



Civil and Administrative Tribunal  
New South Wales

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Case Name: Morsi v Wang

Medium Neutral Citation: [2023] NSWCATCD 133

Hearing Date(s): 10 October 2023; 14 November 2023

Date of Orders: 13 December 2023

Decision Date: 13 December 2023

Jurisdiction: Consumer and Commercial Division

Before: P French, Senior Member

Decision: (1) The rent payable for the premises was excessive from 22 July 2022 to 21 July 2023 and is not to exceed \$340.00 for the period 22 July 2022 to 16 February 2023 and \$400.00 per week for the period 17 February 2023 to 21 July 2023.  
(2) Order 1 is liquidated. The landlord, Susan Wang, must pay the tenants Husam Morsi and Eman Mohamed \$8,421.40 immediately.  
(3) The application is otherwise dismissed.

Catchwords: LEASES AND TENANCIES – Residential Tenancies Act 2010 (NSW) – excessive rent due to withdrawal or reduction in goods, services and facilities provided with residential premises

Legislation Cited: Residential Tenancies Act 2010 (NSW), ss 44, 63, 81

Cases Cited: De Soleil v Palmhide P/L [2010] NSWCTTT 464  
Proudfoot v Hart (1890) 25 QBD 42 Roberts v NSW Aboriginal Housing Office [2017] NSWCATAP 9

Texts Cited: Nil

Category: Principal judgment

Parties: Husam Morsi (First applicant)  
Susan Wang (Respondent)

Representation: Husam Morsi (Self-represented)  
Eman Mohamed (Self-represented)  
Susan Wang (Self-represented)

File Number(s): 2023/00379721 (previously RT 23/37864)

Publication Restriction: Nil

## **REASONS FOR DECISION**

### **Introduction**

- 1 This is an application by Husam Morsi and Eman Mohamed under s 44(1)(b) of the *Residential Tenancies Act 2010* (NSW) (the Act) for orders that would declare that rent was excessive by 30% of the rent payable per week during the period 22 July 2022 to 21 July 2023 because of Susan Wang's (the landlord) withdrawal or reduction of goods, services and facilities provided with the residential premises. The claim principally relates to a loss of use and amenity of the rented premises due to water ingress and mould but includes additional complaints in relation to a malfunctioning oven and blinds. The tenants originally also applied for an order pursuant to s 50, 187(1)(d) and 190 of the Act that would have required the landlord to pay them \$1,000.00 in compensation for distress and disappointment they contend they suffered due to the landlord's interference with their quiet enjoyment of the premises. However, that claim was withdrawn at the start of the first Special Fixture Hearing. This application was made to the Tribunal on 17 August 2023 (the application).
- 2 For the reasons set out following I have determined that the tenants' use of the premises was substantially reduced by its state of disrepair during the period 22 July 2022 to 21 July 2023 and that rent was excessive by 30% per week on this basis. I have made a declaration under s 44(1)(b) to this effect. It is not in issue that the tenants, who vacated the rented premises on 10 September

2023, have paid all rent owing in respect of this period at the rate of \$510.00 per week up to 16 February 2023 and \$550.00 per week thereafter. It is therefore appropriate to liquidate the excessive rent order to a money order that will require the landlord to repay the tenants the rent they are liable for by operation of the excessive rent order in the amount of \$8,421.40. I have made that order.

### **Procedural history**

- 3 The application was first listed before the Tribunal, differently constituted, for Conciliation and Hearing in person on 4 September 2023. The tenants and landlord each attended that listing of the application in person. 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.

### **Evidence and hearing**

- 4 Both parties have complied with the Tribunal's directions for the filing and exchange of evidence. The tenants relied upon bundles of documents filed on 17 August 2023 and 10 November 2023 and 15 November 2023. These were marked Exhibits A1 to A3. Mr Morsi also handed up at the hearing a Statutory Declaration made by him dated 10 October 2023 which was marked Exhibit A4. The landlord relied upon bundles of documents filed on 25 August 2023, 3 October 2023, and 24 October 2023. These bundles were marked Exhibits R1 to R3 respectively. I note that there is considerable overlap in the successive bundles filed by both parties. I also note that some of this evidence primarily concerned a related proceeding instituted by the landlord which was heard and determined at the second Special Fixture Hearing on 14 November 2023.
- 5 The application was listed for a Special Fixture Hearing before the Tribunal, as presently constituted, on 10 October 2023, however insufficient time was allocated to complete the hearing on that occasion. It was adjourned part-heard to a further Special Fixture Hearing conducted on 14 November 2023 on which

occasion the hearing was completed. Mr Morsi and Ms Mohamed both attended those hearings in person and both gave oral evidence under a solemn promise to tell the truth. Ms Wang also attended both hearings in person and gave oral evidence under a solemn promise to tell the truth. 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**

- 6 The dispute arises from a residential tenancy agreement that was made on 18 January 2019 for a 16 month fixed term which was expressed to commence on 18 January 2019 and end on 17 May 2020. The tenancy continued on a periodic basis after the lapse of the fixed term. On 16 June 2020 the parties made a further fixed term agreement of 11 months duration which was expressed to commence on 26 June 2020 and end on 25 May 2021. The tenancy continued on a periodic basis after the lapse of that fixed term. On 9 January 2023 the parties made a further fixed term agreement of 6 months duration which was expressed to commence on 20 January 2023 and end on 19 July 2023. The tenancy continued on a periodic basis after the lapse of that fixed term.
- 7 Prior to the lapse of the fixed term, on 12 May 2023, the landlord's agent served the tenants with an End-of-Fixed-Term Notice of Termination (termination notice) which required them to give vacant possession of the premises to the landlord on 20 July 2023. There was a dispute about the circumstances in which that termination notice was given which ultimately resulted in the landlord making an application to NCAT for a termination order under 84 of the Act. That application was listed for Conciliation and Hearing on 4 September 2023. At that listing the parties reached an agreement to resolve that dispute. Consent orders were made terminating the residential tenancy agreement on that date and requiring the tenants to give vacant possession of the premises to the landlord on 10 September 2023. The tenants complied with those consent orders.
- 8 The rent payable under the initial agreement was \$560.00 per week. However, this was reduced to \$510.00 per week under the agreement made on 16 July

2020 which commenced on 26 July 2020. The context for that reduction was the COVID-19 Pandemic. Rent continued to be payable at the rate of \$510.00 per week up to 16 February 2023. Under the fixed term agreement made on 1 January 2023 rent was increased to \$550.00 per week commencing from 17 February 2023.

