or landlord's agent to maintain a rent record. It provides, relevantly:

37 Rent records

(1) A landlord or landlord's agent must keep a record of rent received under a residential tenancy agreement (a **"rent record"**).

(2) A rent record may be kept in any form, and must contain any particulars, prescribed by the regulations for the purposes of this section.

(3) A landlord or a landlord's agent must, within 7 days of a written request by the tenant, provide a written statement setting out the particulars of the rent record for a specified period.

…

40 The tenant applies for an order pursuant to s 187(1)(h) of the Act that would require the landlords' agent to comply with the requirements of the Act in relation to the maintenance of an accurate rent record. In relation to this element of the claim I make the following factual findings:

(i) the tenant pays rent on a fortnightly basis on a Saturday utilising an OSCO electronic funds transfer facility that deposits his rent to the landlords' agent's Trust Account. I am satisfied that this is a virtually instantaneous transfer. In her evidence on behalf of the landlords, Ms Contarino contended that the transfer took some days to appear and clear in the Trust account. However, this is contrary to what an OSCO payment is. No Trust Account record has been submitted to establish any delay in receipt of the tenant's rent payment. I do not accept that there is any such delay,

(ii) the landlords' agent has in the relatively recent past adopted the use of a tenancy software program called Kolmeo to manage its rent accounts, including the payment of rent monies by tenants, and the distribution of rental income to landlords. The tenant was requested to move his rent payments to this platform but declined to do so.

(iii) it appears that after the tenant's rent payment is received into the Trust Account, the landlords' agent transfers it to Kolmeo. This is not done until a working day of the week

following its receipt. The rent payment is not 'receipted' until this transfer occurs,

(iv) as a consequence of this the tenant's rent record maintained by the landlords' agent repeatedly records him as being in arrears of rent by the period between the Saturday when the rent is payable and the date it is receipted on Kolmeo, which is typically by 3 or 4 days. This triggers automated email and text message warnings to him that his rent is in arrears.

41 I am satisfied on the evidence that the tenant complies with his obligation under s 33 of the Act to pay rent on the day it falls due. The landlords and their agent must therefore comply with the obligations imposed on them by s 36(3)(d) and (e) of the Act by issuing the tenant with a rent receipt that records the date on which the rent is paid (rather than some other date when it is transferred to the Kolmeo platform), and which states the period for which the rent is paid ant the date up to which the rent is paid. The rent record maintained by the landlords and their agent must reflect what is required by the rent receipt.

42 The delayed receipting of the tenant's rent payment results in an inaccurate rent record which adversely affects his reputation. This may affect his ability to obtain other rental properties in the future. It also results in him being unreasonably subjected to rent arrears warnings which interferes with the quiet enjoyment he is entitled to.

43 For the foregoing reasons the tenant is entitled to an order that will require the landlords' agent to comply with its ss 36 and 37 obligations in relation to rent receipts and the maintenance of a rent record that reflects the particulars required by the receipt.

Retaliatory eviction

44 The Tribunal's powers with respect to evictions that are retaliatory are found in s 115 of the Act, which provides, relevantly:

> **115 Retaliatory evictions**
>
> (1) The Tribunal may, on application by a tenant … in relation to a termination notice –
>
> (a) declare that a termination notice has no effect, ..
>
> …

> if it is satisfied that a termination notice given … was a retaliatory notice ….
>
> (2) The Tribunal may find that a termination notice is a retaliatory notice … 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,
>
> …
>
> (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.

45 Section 39(4)(a) of the *Residential Tenancies Regulation* 2019 (NSW) provides that the prescribed period for a termination notice given under s 85 of the Act is within 30 days after the termination notice is given.

46 This element of the dispute concerns a Notice of Termination (termination notice) issued to the tenant by the landlords' agent under s 85 of the Act on 20 May 2023 which required the tenant to deliver up vacant possession of the premises on 18 September 2023.

47 On its face the termination notice complies with the requirements of s 85 and otherwise with the requirements of Part 5 of the Act. There is no issue before me that it was served on the tenant in accordance with s 223 of the Act. I thus proceeded on the basis that, subject to the retaliatory eviction issue, the termination notice is a valid notice, validly served.

48 As at the date of the hearing the landlords had not instituted an application for termination of the tenancy in accordance with the notice, and the 30 day period in which such an application could be made had lapsed (see s 83(2)(a) of the Act and s 39(2) of the Regulation). Nevertheless, having regard to the Tribunal's power under s 41 of the NCAT Act to extend the time in which an application may be made, I was satisfied that there remained potential for such an application to be made. In this respect, it was clear from Ms Contarino's

presentation of the landlords' case that they continued to rely on the termination notice as entitling them to recover possession of the premises.

