



Civil and Administrative Tribunal  
New South Wales

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Case Name: Rizk & Juma v Lai & Lai; Lai & Lai v Rizk & Juma

Medium Neutral Citation: [2023] NSWCATCD 137

Hearing Date(s): 11 September 2023

Date of Orders: 06 November 2023

Decision Date: 6 November 2023

Jurisdiction: Consumer and Commercial Division

Before: R Glover, General Member

Decision: (1) Pursuant to s 106 of the Residential Tenancies Act, the Tribunal declares that the Tenants (Bechara Rizk & Ariye Atayi Juma) abandoned the residential premises on 1 May 2023.  
(2) The Tenants (Bechara Rizk & Ariye Atayi Juma) are to pay the Landlords the sum of \$3,000.  
(3) The Rental Bond Services is directed to pay the landlords, EMILY LAI and ANDREW CHAO-HUNG LAI the sum of \$3,000 from the Rental Bond number T552102-8. Any amount received is to be credited against the money order. Any balance of the bond is to be paid to the tenants, BECHARA RIZK and ARIYE ATAYI JUMA.

Catchwords: LEASES AND TENANCIES — Residential Tenancies Act 2010 (NSW) — Rental bonds — Payment and release — Rights and obligations of landlords and tenants — Termination — Grounds for

Legislation Cited: Civil and Administrative Tribunal Act 2013 (NSW)  
Residential Tenancies Act 2010 (NSW)  
Residential Tenancies Regulation 2019 (NSW)

Cases Cited: Abdel-Messiv v Marshall [2017] NSWCATAP 136  
Al-Basry v Maharaj [2022] NSWCATCD 9

Bhandari v Laming [2015] NSWCATAP 224  
Cowling v Tran; Tran v Cowling [2022] NSWCATCD 128  
Darren and Julie Patterson v David Dawson [2015] NSWCATAP 31  
Duffey v Tunteveski; Tuntevski v Duffey [2020] NSWCATCD 24  
Lethorn v Wagenheim [2020] NSWCATAP 199  
Li v Bonestroo [2022] NSWCATAP 2  
Moffatt v Muscat [2023] NSWCATCD 13  
Roberts v NSW Aboriginal Housing Office [2017] NSWCATAP 9  
Russo v Brack [2016] NSWCATAP 261  
Srisivalingam v O'Leary [2023] NSWCATAP 40  
Talbot-Price v Jacobs [2008] NSWCA 189

Texts Cited: Australian Concise Oxford Dictionary, 6th Ed  
Residential Tenancies Law and Practice New South Wales, 8th Ed

Category: Principal judgment

Parties: Emily Lai & Andrew Chao-Hung Lai (Applicants in RT 23/28473; Respondents in RT 23/24205)  
Bechara Rizk & Ariye Atayi Juma (Applicants in RT 23/24205; Respondents in RT 23/28473)

Representation: Emily Lai & Andrew Chao-Hung Lai: Mr Carr (Managing Agent)  
Bechara Rizk & Ariye Atayi Juma: In person

File Number(s): RT 23/24205 & RT 23/28473

Publication Restriction: Nil

## REASONS FOR DECISION

1 Emily Lai & Andrew Chao-Hung Lai were the landlords (**Landlords**) and Bechara Rizk & Ariye Atayi Juma were the tenants (**Tenants**) pursuant to a residential tenancy agreement (**Agreement**) entered into on 27 April 2023. The premises that were the subject of the Agreement were located at Liverpool Street, Sydney NSW (**Premises**).

- 2 These reasons concern competing claims by the Landlords and the Tenants.
- 3 By their application, the Tenants seek orders:
- (1) for the payment of the whole of the rental bond pursuant to s 175 of the *Residential Tenancies Act 2010* (NSW) (**Act**);
  - (2) an order for the reduction of the rent payable pursuant to s 45 of the Act.
- 4 As articulated in the “*Reasons for Orders*” section of the Tenants application, the substance of the Tenants’ claim was for the return of their rental bond and the deposit paid by them for the Premises which was equivalent to two weeks rent.
- 5 By their application, the Landlords seek orders:
- (1) that the Premises were abandoned by the Tenants pursuant to s 106 of the Act;
  - (2) that the Tenants pay compensation in the amount of \$4,000 pursuant to s 107 of the Act.
- 6 The application filed by the landlords also sought orders pursuant to s 187(1)(b) and (c) of the Act, however no relevant additional relief to that identified immediately above was ultimately claimed by the Landlords under those provisions. In the “*Reasons for Orders*” section of their application, the Landlords identify that the substance of their claim is for “*\$4,000 in break fees being 4 weeks rental*”.