9 This rent increase was prompted by a rent review conducted by the landlord's agent on or about 7 December 2022. Correspondence that passed between the agent and landlord in relation to that review is in evidence at Exhibit R1 at pages 143-144. In summary, the agent advised the landlord of the rent review and of his recommended rent increase to \$550.00 per week. In response to that advise, the landlord enquired of the agent if "the rent appraisal [is] generally for 3BR townhouses/units in the area or is it factoring in the water damage/roof leaks as well?". The agent replied that he had "factored into the [recommended rent rate] the damage/roof leaks issue" and "if this was not there we can achieve more in rent". I will set out the evidence in relation to the water damage and roof leaks following.

10 The landlord contends that the market rent value of the property would have been \$650.00 per week but for the water damage and roof leaks. I cannot find in her evidence any opinion of her Managing Agent or any other agent to this effect. However, such an opinion does appear to have been in evidence in the proceedings Ms Wang instituted against the Owners Corporation in SC 22/44090 (as to which see following). In its decision in that application, a differently constituted Tribunal stated in relation to Ms Wang's damages claim:

The third head of damage is for lost rent, being \$5000.00. This is based on the difference between the \$550.00 a week Ms Wang was charging for weekly rent, and the \$650.00 her agent says she could have obtained had the repairs been effected and the unit repainted and generally freshened up after the necessary repair works. As I explained during the hearing, despite the opinion of Mint Property Agents that her unit "could achieve \$650pw", whether it did nor did not is entirely a matter of conjecture. To allow for the unpredictability of the future, I have decided to allow half the amount claimed, namely \$2,500.00.

11 The rented premises is a two level townhouse situated in a strata scheme in Greenacre. It has 3 bedrooms, 1 bathroom, lounge room, dining room, kitchen, and laundry. The premises also includes a lock-up garage for 1 car, a small

front porch, a partially enclosed raised cabana at the rear of the property and a small paved rear yard. The kitchen includes a rangehood, cook-top and oven. No other appliances were incorporated into the premises.

- 12 When the tenants moved into the premises, they were very unhappy about what they considered was is serious uncleanliness and state of disrepair. The Start-of-Tenancy Condition Report they returned to the landlord's agent on or about 25 January 2019 reflects that discontent. Much of the evidence, and the submissions, filed by the parties, concern the complaints the tenants made at that time, and whether those issues were attended to or not. However, those matters have a very limited bearing on the question of whether rent was excessive during the period 22 July 2022 to 21 July 2021. I therefore will therefore only refer to these complaints insofar as they have some bearing on the issue before me for determination.
- 13 Similarly, the tenants include in their evidence and submissions complaints about the conduct of the landlord and landlord' agent conduct towards them after 21 July 2023. Those complaints would potentially have been relevant to the tenants' compensation for interference with quiet enjoyment claim. However, as I have already indicated, that claim was withdrawn at the start of the first Special Fixture Hearing. For this reason, I will not refer to these matters in these reasons.
- 14 The tenants' case that rent was excessive is principally founded upon the following claims:
- (i) the withdrawal of the oven
  - (ii) the state of disrepair of the blinds
  - (iii) the state of disrepair of the cabana
  - (iv) water ingress and mould in the interior of the property

*The oven*

- 15 On 27 July 2022 the landlord's agent conducted a Routine Inspection of the premises. The tenants were present at that inspection. They complained that the oven was not heating as it should and that the internal glass door had become loose. They requested the oven's repair. The agent noted this in his

inspection report, a copy of which is in evidence. Despite that no action was taken to repair or replace the oven.

- 16 On 2 March 2023 the landlord's agent conducted another Routine Inspection of the premises. The tenants were also present at that inspection. They complained that the oven didn't work. The agent noted this in his inspection report a copy of which is in evidence. In the "inspection findings" he provided to the landlord, which is also in evidence, the agent states: "oven does not work. Its older style I would recommend its replacement". The landlord approved the oven's replacement on or about 24 March 2023. There is an invoice in Exhibit R1 which establishes that the new oven was installed on or about 29 March 2023.

#### *The blinds*

- 17 In the Start-of-Tenancy Condition report the landlord's agent records the vertical blinds in the lounge room as being clean, and in undamaged and working order. However, the agent also comments: "blinds work. Chain is broken". In the copy of the Condition Report they returned the tenants dissent from the condition stated by the agent adding "also dirty and blinds creased". With respect to the kitchen blinds, the agent records them as clean, undamaged and in working order. The tenants dissent from this, stating that the blinds are "dirty, greasy and [there is] a string broken". With respect to the bedroom 1 curtains the agent records the blinds as being clean, and in undamaged and working order but adds the comment: "X1 blind does not have a rotation cord and [is] worn". The tenants agree with this, but add the comment: "minor stains, blind creased, cord very worn out ...". With respect to bedroom 2 the agent records the blinds as being clean, undamaged and in working order. The tenants dissent from that condition stating: "blinds/curtains dirty/stained, blinds wrinkled, cord broken". With respect to bedroom 3 the agent records the blinds a clean, undamaged and in working order, but also comments: "blind does not have a rotation cord". The tenants agree with this but add the blinds are "dirty and unconnected ...".
- 18 After moving into the property, the tenants requested various repairs to the premises. Email correspondence with the landlord's agent concerning these

repairs is found at pages 97 to 104 of Exhibit A3. There is no reference to the blinds in the emails.