49 A termination notice issued under s 85 of the Act is commonly referred to as a '90 day' or 'no-grounds' notice. That is, such a notice does not require a landlord to cite a reason or motive for terminating the tenancy. However, it is well established law that such a notice operates subject to s 115(1): *Curry v Eftimovski* [2023] NSWCATAP 290 at [17] and the authorities cited there. Consequently, although the tenant bears the formal onus of proof in establishing that the termination notice is a retaliatory notice, the landlords' defence to the application requires them to discharge the practical onus of establishing that the termination notice was not motivated by one or more of the reasons set out in s 115(2). That is because motive is the essence of the cause of action conferred by s 115.

50 Consideration of an application made under s 115(1) is a two-step process. The Tribunal must first determine if the impugned termination notice is a retaliatory notice by reference to the matters set out in s 115(2). If that is not found, that is an end to the matter. If it is found, then the discretion conferred by s 115 to declare the termination notice of no effect because it is a retaliatory notice is enlivened. The Tribunal must then determine, second, if such a declaration should be made as a matter of discretion: *Steinbeck v McDonald* [2015] NSWCATAP 90 at [29] to [33].

51 I have set out above the history of the tenant's complaints about the state of disrepair of the premises. I rely on that background in relation to this element of the claim, and additionally, make the following findings:

(i) by letter dated 17 January 2023 the landlords' agent issued the tenant with a fixed term agreement for his signature. The fixed term was stated to be 21 January 2023 to 19 January 2024. The tenant declined to sign this agreement which resulted in the tenancy continuing on a periodic basis without any apparent objection by the landlords,

(ii) by Notice of Rent Increase issued to the tenant by the landlords' agent also dated 17 January 2023 rent was increased from $940.00 per fortnight to $1,100.00 per fortnight with effect from 1 April 2023,

(iii) on 3 May 2023 a Property Manager telephoned the tenant to request access to the premises to conduct a routine inspection on 8 May 2023. The tenant advised that that date was inconvenient because he was working from home that day. This resulted, on 4 May 2023, in the agent issuing the tenant with a 'Form 9 Entry Notice' which purported to advise of a compulsory inspection to be conducted on 9 May 2023 between 10:30am and 1:00pm. This is a notice developed by the Queensland Residential Tenancies Authority pursuant to ss 192-199 of the *Residential Tenancies and Rooming Accommodation Act* 2008 (Qld). The tenant objected to the notice on the basis that it had no legal effect under the NSW Act,

(iv) by email to the tenant dated 4 May 2023 Ms Dee O'Connor, Office Manager of the landlord's agent, notified the tenant that the landlords refused to reinstate a Convection oven capable of heating to 200 degrees and dimmer switches, among other things,

(v) on 9 May 2023 at about 10:40am the Ms O'Connor and a Property Manager conducted a routine inspection accompanied by 3 tradespersons. The tenant was home at the time. He refused to permit all 5 persons into the property at the same time. He allowed Ms O'Connor and the Property Manager to conduct an inspection, and then allowed two carpenters and a plumber into the property in succession. The landlords' agents sought to take photographs in the premises. However, the tenant refused to permit any photograph to be taken of his personal possessions. A dispute ensued about this in which the tenant stated he would call the Police and make an application to NCAT,

(vi) on 11 May 2023 Ms O'Connor created a document called "This is a summary of events – Routine Tues 10:30am Tenant Ryan. That document purports to record what occurred at the inspection conducted on 9 May 2023. The tenant is characterised as obstructive and described as "condescending", "passive aggressive" and "rude",

(vii) on 15 May 2023 the tenant made a complaint to NSW Fair Trading about various matters including the state of disrepair of the premises, the landlords' refusal to carry out the repairs he sought, and the delayed receipting of his rent payments,

(viii) on or about 9 June 2023 a NSW Fair Trading Customer Service Officer referred that complaint to the landlords' agent. It was dealt with by Ms O'Connor, who was at that time on leave. Ms O'Connor provided a short response to

the complaint and stated that she would provide a more detailed response upon her return from leave,

(ix) on 15 June 2023 Ms O'Connor provided NSW Fair Trading with a detailed written response to the tenant's complaint. That response includes the following:

…

May I please request that this information passed not be shared with the tenant Ryan, if you want me to send something for him, please advise as I can help or you can select what information you will share invoices attached are okay as they show works performed, ledger and arrears currently screen shot also okay.