## **THE HEARING AND EVIDENCE**

- 7 Proceedings RT 23/24205 (commenced by the Tenants) were listed for conciliation and hearing in a group list on 26 June 2023. On that occasion, the Tribunal made directions for both matters to be listed together for final hearing. In doing so, the Tribunal made directions for the parties to file and exchange all documents on which the parties intended to rely at the hearing.
- 8 In accordance with those directions, both parties filed bundles of documents.
- 9 The matters were listed for final hearing on 11 September 2023. The Tenants appeared in person. Mr Carr (managing agent) was granted leave to appear on behalf of the Landlords.

- 10 The Tenants relied on a bundle of documents that had been filed by them in accordance with the directions made by the Tribunal on 26 June 2023. That bundle included:
- (1) an outline of submissions which included a chronology of events;
  - (2) a copy of the advertisements that related to the property;
  - (3) correspondence between the Tenants and the Landlords' agent;
  - (4) rental bond records;
  - (5) payment records;
  - (6) invoices and receipts;
  - (7) a copy of the Agreement;
  - (8) an extract of the incoming condition report in relation to the Premises;
  - (9) still images of insects found within the Premises;
  - (10) correspondence with NSW Fair Trading;
  - (11) copies of correspondence from the Tribunal and the applications that have been filed.
- 11 The Tenants also relied on a series of video files that depicted cockroaches in the Premises. Those files comprised 6 short video each of which depicted a cockroach, alive or dead, in the Premises. The USB on which those files were stored also included a still image of a cockroach in a toilet.
- 12 The Landlords also filed a bundle of documents, which included:
- (1) an outline of submissions;
  - (2) a copy of the managing agency agreement;
  - (3) a copy of the rental ledger;
  - (4) rental bond payment records;
  - (5) a copy of the Agreement;
  - (6) a copy of the incoming condition report in relation to the Premises;
  - (7) a copy of an invoice issued by "Guardian Pest Solutions" on 3 May 2023
  - (8) correspondence between the parties.
- 13 For the avoidance of doubt, the summary of the evidence relied on by the parties set out in the preceding paragraphs is not intended to be exhaustive or set out a fulsome description the numerous documents contained in the parties' respective bundles.

- 14 The Tenants and Mr Carr also gave oral evidence during the hearing. During the hearing, the parties were also given the opportunity to ask each other any relevant questions and to make submissions to the Tribunal.
- 15 I have had regard to all the material before the Tribunal in reaching the conclusions set out below.

## **JURISDICTION**

- 16 As indicated above, the Landlords and Tenants were parties to the Agreement, that was entered into on 27 April 2023. The Agreement was governed by the Act.
- 17 I am satisfied that the Premises which are the subject of the Agreement, and these proceedings, are residential premises within the meaning of the Act.
- 18 I am also satisfied that each of the claims made in the proceedings were commenced within time, whether the entirety of the issues between the parties are considered in the context of the parties competing claims to the rental bond (which according to the rental bond services information sheet on the Tribunal's file has not been paid out) pursuant to s 175 of the Act, or whether they are considered as competing claims for breaches of the Agreement (abandonment being a species of repudiation): see ss 175(3) and 190(1) of the Act; cl 39(8) and (9) of the *Residential Tenancies Regulation 2019* (NSW).
- 19 Accordingly, I am satisfied that the Tribunal has jurisdiction to hear and determine these proceedings.

## **THE FACTS**

- 20 In the paragraphs that follow, I set out the facts relevant to the dispute as I have found them from the evidence before the Tribunal.
- 21 The Landlords are the registered proprietors of the Premises.
- 22 On 22 April 2023, the Tenants saw an advertisement listing the Premises as being available for rent. On that same day, the Tenants inspected the Premises and made an application for it.
- 23 On 26 April 2023, the Tenants were notified that their application had been successful. In that notice, the Tenants were advised that to remove the

Premises from the market, they would need to pay a “*holding fee*” of \$1,000, which would be applied to the first weeks rent once a tenancy agreement had been signed. The Tenants paid that deposit on the same day.