- 19 In July 2021 the landlord's agent conducted a Routine Inspection of the premises. Mr Morsi gave oral evidence about the inspection in which he asserted that he was present for the inspection, drew attention to the state of disrepair of the blinds in each of the rooms referred to above, and requested the repair or replacement of the blinds. The landlord has submitted no statement by her agent which contradicts this evidence.
- 20 The landlord's agent conducted a Routine Inspection of the premises on 26 July 2022. The tenants were present during this inspection. In his oral evidence Mr Morsi stated that he complained about the condition of the blinds again, requesting their repair or replacement. However, there is no reference to this in the Routine Inspection Report produced by the agent as a result of this inspection. On 2 March 2023 the landlord's agent conducted another Routine Inspection. The tenants were also present during this inspection. Mr Morsi gave oral evidence that he complained again about the condition of the blinds and requested their repair or replacement. In the Routine Inspection Report that was created as a result of that inspection, the agent states with respect to bedroom 1: "blinds cord needs repair to open close". On 6 March 2023 the agent wrote to the landlord to report the findings from the Routine Inspection. In that email, he recommends that the "blinds cord needs repair to open close".
- 21 On 20 April 2023 the landlord's agent obtained a quotation from a business t/a Albert Blinds and Screens for the repair (replacement of parts) in the blinds in Bedrooms 1 and 2, the lounge room, and in one other location which is not clear. The landlord did not approve this work before the end of the tenancy.
- 22 On 11 September 2023 the landlord's agent conducted a final inspection and completed an End-of-Tenancy Condition Report. The tenants were not present during this inspection and the Condition Report is unilateral. The blinds in bedroom 1 are recorded as being in clean and undamaged condition, but not working. In this respect the agent comments: "[l]eft side blinds don't rotate. Cord almost broken". The blinds in bedroom 2 are also recorded as being clean and in undamaged condition, but not working. In this respect the agent



comments: “[b]linds don’t rotate”. The same condition is recorded with respect to the blinds in bedroom 3. The blinds in the kitchen, lounge room and entrance hall are recorded as being clean, undamaged and in working order.

#### *Rear deck/cabana*

- 23 At the Routine Inspection conducted by the landlord’s agent on 22 July 2022 the tenants complained about the condition of the back deck. In the Routine Inspection Report completed following that inspection the agent records: “[b]ackyard flooring timbers require service/repaint/reoil”. The photographs incorporated into that report depict the floorboards as substantially bare of any stain or sealant. No structural damage is depicted in these photographs.
- 24 At the Routine Inspection conducted on 2 March 2023 the tenants complained again about the condition of the deck. In the report the agent produced as a result of that inspection it is recorded: “[d]eck wearing out needs polishing, Downpipe not connected to gutter, it overflows and damages the deck and railing. Railing timber has gone crooked”. In the photographs that are incorporated into that report, the deck surface is depicted as water damaged and worn, and the side rails as warped. On 6 March 2023 the agent wrote to the landlord to report the findings from the Routine Inspection. In that email, he recommends the deck for “follow-up”.
- 25 On or about 28 March 2023 the landlord’s agent issued a work order to a contractor to quote for the repair of the deck. However, no work was carried out to the deck before the end of the tenancy.
- 26 In the End-of-Tenancy Condition Report completed by the landlord’s agent on 11 September 2023 the deck is recorded as being clean and in undamaged condition and working order. However, the agent also comments: [d]ecking wearing out and not stained ...”.

#### *Water ingress and mould*

- 27 In the Start-of-Tenancy Condition Report the tenants returned to the landlord’s agent, the tenants record the existence of water damage to the interior ceiling of a built-in robe in bedroom 2. The landlord’s agent also records the paint on the ceiling of the bathroom as peeling with which the tenants agree.

28 By text message to the landlord's agent on 7 July 2021 Mr Morsi advised that there was mould on the ceiling of the "shower" (bathroom) and that a wall in the built-in robe in bedroom 2 had experienced water damage.

29 In its decision in SC 22/44090, the Tribunal, differently constituted, set out what happened next as follows:

2. On 9 July 2021 Ms Wang's tenant reported leak from roof space (over manhole in the bathroom). Ms Wang's rental agent Mint Property contracted Foreshew Strata Agency Pty Ltd ("Foreshew"), the respondent's strata manager. Cameron of Foreshew advised that "each roof of the town houses are being attended to and Units 8 to 16 are next to be attended to, date to be advised".

3. On 15 December 2021 Foreshew told Ms Wang that Vertec Roofing had completed the gutter cleaning and roof repairs.

4. On 2 February 2022 Ms Wang's tenant reported leak in bathroom ceiling again. Mint Property sent a repair request to Foreshew and also requested confirmation on what repair works were conducted on unit 15 roof as the roofer had not contacted the tenants on the day they were supposed to turn up. Several attempts were made to speak to a Foreshew strata manager and to contact him by email but no response was received.

5. On 10 March 2022 Ms Wang's tenant contracted her real estate agent stating:

"Repair required: due to heavy rains, water leaked into the dining room from the corner of the ceiling causing damage to the wall, ceiling and building. Mould. Carpet wet and smells terrible. Photos have been taken."

6. On 18 March 2022, after very heavy rains, Ms Wang's tenant again reported water leaks, cracking in ceiling, cornices and walls; significant black mould; damaged carpet and door. Mint Property agent requested an urgent roof report for insurance (for damages not covered by Strata) and urgent roof repair. Several email follow-ups and attempts to speak to any Foreshew manager were made for help on the matter. Ms Wang was kept being told that she would receive a callback, but none was made.