The suppliers have mentioned they don't wish to share comms with him as he is passive aggressive and has made them feel uneasy same does for when myself and PM Bronwyne attended a routine on 9th May 2023 where the tenant Ryan prevented us from doing our job, taking routine pictures for the landlords eyes only as per lease and laws in place. He was aggressive and threatened to call the police when I asked him to call Fair trading to discuss the laws in place and how our entry was lawful as per entry notice issued in accordance with the legislation he was very rude, abrupt and made us both feel unsafe, as the apartment is a studio sized one I felt the best course of action was to leave, note down what occurred update our file notes as to the incident and ensure the landlord was made aware of the reason we have still not sent them a report with pictures as to how the property looks and is been kept was due to the tenant being passive aggressive nature where no pictures were allowed to be taken I believe this is due to the hoarding where he does not wish for anyone to be privy to the situation unfolding.

…

Strata plumber – Marsden Plumbing – email attached says that extensive works will be required to the building's gas line that runs from the balcony to the kitchen where line is hidden behind the walls, demolition will be required, as the matter has been bypassed for a few years. They now have funds accumulated to get building works remedied, therefore the property in the near future will be unhabitable as works will take weeks to arrange as the property is a studio apartment (with the tenant having a lot of hoarding materials) therefore the tenant will be heavily impacted, the landlord is deciding as to what he wants to do as he feels he may terminate the lease at some point to do a renovation at the same time as Strata perform gas line works then look to get a sales appraisal and possibly sell the unit as the cost of rates and mortgage increases where rent collected is not sufficient to what he needs to pay all the bills so this may occur in the near future.

…

(x) on 20 June 2023 the Notice of Termination was issued.

52 On this evidence I am satisfied that at the material time for this element of the dispute the tenant had notified the landlords' agent that he proposed to apply to the Tribunal for an order (that fact is recorded by Ms O'Connor in the file note she created on 11 May 2023) and that the tenant had taken other action to enforce his rights under the residential tenancy agreement. In this respect he had made a complaint to NSW Fair Trading about the state of disrepair of the premises and about the delay in the recording of his rent payments, among other things. The circumstances envisaged by s 115(2) of the Act are thus engaged.

53 The issue is whether the landlords were wholly or partially motivated by those matters to issue the tenant with the termination notice. I am satisfied that they were. The termination notice was issued 11 days after the tenant's complaint was referred to the landlords' agent by NSW Fair Trading, and 5 days after Ms O'Connor provided NSW Fair Trading with a detailed response to the complaint. There is thus close proximity between the complaint and the termination notice being issued.

54 The tenant denies that he ever refused the landlords' agent access to the property, or that he ever acted in an aggressive, threatening, or obstructive way. That denial is consistent with the email communications that passed between the tenant and the landlords' agent in the lead up to the inspection carried out on 9 May 2023. In those emails the tenant asserts what he considered were his rights in relation to repairs, providing access, and other matters, but he does not do so aggressively, or in a threatening way. His tone is measured and courteous. The tenant gave evidence at the hearing. He presented as assertive, but measured and courteous.

55 Ms O'Connor did not give evidence at the hearing, although she was present in the hearing room. She was very agitated by the hearing, particularly when the tenant was presenting his case. She typed loudly on a laptop, gesticulated, pulled faces, called out to Ms Contarino, and used her mobile phone apparently to read or send text messages. She had to be warned twice in relation to this conduct. This conduct created a very unfortunate impression of her objectivity and professionalism.

56 The detailed response Ms O'Connor provided to NSW Fair Trading displays considerable animus towards the tenant and attempts to portray him as passive aggressive, obstructive, threatening, and as a 'hoarder'. I am satisfied that these allegations are false and malicious. They are an attempt to characterise the tenant's reasonable assertion of his rights as various forms of abuse from a person with a psychological problem (he is falsely referred to as a 'hoarder'). The opening lines of the excerpt from this response set out above, on any objective view, are a transparent and childish attempt to co-opt NSW Fair Trading's Customer Service Officer into concealing information from the tenant based on these allegations. They include claims that 'suppliers' don't want information shared with the tenant. Those claims are false and ridiculous. The response as a whole is emotionally charged, vindictive and wholly unprofessional.

57 It is clear from what is set out in the response that Ms O'Connor had already started to engage with the landlords to find a basis for terminating the tenancy. Nothing about the tenant's complaint to NSW Fair Trading raised an issue about terminating the tenancy, yet the response forecasts that outcome in some detail. It is a pre-emptive attempt to justify termination of the tenancy.

58 I am thus satisfied that there is a direct connection between the tenant's complaint to NSW Fair Trading, and his foreshadowed application to NCAT and the issuing of the termination notice.