- 24 On 27 April 2023, the parties entered into the Agreement.
- 25 The Agreement had an initial fixed term of 28 April 2023 and ending on 25 April 2024. Subject to a special condition to which I will return, the rent payable under the Agreement was stated as being \$1,000 per week. The Tenants were also required by the Agreement to pay a rental bond of \$4,000 (**Bond**).
- 26 The Agreement contained the following special condition (bold in original) (**Rent Reduction Special Condition**):

**Strata Building works and rent reduction**

The tenant and landlord acknowledge that there are currently Strata Building rectification works in progress to the building as per the attached renovation schedule. These relate to waterproofing and balcony rectification as well as common area upgrades. The tenant has accepted \$250 per week reduction per section 43 and 44 of the Residential Tenancies Act in full and final settlement of claim related to the balcony restriction works. The balcony works are scheduled to be completed within 3 months, the rental reduction shall continue until such time as the scaffolding erected has been removed and the balcony returned to the tenant use.

- 27 The Landlords say that the works that are the subject of that clause had not commenced at the time the Agreement was entered into. The significance of the Rent Reduction Special Condition on the respective claims advanced by the parties is considered further below.
- 28 On 27 April 2023, the Landlord’s agent prepared an incoming condition report. The Premises were inspected by the Landlord’s agent on 24 April 2023 for the purposes of preparing that report. The report includes the following “*Are there any pests of vermin?*” against which the report records “N” – which conveys a negative answer.
- 29 Mr Carr’s evidence (which I accept) was that in conducting the inspection over three hours, no evidence of pests, including cockroaches, was found in the Premises.
- 30 The incoming condition report was not signed by the Tenants. Accordingly, the presumption in s 30(1) of the Act does not apply. Nevertheless, the report falls

to be considered as part of the overall evidentiary matrix relevant to the dispute between the parties.

- 31 On 28 April 2023, the Tenants received the keys to the Premises. In accordance with the terms of the Agreement, the tenancy commenced on that day.
- 32 On 29 April 2023, the Tenants attended the Premises for the first time. On that day, the applicants observed the presence of “*tiny insects and small cockroaches*” in the linen cupboard, living area, master bedroom, second bedroom and main bathroom. The insects were seen on the walls, doors, skirting boards, carpets and in the toilets.
- 33 At approximately 1 pm on 29 April 2023, the Tenants contacted Nash Singh (one of the Landlord’s agents) by telephone. Later that day, at 1.48 pm, Mr Rizk sent Mr Carr an email stating:

Hi Jonathan,

You would have heard from Nash earlier, Ariye, Pari and I went to the property an hour ago for the first time since we received the keys yesterday and there were tiny insects and cockroaches alive and dead in every room. I have taken some videos if you need to see evidence but most importantly, we are not comfortable bringing a small baby who is crawling to live in this apartment.

I am writing to formally pull out of the lease and wanting to understand what the repercussions are for us.

- 34 I am satisfied that there were discussions between Mr Carr and Mr Rizk on 29 April 2023, and that during those discussions Mr Carr offered to arrange a pest control service to attend the Premises. That offer was rejected by Mr Rizk as he did not believe that the issue was able to be resolved by a pest controller.
- 35 On 1 May 2023 (the next business day after the Tenants had received the keys) the Tenants returned the keys to the Landlord’s agent. Having done so, Mr Rizk sent Mr Carr an email stating:

Hi Jonathan,

Please note I have just dropped the keys off at the office and signed them in with sage.

- 36 On 2 May 2023, Mr Rizk sent an email to Mr Carr stating:

Hi Jonathan, Have you managed to speak to the landlord regarding the property infestation issue as I haven't heard back from you yesterday. Could you please arrange for the release of the bond and return of \$1,000 deposit?

- 37 On 3 May 2023, the Landlords arranged for the Premises inspected by a pest controller (Guardian Pest Solutions), who also treated "*all internal and exterior areas for cockroaches and pests*". On its invoice, Guardian Pest Solutions recorded that there had been a "*small amount of activity located and treated*".
- 38 On 4 March 2023, Mr Carr sent the Tenants an email which stated (bold in original):

We are writing to confirm your action of vacating the property and return on vacant possession on 2 May 2023. As the tenancy agreement was for a fixed term agreement and was set for expiry on the 25/04/2024 the landlord is viewing this as a break of lease.

The property has been inspected by a registered pest control company and they could find no evidence of a pest infestation in the property and as such the landlord views the claim of uninhabitable due to an infestation of pest as without merit.