7. On 24 March 2022, Juliet, the Foreshew Strata manager, said to Ms Wang:

"We have arranged for contractors to attend to the rood leak and quote for the repairs to the:

1. Repair ceilings and wall stains that are water damaged
2. Repair movement cracks
3. Repair door that has expanded due to leak"

However, [Ms Wang states?] no work order, contractor contacts or dates for repairs was provided to me or my property manager despite repeated requests for them. Again, repeated attempts at contacting ForesheW on the matter.

- 30 On 31 March 2022 Mr Morsi notified the landlord's agent again by email that the ceiling was leaking in several areas causing mould:

...

Please see attached photos of the damage caused due to the roof leaks and floods/rain.

The mould is so bad it's the black mould and it is starting to affect my kids due to their asthma.

They are finding it hard to recover please fix urgent.

The damages are to the walls and ceiling of the dining room as well as the carpet with very bad mould. This is a photo after it has been cleaned several times, comes back worse.

There is damage to the ceiling of the garage with mould and water damage.

Water damage to the wall in the ceiling of the small bedroom.

Ant the mould in the bathroom ceiling keeps coming back despite how many times my wife cleans it.

- 31 What occurred after 31 March 2022 is set out in the Tribunal's decision in SC 22/44090 as follows:

8. On 6 April 2022, Ali Asgar, the secretary of the strata committee of the respondent, called for a 9 April general meeting without proper notice or motions to vote on. The strata committee also did not have the Strata Roll, so not all owners were invited to attend. No meeting minutes were distributed after.

9. On 10 April 2022: Mr Asgar called another general meeting to be held on 20 April 202, but again did not provide motions to vote on. Again, there was no Strata Roll, so not all owners were invited to attend, and no minutes were distributed afterwards.

10. Ms Wang attended both general meetings but no progress was made in respect of the roofing issues, and several lot owners indicated that they would bring an application to NCAT about ForesheW ... acting without authorisation and negligence.

11. Shortly afterwards Ms Wang applied for Fair Trading Mediation against the respondent.

- 32 On 5 May 2022 Mr Morsi sent the landlord's agent a further email about the water ingress and mould, stating as follows:

...

I'm kindly writing to you for an urgent follow-up in regards to the water damage and mould issue in the premises.

It has been over 5 weeks with no real action taken.

I have three kids with asthma and as I have advised on numerous times they have not been feeling well and living in this environment is not going to help them recover.

I have attached a fact sheet by nsw health on the impact of mould.

I have given the owner ample of time to carry out the necessary repairs as it is her obligation to carry out these urgent repairs.

I have yet to ask for a rent reduction or compensation or legal action.

It is not my issue whether this matter is a strata issue or insurance issue. As far as I am aware the repairs needs to be carried out urgently and the owner an sort strata/insurance after.

My kids health is of the utmost importance, I need time on when the repairs will take place no more than 1 week or I will be completing a s 11 form.

5 weeks and not a single repair done is beyond acceptable by any standard.

...

- 33 The landlord's agent replied to Mr Morsi's message by email on 10 May 2022 stating:

... thank you for your email and follow-up.

Strata is very slow about taking action to repair the roof leaks and owners corporation (group of owners) are taking strata to mediation to have the roof repaired and to have this obviously repaired asap.

Mediation is set for 13 July.

We understand if you need to vacate due to issued expressed as we are in unfortunate position where action is not been taken by strata to rectify this work as roof and walls repair belongs to strata and they are the only one who can repair roof and wall structures.

From the owners side, we will request for a mould specialist to call you to give us a report and quote to treat.

...

- 34 What occurred after 31 March 2022 is set out in the Tribunal's decision in SC 22/44090 as follows:

12. On 13 July 2022, following mediation a settlement agreement was entered into between Ms Wang and the respondent the terms of which were:

“THE PARTIES AGREE THAT:

1. That within 5 days of the date of this Agreement, the Respondent will provide to the Applicant, via email, a copy of the Vertec Roofing report for SP 67511.

2. That within 7 days of the date of this Agreement, the Respondent will engage a roofing contractor to:

(a) Assess and report on the workmanship of Vertec Roofing for work done for SP 67511, and following the assessment and report of the roofing contractor the Respondent will undertake the recommendations of the roofing contractor to complete the necessary roofing repairs;

(b) Compare the roofing work undertaken by Vertec Roofing against the scope of works (from Vertec Roofing) to determine any deficiencies in the Vertec Roofing work for SP 67511 and/or determine whether the current roof damage to SP 67511 is outside of the Vertec Roofing scope of works”.

13. On 17 July 2022: Tony, a Foresheew Strata director, forwarded quotations and a roof report from Vertec.

14. On 20 August 2022, Tony, a Foresheew Strata director, emailed Ms Wang saying quotes “are for the roof to be inspected re the workmanship of Vertec and also what needs to be done to repair the roof”. Ms Wang says that this was in breach of the settlement agreement.

15. On 4 October 2022 Ms Wang filed the present application.

16. On 7 December 2022, the respondent held the 2022 annual general meeting. No quotations were presented for the undertaking of any of the necessary repair works. Motions to terminate Foresheew Strata and appointment with another strata management agency with an included agency proposal were defeated.

17. On 8 March 2023, in matter SC 22/51341, Foresheew’s managing agency agreement was terminated by the Tribunal.

35 At some point which is not in evidence, a technician from The Mould Doctor attended the premises to inspect the mould and quote for mould remediation. It appears from what is said about this in SC 22/44090 that the cost of the remedial works recommended was \$1,430.00 which was awarded to the landlord in compensation in those proceedings. However, it is not in issue that this work was not carried out by The Mould Doctor during the tenancy. The Mould Doctor’s inspection report and quotation is not in evidence.