59 The landlord submits that the termination notice is not retaliatory on the following bases:

(i) it submitted they may sell the property in the future.

I am satisfied that this is at most a vague possibility. An email of enquiry of a selling agent is submitted in support of it. However, the landlords only refer to the sale of the property as a future possibility. They do not request the selling agent to prepare any marketing submission for their consideration. There is obviously no contract for the sale of the property which specifies that vacant possession is required. It is implausible that the landlords would terminate the tenancy and therefore forego rent payments based on some vague possibility that they may sell the property at some unspecified time in the future,

(ii) the Owners Corporation intend to carry out remedial works to the gas supply to the apartment which will require the apartment to be vacant. They intend to renovate the apartment at the same time.

The only evidence that is offered in support of this claim is an email from the Owners Corporation's plumber which indicates that the Owners Corporation has an intention to commission work to the gas supply. There is no scope of work before me in relation to such remedial work. There is no notice to the lot owners/landlords from the Owners Corporation that advises of these remedial works and what it required of the Lot Owners in relation to them. Assuming that this work will be carried out, I do not know when it will occur, how extensive the works will be or how long it will take, or what is required of the landlords in terms of access to the apartment. There is therefore insufficient evidence for me to conclude that the works will require vacant possession of the apartment.

Even if they did, in the absence of any evidence as to the duration of the works (ie whether they will take hours, days, weeks or months to complete) it is not open to me to find that it is reasonable for the landlords to terminate the tenancy rather than fund the tenant's temporary relocation from the premises while the works are completed.

In relation to the landlords' stated intention to renovate the apartment in conjunction with such works, there is no scope of works for a renovation in evidence that indicates the scale of work contemplated. The landlords have not entered into any contract with a builder for renovation works which specifies a start date and completion date. In these circumstances, even if the landlords do have a genuine intention to renovate, I could not be satisfied that the scale of any such renovation is such that vacant possession is required.

60 In relation to both 'reasons' given by the landlords for the issuing of the termination notice, I note that the landlords offered the tenant a 12 month fixed-term lease in January 2023 which would not have lapsed until January 2024. I accept that circumstances can change, but no actual change of circumstances has been proved in this case.

61 For the foregoing reasons, I am satisfied that the landlords were wholly motivated to issue the termination notice by the tenant's complaint to NSW Fair

Trading and his foreshadowed application to NCAT, urged on by Ms O'Connor's deplorable behaviour. The landlords' have not discharged their practical onus of establishing that there was another reason for the termination notice to be issued. I therefore declare the termination notice a retaliatory notice.

62 The second stage of analysis is therefore reached. I must determine as a matter of discretion whether the termination notice ought to be declared of no effect on this basis. I am satisfied that it should. It appears to me that the circumstances of this case involve exactly the sort of mischief that s 115 was enacted to address. It is an abuse of power by landlords who are attempting to use their superior title in the property to defeat the tenant's legitimate right to repairs, and to an accurate record of his rent payments, amongst other things. Such an abuse of power should not be permitted. I therefore declare the termination notice of no effect because it is a retaliatory notice.

Order for compensation

63 Section 187(1)(d) of the Act confers power on the Tribunal to make an order for compensation. However, that power it not at large. It is only enlivened in circumstances where that is the appropriate remedy in relation to a cause of action found elsewhere in the Act. In this case, the tenant claims an entitlement to compensation for damage and loss he contends he has suffered due to the landlord's failure to maintain the premises in a reasonable state of repair (s 63 of the Act – see above). The damage and loss alleged are meal costs incurred since 3 December 2019 due to the malfunction or lack of cooking capacity of the Convection Microwave oven.

64 Section 190(1) of the Act provides that an application in relation to a breach of a residential tenancy agreement must be made within the period prescribed by the regulations. Section 39(9) provides that this prescribed period is within 3 months of the applicant becoming aware of the breach.

65 I have set out the facts in relation to the malfunction of the original Microwave Oven and its replacement above. If time is taken to run from the date the original oven shorted the tenant had until 2 March 2020 to make an application in relation to that alleged breach. If time is taken to run from the date the

landlord replaced that oven with another oven that did not function with equivalent cooking capacity, which was 20 January 2021, the tenant had until 19 April 2021 to make an application in relation to that alleged breach. His application was made to the Tribunal on 30 June 2023, which was more than 3 years and six months after the original oven shorted and 2 years and 5 months after the original oven was replaced with an oven of inferior capacity.

66 A landlord's obligation to maintain premises in a reasonable state of repair is a continuous one. Breach recurs each day a state of disrepair persists: *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 at [91]. This element of the tenant's claim is thus maintainable in relation to the 3 month period before 30 June 2023, but it has been made outside the period permitted by s 190(1) of the Act and s 39(9) of the Regulation to the extent that it relates to the period before 1 April 2023.