**What happens now that you are vacating whilst still in a fixed term agreement?**

Pursuant to s 51 of your tenancy agreement, you are breaking the Tenancy Agreement early and will be subject to a break fee as per section 106 and 107 of the Residential Tenancy Act. The break fee is the equivalent of 4 weeks rent as you are in the first quarter of your tenancy agreement. The payment of the break fee becomes due and payable on the return of vacant possession to the landlord and may be claimable from the bond.

- 39 I am satisfied that the reference to 2 May 2023 in that email is an error as the evidence satisfies me that the Tenants returned the keys to the Premises on 1 May 2023.
- 40 On 7 May 2023, Mr Rizk sent an email to Mr Carr replying to Mr Carr's email of 4 May 2023 that stated:

Hi Jonathan,

This is very disappointing to hear.

To clarify, we returned the keys on the morning of the 1st of May and would have done so on 29th of April immediately after we left the property had your agency been open.

We have pulled out of our lease not due to a change of mind, it is uninhabitable and simply not what we signed up for. As stated in my previous email, we cannot live in an insect-infested apartment with a young baby. As any parent should understand, our child is our first priority and at the very least it would be irresponsible and the most could potentially put her in harm. Again,



I will mention that we are happy to share our photos and videos from the 29th of April to show the extent of the infestation.

This entire situation has been incredibly frustrating, inconvenient and costly to us as we had hoped to be in a new home before our daughter started daycare. We had fill intention of moving in including connecting the electricity, arranging for cleaners to do a deep clean and changing our mailing address. Now we're forced to stay in a serviced apartment until we can find a new and habitable home.

We hoped we could have come to an understanding and are making this final attempt to go back to the landlord to reconsider their position. We are standing firm on our stance of the property being uninhabitable and requesting the return of our one week rent deposit and full bond.

41 The Premises were re-tenanted on 1 June 2023.

## **CONSIDERATION OF THE PARTIES' CLAIMS**

### **The Tenants' claim**

42 As set out above, the substance of the Tenants' claim is the return of the rental bond pursuant and the deposit (equivalent to wo weeks rent) that was paid by them.

43 I note that the application also sought an order under s 45 of the Act reducing the rent payable where the premises are unusable or uninhabitable. However, in the Tenant's submission, the Tenants stated that the references to s 45 and 175 should be "updated to" ss 103 and 103A of the Act. Accordingly, no application for orders pursuant to s 45 of the Act were pressed.

44 As to the claim for the return of the deposit – that claim was resolved by the parties during the hearing on 11 September 2023. The agreement of the parties reached on that day was given effect by consent orders made by the Tribunal on that day. Accordingly, it is not necessary to further consider that aspect of the Tenants' claim.

45 The basis of the Tenants' claim was set out in their submissions filed with the Tribunal.

46 As advanced at the hearing, the Tenants say that they are entitled to the return of the rental bond in circumstances where the Agreement is "void" by reason of the Landlords (or their Agent) "failing to comply with Section 103 and Section 103A" of the Act. In advancing that claim, the Tenants stay that:

- (1) First, they are entitled to a termination order in accordance with s 103 of the Act as the Landlords breached cl 19.6 of the Agreement by failing to “*comply with all statutory obligations relating to the health or safety of the residential premises*”.

During the hearing, the Tenants were unable to identify the particular “*statutory obligations*” that they say were breached by the Landlords, although they relied heavily on the Tenant Information Statement published by NSW Fair Trading. In this respect, the Tenants submitted that (consistent with what is set out in their submissions) NSW Fair Trading had advised them that the Landlords failed to provide the Premises in a reasonable state of cleanliness and fit for habitation due to the presence of cockroaches.

Although not expressly referred to by the Tenants, that argument invokes the obligation of a landlord under a residential tenancy agreement contained in s 52(1) of the Act.

- (2) Secondly, the Tenants say that they are entitled to a termination order pursuant to s 103A of the Act because the Landlords’ agent contravened s 26(1) of the Act by inducing the Tenants to enter into a residential tenancy agreement by making statements that the Landlords’ agent knew to be false, misleading or deceptive and by knowingly concealing a material fact. In this respect, the Tenants point to the fact that the Landlords’ agent failed to tell them that there were “*significant health risks*” due to a pest infestation at the Premises, as well as the notation in the incoming condition report (referred to above) that there were no pests at the Premises.

47 The Tenants also state that the rent payable for the Premises was \$750 per week, not \$1,000 per week by reason of the effect of the Rent Reduction Special Condition referred to above.