36 In the Routine Inspection Report the landlord's agent completed on 26 July 2022 it is recorded with respect to the bathroom that there is "persisting mould on the ceiling despite being cleaned numerous times". With respect to the lounge room it is recorded: "in the dining room the water damage is getting worse, carpet smells worse and needs urgent replacing due to water damage". The photographs incorporated into this report depict extensive mould over and around the ceiling access hole in the bathroom and mould on the ceiling and cornices of various rooms.

37 In the Routine Inspection Report the landlord's agent completed on 2 March 2023 it is recorded that mould is present on the bathroom ceiling and that there are

roof leaks in the garage. Paint peeling. Carpet stench from water leak. Walls and ceiling need repainting due to water leaks.

38 The photographs that are incorporated into that report depict extensive mould on the ceiling of the bathroom and water damage and mould to the garage ceiling and cornice.

39 In its decision in SC 22/44090 on 23 March 2023 the Tribunal ordered the Owners Corporation to cause the carrying out of repairs to the roof and other common property related to Lot 15 in accordance with two trades quotes that were in evidence before it. That order had a compliance date of 4 May 2023. It also made orders for the compulsory appointment of a Strata Manager, being Australian Property Managers (Accounting) P/L (APMA). What happened next is set out in the landlord's timeline in these proceedings as follows:

3. 27 Mar 2023: APMA struck \$12,250 special levy due 1st June 2023 for roof repairs (including \$9,097 ARP Trade Services P/L revised quote 642 for U15 roof leak).

4. 27 Mar 2023 APMA struck \$3,680.48 special levy due 1st June 2023

5. 27 Mar 2023 APMA struck \$4,480 special levy due 1st June 2023.

6. 27 Mar 2023: APMA sent work orders for all strata repair works issued as outlined in SC 22/44090 Orders: ARP roof repair work order 47727, Ascone water damaged ceilings etc work order 47782.

7. 24 Ap 2023: Alternative Plumbing sent quote for bathroom repairs, part of the work is lot owner's responsibility, not strata. Landlord agreed to pay lot owner share of cost. APMA sent work order 5735 to

Alternative Plumbing \$4,675 Alternative Plumbing quite 28577 for U15 shower waterproofing – split cost: Strata Floor \$2,850 + GST = \$3,135, Lot Owners Walls \$1,400 + GST = \$1,540.

...

9. 12 July 2023: APMA obtained \$200,000 loan in the Owners Corporation's name to pay for strata repairs to roofs, exterior painting and other works and strata management costs. Special levies will be struck to cover the loan repayments.

- 40 The repairs to the interior of the premises were commenced on or about 17 July 2023 and they were completed on or about 21 July 2023. There are two contractor invoices in evidence which set out the scope of works carried out. They itemise the following:

#### Lounge/dining/entrance areas

- repair multiple areas that were cracked, includes large cracks and separations to filling adjoining hairline cracks.
- undercoated/seal repaired areas
- finish with 2 coats of ceiling white (Delux)

#### Kitchen

- clean out large crack running right across the ceiling
- apply joint tape
- set with a 3 coat plaster system
- undercoat/finish with 2 coats ceiling white.

PLEASE NOTE: The paint on the cornices may require attention in the future as it is starting to flake

#### Garage

- repaired water damaged and sunken ceiling, mould and flaking paint.
- prop to life and added many screws to affected areas
- secure and seal cornice.
- filled cracks, cover screws and openings then set with plaster.
- seal/undercoat and paint repaired areas.

#### Rumpus

- carried out repairs to water damaged ceiling as well as joining walls.
- filled cracks and openings to back door architraves.
- treat/seal mouldy areas. Finish with colour matched paint.
- long dry times due to thickness of plaster repairs.

#### Bathroom

- removed flaking paint, filled gaps.
- applied stain and mould blocker
- finished with Delux bathroom ceiling paint would mould inhibitors.

41 In SC 22/44090, in addition to an order for repair, Ms Wang sought orders for compensation from the Owners Corporation, being for carpet replacement, mould remediation and lost rent. I have set out the Tribunal's decision in relation to the lost rent claim above. In relation to the carpet and mould claims, the Tribunal determined as follows:

Turning now to compensation, three heads of damage are agitated by Ms Wang.

The first is for the replacement of the carpet in the living/dining room. I am satisfied on the evidence before me, including inspection reports carried out by Ms Wang's agent, that the carpet is damaged mouldy and has a "stench". However, I am not satisfied that Ms Wang is entitled to the full \$990 she has claimed. That is because the carpet was there when she purchased the unit so is at least 99 years old (sic).

I will allow \$500 of the amount claimed.

The second head of damage is reimbursement of the cost of the report of The Mould Doctor dated 3 August 2022. I am satisfied that this is appropriate and I allow the \$1,430 claimed.

#### **Contentions of the parties**

42 The tenants contend that they suffered a substantial reduction in use of the premises due to its various states of disrepair the value of which was equivalent to 30% of the rent they paid. They contend that they paid a market rent for the premises (being \$510.00, then \$550.00) at all material times for this dispute.

43 The landlord defends the claim on several bases. She contends that the loss of use of the premises contended for by the tenants is non-existent or seriously exaggerated. She contends that the tenants paid an under-market rent for the premises which reflected its state of disrepair and that rent was not excessive at any material time for this reason. She contends that her agent offered to release the tenants from the lease on 10 May 2022 and that their failure to take up that offer represents a failure to mitigate their loss. She contends that the water ingress and mould occurred as a result of inaction by a dysfunctional



Owners Corporation and incompetent Strata Manager. She contends that she took the action that was available to her in relation to this by instituting proceedings in NCAT. She contends that the tenants delayed the remedial works to the interior of the premises. Additionally, she contends that this claim is retaliatory (or a “revenge”) application brought by the tenants because of the dispute about the termination of the residential tenancy agreement.

### **Applicable law**

44 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 amount.

...

(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,

...