67 Section 41 of NCAT Act confers discretion on the Tribunal to extend the time in which an application may be made. That discretion is unfettered but it must be exercised judicially having regard to established principle. In short summary, time limits are to be strictly enforced unless to do so would work an injustice to an applicant. The relevant considerations are the length of the delay, the applicant's explanation for the delay, any relevant prejudice to the respondent that might arise from time being extended, and the merit of the claim. In this last respect, if the delay in making the application is relatively short, the applicant bears the onus of establishing that his claim is fairly arguable. If the delay is extensive, he bears the onus of establishing that his claim has substantial merit.

68 Whether time is taken to run from 3 December 2019 or 20 January 2021, the applicant's delay in making this application with respect to the period before 1 April 2023 is between 3 years and 3 months (after 2 March 2020) and 1 day (31 March 2023). Most of this period represents a very extensive delay, but of course that is not the case for the days immediately before 1 April 2023. Nevertheless, the delay taken as a whole, weighs against an extension of time being granted.

69 The applicant's explanation for the delay was a concern that the making of an application might result in the landlords taking adverse action against him, such as by terminating his lease. That concern can be given significant weight in this case because this is what the landlords did do when he ultimately asserted a right to replacement of the oven and reinstatement of the dimmer switches.

70 I am satisfied that the landlord would suffer a relevant prejudice if time were to be extended. In this respect, they would be financially exposed to compensate damage and loss that has accrued since December 2019, not just that that had accrued 3 months prior to the application being made. I give this consideration significant weight.

71 The decisive factor is the merit of the applicant's claim. It may be accepted for the reasons already set out above in relation to other claims that breach of the landlords' obligation to maintain premises in a reasonable state of repair would be established in relation to this element of the application. However, it would then be necessary for the tenant to prove his loss. His asserted loss is $90.00 per week in meal costs he has incurred since the original microwave oven malfunctioned, or alternative, since it was replaced with a microwave oven of non-equivalent capacity. That assertion is ipse dixit. It is not supported by any objective evidence of loss in the form of receipts, payment records, restaurant booking details etc. Nor has any Statutory Declaration or Statement been given that sets out the details of when meals were purchased and at what cost. In these circumstances the applicant has little prospect of proving the loss he contends for.

72 Weighing each of these considerations in the balance there is an insufficient basis for the exercise of discretion to extend the time in which this element of the application can be made. To the extent that it relates to the period before 1 April 2023, it must therefore be dismissed on the basis that it is out of time and the Tribunal does not have jurisdiction to deal with it.

73 This element of the application is maintainable in relation to the period on and from 1 April 2023. In relation to that period, I am satisfied that the landlords persisted in their breach of the residential tenancy agreement by failing to maintain a microwave oven in the premises with equivalent capacity to that

which was incorporated into the rented premises at the start of the tenancy. However, for the reasons I have stated the tenant has failed to provide any satisfactory evidence of loss. I therefore dismiss this element of the application in respect of the period on and from 1 April 2023 on its merits.

Orders

74 For the foregoing reasons, I made the following orders:

(1) Pursuant to s 115(1) of the *Residential Tenancies Act 2010* (NSW) the Tribunal declares that the termination notice dated 20 June 2023 is of no effect because it is a retaliatory notice.

(2) The landlords must cause the carrying out of the following work in a proper and work-person-like manner at their own expense by 24 November 2023:

(a) replace the Convection Microwave oven with a Microwave and Convection oven that is capable of heating to 200 degrees (or an alternative agreed upon between the parties),

(b) reinstate dimmer switches in the bedroom and living area.

(3) The rent payable for the premises was excessive from 25 October 2022 to 24 October 20**23** and is not to exceed $423.00 for the period 25 October 20**22** to 31 March 2023 and $495.00 for the period 1 April 2023 to 24 October 2023.

(4) Order 3 is liquidated. The landlords Vince and Patricia Fimmano must pay the tenant, Ryan Anderson, $2,687.27 immediately.

(5) Pursuant to s 187(1)(h) of the *Residential Tenancies Act 2010* (NSW) LITTLE Real Estate (Vic & NSW) Pty Ltd t/s LITTLE Rea Estate must immediately comply with ss 36 and 37 of that Act. Specifically, a rent receipt and rent record must record the date the rent payment is received into the Trust Account (not the date of administrative processing or 'clearance'). The paid to date must be calculated from the date of receipt of the payment.

(6) The application is otherwise dismissed.

****

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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