- 45 The distinction between a 'withdrawal' and 'reduction' in goods services and facilities for the purposes of s 44(1)(b) was discussed by an Appeal Panel of the Tribunal in *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 at [124] where it is said:

124. As to what constitutes a reduction, in our view this means the goods, services or facilities are of a qualitative or quantitative standard which is less than what a landlord is required to provide under a residential tenancy agreement. On the other hand, a withdrawal suggests there must be a removal or inability to use the particular goods, services or facilities. That is, the goods services or facilities or part of them are no longer available to a tenant.

- 46 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.
- (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.

....

- 47 Section 52 of the Act codifies a landlord's general obligations with respect to residential premises, including the minimum standards for habitability with which a landlord must comply. It provides, relevantly:

### **52 Landlord's general obligations for residential premises**

(1) A landlord must provide the residential premises ... 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

...

(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.

...

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

48 The common law test for the habitability of premises is that it is capable of being dwelt in with reasonable safety and comfort having regard to cotemporary standards, bearing in mind that uninhabitability will not be found lightly: *Proudfoot v Hart* (1890) 25 QBD 42; *De Soleil v Palmhide P/L* [2010] NSWCTTT 464.

49 Section 81 of the Act prescribes the circumstances in which a residential tenancy agreement terminates:

### **81 Circumstances of termination of residential tenancies**

(1) Termination only as set out in Act: A residential tenancy agreement terminates only in the circumstances set out in this Act.

(2) Termination by notice and vacant possession: A residential tenancy terminates if a landlord or tenant gives a termination notice in accordance with this Act and the tenant gives vacant possession of the residential premises.

(3) Termination by order of Tribunal: A residential tenancy agreement terminates if the Tribunal makes an order terminating the agreement under this Act.

- (4) Other legal reasons for termination: A residential tenancy agreement terminates if any of the following occurs –
- (a) a person having superior title (such as a head landlord) to that of the landlord becomes entitled to possession of the residential premises,
  - (b) a mortgagee of the residential premises becomes entitled to possession of the premises to the exclusion of the tenant,
  - (c) a person who succeeds to the title of the landlord becomes entitled to possession of the residential premises to the exclusion of the tenant,
  - (d) the tenant abandons the residential premises,
  - (e) the tenant gives up possession of the residential premises with the landlord's consent, whether or not that consent is subsequently withdrawn,
  - (f) the interests of the landlord and tenant become vested in the one person (merger),
  - (g) disclaimer occurs (such as when the tenant's repudiation of the tenancy is accepted by the landlord).

## **Consideration**

### *Jurisdiction*

50 At the outset, I note that the application was made before the end of the tenancy as required by s 44(3). The Tribunal therefore has jurisdiction to make the order sought by the tenants. The landlord claimed that the tenancy had ended when the application was made because the fixed term ended on 19 July 2023 and the tenants had been issued with an End-of-Fixed-Term Termination Notice which required them to give vacant possession on 20 July 2023. However, that submission misunderstands the applicable law. A residential tenancy agreement only terminates in the circumstances set out in s 81 of the Act. None of those circumstances had crystallised when the tenants' application was made.

### *Were the impugned goods, services and facilities "provided" with the rented premises?*

51 There is no issue in this case that an oven, blinds, cabana, carpets, ceilings and walls were goods and facilities provided for the tenants' use as elements of the rented premises under the terms of the residential tenancy agreement. If there is any doubt about this, that doubt is dispelled by the Start-of-Tenancy Condition Report which referred to each of these items as part of the rented premises.

*Was the tenant's use of these goods and facilities withdrawn or reduced by the landlord?*

- 52 I am satisfied on the evidence set out above that the oven in the premises was in a state of disrepair such that it could not be used for its intended purpose from before 27 July 2022 when the tenant's notified the landlord's agent that the oven was not working properly up to when it was replaced on or about 29 March 2023. A landlord has an obligation to maintain premises in a reasonable state of repair. The landlord's failure to replace the oven despite being on notice as to its state of disrepair constituted a breach of that obligation. For the purposes of s 44(1)(b) of the Act the oven was withdrawn from the tenants' use by the landlord as a result of that breach.
- 53 I am also satisfied on the evidence set out above that during the material time for this dispute the vertical blinds in at least 4 rooms were in a state of disrepair. Connectors and tracks were broken, and the open/close mechanisms were not working. That condition existed, at least in part, at the start of the tenancy, as is recorded in the Start-of-Tenancy Condition Report. However, a landlord has an obligation to maintain and repair rental assets even if the tenants had notice of their state of disrepair before signing the lease. Failure to do so constitutes a breach of the agreement.
- 54 I did not understand the tenants to contend that the blinds could not be used at all. In any event, in all of the photographs that are in evidence they appear to cover the windows at least partially fulfilling their purpose. I am thus satisfied that the tenants' use of the blinds was reduced by the landlord as a result of their state of disrepair, rather than being withdrawn from their use. They could be opened and closed properly.
- 55 The evidence persuades me that during the material time the cabana floor and railings were in dilapidated condition. The boards had worn bare of stain and seal and there was some warping as a result of prolonged exposure to water from the defective downpipe. In their oral evidence the tenants sought to prove that the deck was structurally unsound and unsafe, but apart from the warping depicted in their photographs, this was a bare assertion not supported by objective evidence such as a building report or similar. On the state of the evidence, I therefore cannot be satisfied that the deck was incapable of use

because of the landlord's failure to maintain it. It was thus not withdrawn from the tenants' use for the purposes of s 44(1)(b). However, I am satisfied that there was some reduction in the tenants' amenity of the deck that resulted from its state of dilapidation. Its' use was therefore reduced by the landlord due to its state of disrepair.

- 56 The evidence I have set out above persuades me that at the material time for this dispute the tenants suffered a very significant reduction in their use of the whole of the premises due to water ingress and mould. The water ingress and mould may have been confined to the bathroom, 1 bedroom, the living room and garage, but I am satisfied that the mould odour, mould spores, and the 'stench' of the water damaged carpet permeated the whole premises. The water ingress and water damage in the premises constituted a condition far below that required to be provided by a landlord to a tenant under a residential tenancy agreement having regard to the common law test, and statutory minimum standards for habitability contained in s 52 of the Act.
- 57 The persistent water ingress was the result of the Owners Corporation's failure to maintain the common property of the Strata Scheme, being its roof, in a reasonable state of repair. However, as between the landlord and tenants, the landlord had a contractual obligation to provide the premises in a state fit for habitation and in a reasonable state of repair. Those obligations were breached even if that breach arose as a result of the inaction of the Owners Corporation. The reduction in amenity of the premises the tenants experienced was thus the result of conduct 'by the landlord' for the purposes of s 44(1)(b).
- 58 The landlord contends that the tenants failed to mitigate their loss by moving out of the property when her agent suggested this to them on 10 May 2022. I have considered whether, as a consequence of the tenants remaining in the property after that date, their loss of use arose from their own conduct rather than that of the landlord for the purposes of s 44(1)(b). I am satisfied that it did not. The agent's email of 10 May 2022 does not offer any compensation for the tenants' loss of tenancy. It assumes that the tenants must bear the whole burden of the Owners Corporation's inaction. Had the landlord offered to compensate the tenants for their loss of tenancy, such as pay removalist costs

etc, an argument in mitigation may be maintainable. However, it is not in the absence of this.

*What was the impact of the withdrawal or reduction of these goods and facilities?*

- 59 I am satisfied that the withdrawal of the oven had a significant impact on the tenants. The availability of an oven to prepare food is essential in any home. The lack of an oven significantly reduces the variety of meals that can be prepared.
- 60 I am satisfied that the reduction in the function of the blinds had moderate impact on the tenants. The ability to easily open and close blinds to regulate light and provide privacy is an important feature of any home. In this case this could not be done easily and conveniently because of the state of disrepair of the blinds.
- 61 I am not satisfied that the condition of the cabana deck and railings had other than a minor aesthetic impact on the tenants. It may have been unsightly, but there is no satisfactory evidence of any reduced function or unsafety.
- 62 I am satisfied that the water ingress and mould had a very significant impact on the tenants. Water penetration impacted on the tenants' comfort and use of rooms, the mould was unsightly, malodorous, and unsafe, and the water damaged carpet emitted a 'stench'. As I have said above that condition was very significantly below the standard required to be provided by a landlord under a residential tenancy agreement.
- 63 I reject the landlord's contentions that the tenants' claims about the extent and impact of the water ingress and mould are fanciful or exaggerated. That contention is contradicted by the evidence given, and accepted by the Tribunal, in the proceedings the landlord instituted against the Owners Corporation. The photographs in evidence clearly depict extensive mould on the ceilings and walls at the material time, and I accept the tenants' evidence that this mould was recurring despite frequent cleaning. It is clear from the landlord's proceedings against the Owners Corporation that she has in her possession an inspection report and recommendations prepared by The Mould Doctor. She has not submitted that report into evidence in these proceedings. I draw an inference from this that this report would not have assisted the landlord's case

if she had done so. Additionally, having regard to the scope of works itemised by the landlord's contractors, it is clear that there was extensive water damage to the interior of the property.

*Was the rent payable for the premises a market rent at the material time for this dispute?*

64 As set out above, the material time for this dispute is 22 July 2022 to 21 July 2023. Two rent rates were payable by the tenants during this period. The rent was \$510.00 per week from 22 July 2022 to 16 February 2023 and it was \$550.00 thereafter. The rent increase to \$550.00 was based on a market appraisal conducted by the landlord's agent in early December 2022. It is the landlord's case that this increase was below market value for equivalent properties in the locality because water ingress into the property was considered. She contends that but for the water ingress she could have leased the property for \$650.00 per week.

65 Both parties have filed and exchanged evidence of comparative rental properties in the locality of the rented premises and adjacent localities. Mr Morsi relies upon a Statutory Declaration he made on 10 October 2023. In that Declaration he deposes to having made inquiries of two immediate neighbours in the Strata Plan who informed him that they are paying \$500.00 per week rent for similar 3 bedroom properties which were not affected by water ingress. At pages 245 to 256 of Exhibit A3 the tenants also provide comparative listings which include historical rent rates. The property featured at page 245 is in Greenacre. It was listed for rent at \$650.00 per week in March 2022. It is submitted that this is a significantly superior property to the rented premises because all three bedrooms have built-in robes, and it has 2 bathrooms, air-conditioning, and has been subject to recent renovation. The property featured at pages 246 to 250 is also in Greenacre. It is a 3 bedroom townhouse which was last listed for rent at \$580.00 per week in July 2022. It is submitted by reference to the photographs incorporated into the listing that this property is significantly superior to the rented premises. A third comparative property is set out at pages 251 to 256. It is also located in Greenacre and was last advertised for rent at \$500.00 per week in June 2023. In its historical price summary, it is recorded as having been listed for rent at \$550.00 in December 2021, and



\$470.00 per week in August 2021. It is a 3 bedroom townhouse with 1 bathroom and 2 car garage. Each bedroom has a built-in robe and it has 3 split-cycle air conditioning units. It is stated in the advertisement that it has been subject to a recent renovation. The tenants contend that this is a superior property to the rented premises.

66 The landlord relies upon evidence of rents for comparative properties which are at pages 33 to 69 of Exhibit R2. The property featured at pages 33 to 37 is a 3 bedroom town house located in Greenacre. It has 1 bathroom, 2 car garage and air-conditioning. It was listed for rent at \$470.00 per week on 1 September 2021 and at \$550.00 per week in December 2021. The property featured at pages 39 to 44 is in Greenacre. It is a 3 bedroom townhouse with built-in robes in each bedroom, 2 bathrooms and double garage. It was listed for lease at \$690.00 per week in September/October 2023. The property featured at pages 45 to 49 is in Greenacre. It is a townhouse with 3 bedrooms, 1 bathroom and 1 car garage. It was listed for lease in September 2023 at \$690.00 per week. The property featured at pages 51 to 54 is in Greenacre. It has 3 bedrooms, 1 bathroom and 1 car space. It was listed for rent at \$650.00 per week in September 2023.

67 The landlord also relies upon a report produced by Homelink Realty which contains rental and sales data that is comparative to the rented premises (at pages 55 to 66 of Exhibit R2). The rental entries contained in that report are too numerous to outline in detail. My attention was taken to the following entries all of which are in Greenacre:

- (i) a 3 bedroom unit with 2 bathrooms and a 2 car garage located in Greenacre which was listed for rent at \$800.00 per week in September 2023,
- (ii) a 3 bedroom unit with 1 bathroom and a 2 car garage which was listed for rent at \$660.00 per week in March 2023,
- (iii) a 3 bedroom unit with 2 bathrooms and a 2 car garage which was listed for rent at \$520.00 per week in September 2022,
- (iv) a 3 bedroom unit with 2 bathrooms and a 2 car garage which was listed for rent at \$680.00 per week in November 2022,

- (v) a 3 bedroom unit with 2 bathrooms and a 1 car garage which was listed for rent at \$700.00 per week in May 2022.
- (vi) a 3 bedroom apartment with 2 bathrooms and a 1 car garage which was listed for rent at \$735.00 per week in September 2022.

- 68 On the evidence before me I am satisfied that the rent payable by the tenants up to 16 February 2023 was a market rent. There is no evidence of any market appraisal or advice from the landlord's agent to the landlord that the property had a higher potential rent yield prior to early December 2022. The actual or potential rent return on comparative properties dating to September/October 2023 is of little probative value in establishing the market rent before 16 February 2023 because of the sharp increase in rents over 2023.
- 69 Some of the comparative properties contended for by the landlord did have weekly rents higher than \$510.00 per week before February 2023, but these had superior features to the rented premises, including an additional bathroom (or ensuite) and a two car garage or both. It cannot be known on the brief description of these properties in the Homelink Realty Report if they did or did not have other inclusions, such as air-conditioning. Such additional facilities make a significant difference in terms of potential rent yield.
- 70 However, I am prepared to accept that the potential rent yield for the property did increase on and from 17 February 2023 when the rent increase notice came into effect but was constrained by the water ingress into the property. The landlord received a market rent appraisal from her agent to that effect. The comparative properties both parties have placed into evidence vary significantly in rent yield. They range from \$500.00 to \$800.00 per week. They are not productive of any certain comparison.
- 71 In SC 22/44090, a differently constituted Tribunal determined, in effect, that the potential rent yield for the property at that time, being March 2023, was \$600.00 per week (the landlord contended it was \$650.00 and sought damages calculated at \$100.00 per week, and half that was allowed). Although I am not bound by that determination, the Tribunal ought to strive for consistency in decision making. Having regard to that principle I will allow that the tenants were paying rent on and from 17 February 2023 which was \$50.00 less than

the market rate because of the water ingress into the property. I acknowledge that the damages awarded by the Tribunal in SC 22/44090 were in respect of a 50 week period which is not stated. There is a likelihood however that it relates to the 50 week period prior to 23 March 2023. Nevertheless, in these proceedings there is no satisfactory evidence that would allow me to conclude that the tenants were paying other than a market rent up to 16 February 2023 when the rent increase stemming from the agent's December 2022 appraisal came into effect.

*Was rent excessive having regard to the above?*

- 72 The ultimate issue in these proceedings is whether rent was excessive at the material time having regard to the above, and if so, by what amount.
- 73 The tenants contend that rent was excessive by 30% of the weekly rent due to the state of disrepair of the premises. Having regard to the water ingress and mould alone, I am satisfied that this was the case. For the reasons set out above the impact of the water ingress and mould seriously reduced the value of the tenants' possession of the premises relative to the rent they paid. The reduced use of the premises caused by water ingress and mould must be considered in the context of the totality of goods, services and facilities provided with the premises. But even when that is considered the claimed 30% reduction appears to me reasonable having regard to both its extent and impact.
- 74 I have determined that the rent payable by the tenants was a market rent up to 16 February 2023. It follows from this that the tenants are entitled to an excessive rent order that will declare that the rent should not exceed \$340.00 per week between 22 July 2022 and 16 February 2023.
- 75 I have determined that the rent payable by the tenants between 17 February 2023 and 21 July 2023 was under market value by \$50.00 per week. That must be considered in determining by what amount rent was excessive; that is the tenants are entitled to a 30% rent reduction from \$600.00 per week rather than the \$550.00 per week they actually paid. It follows from this that the tenants are entitled to an excessive rent order that will declare that the rent should not exceed \$400.00 per week between 17 February 2023 and 21 July 2023.

76 The tenancy terminated on 10 September 2023, and all rent due up to that date has now been paid. It follows from this that the excessive rent orders ought to be liquidated to a money order payable by the landlord to the tenants. The rent not required to be paid by the tenants by operation of these orders is \$8,421.40. I will therefore make a money order in favour of the tenants in this amount.

**Orders**

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

- (1) The rent payable for the premises was excessive from 22 July 2022 to 21 July 2023 and is not to exceed \$340.00 for the period 22 July 2022 to 16 February 2023 and \$400.00 per week for the period 17 February 2023 to 21 July 2023.
- (2) Order 1 is liquidated. The landlord, Susan Wang, must pay the tenants Husam Morsi and Eman Mohamed \$8,421.40 immediately.
- (3) 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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