48 Finally, the Tenants seek to recover filing fees of the application made to the Tribunal, cost of copying and collating material for the proceedings, and costs associated with energy connection and mail redirection incurred by them. Those amounts total \$241.52.

### **The Landlords’ claim**

49 The Landlords claim that the Tenants abandoned the Premises within the meaning of s 106 of the Act, and that as a result they are entitled to a “*lease break fee*” in accordance with s 107 of the Act. The lease break fee claimed is

\$4,000 representing 4 weeks rent at \$1,000 per week. That is the only amount sought in the application filed by the Landlords.

- 50 In their submissions however, the Landlords advanced to claim an amount of rent for the period from 28 April to 1 May 2023. As observed above, that aspect of the claim was resolved by the parties on 11 September 2023 by the Landlords agreeing to refund the whole of the deposit to the Tenants. That agreement was reflected in consent orders made on 11 September 2023. Accordingly, it is not necessary to further consider this issue in these reasons.

### **The issues**

- 51 Having regard to the issues raised by both parties, an assessment of the parties' competing claims may be conveniently approached by reference to the following questions:
- (1) Did the Tenants abandon the Premises?
  - (2) If yes, are the Landlords entitled to recover a lease break fee?
  - (3) Who is entitled to the rental bond?
  - (4) Are the Tenants entitled to recover the additional amounts (by way of costs and connection and redirection fees) claimed?

### **DID THE TENANTS ABANDON THE PREMISES?**

- 52 Relevantly to the issues raised in these proceedings, clause 51 of the Agreement provides:

The tenant agrees that, if the tenant ends the residential tenancy agreement before the end of the fixed term of the agreement, the tenant must pay a break fee of the following amount if the fixed term is not more than 3 years:

51.1 4 week's rent if less than 25% of the fixed term has expired,

....

This clause does not apply if the tenant terminates a fixed term residential tenancy agreement for a fixed term of more than 3 years or if the tenant terminates a residential tenancy agreement early for a reason that is permitted under the Residential Tenancy Agreement.

Note. Permitted reasons for early termination include destruction of residential premises, breach of the agreement by the landlord and an offer of social housing or a place in an aged care facility, and being in circumstances of domestic violence. Section 107 of the Residential Tenancies Act 2010 regulates the rights of the landlord and tenant under this clause.

- 53 As is made clear in the notation to clause 51 of the Agreement it is subject to s 107 of the Act, which provides:

(1) The Tribunal may, on application by a landlord, order a tenant to pay compensation to the landlord for any loss (including loss of rent) caused by the abandonment of the residential premises by the tenant.

(2) The landlord must take all reasonable steps to mitigate the loss and is not entitled to compensation for any loss that could have been avoided by taking those steps. This subsection does not apply in the case of a fixed term agreement for a fixed term of not more than 3 years.

(3) The compensation payable by a tenant under this section in respect of a fixed term agreement for a fixed term of not more than 3 years is the amount of the applicable break fee for the tenancy calculated under subsection (4).

(4) The "break fee" for a fixed term agreement for a fixed term of not more than 3 years is--

(a) if less than 25% of the fixed term had expired when the premises were abandoned--an amount equal to 4 weeks rent, or

(b) if 25% or more but less than 50% of the fixed term had expired when the premises were abandoned--an amount equal to 3 weeks rent, or

(c) if 50% or more but less than 75% of the fixed term had expired when the premises were abandoned--an amount equal to 2 weeks rent, or

(d) if 75% or more of the fixed term had expired when the premises were abandoned--an amount equal to 1 week's rent.

(5) The amount of any money paid to a landlord by a tenant on terminating a fixed term agreement before the end of the fixed term or before otherwise abandoning the premises (other than money previously due to the landlord under the residential tenancy agreement) is to be deducted from any amount payable to the landlord under this section.

54 To the extent that there is any inconsistency between s 107 of the Act and the terms of the Agreement, s 107 of the Act prevails: see *Talbot-Price v Jacobs* [2008] NSWCA 189.

55 Accordingly, a "lease break fee" is only payable in circumstances where a tenant has abandoned the premises. However, the presence of the word "may" in s 107 provides that the Tribunal retains a discretion as to whether to order the payment of a "lease break fee" in any given case: see, e.g., *Abdel-Messiv v Marshall* [2017] NSWCATAP 136; *Li v Bonestroo* [2022] NSWCATAP 2 at [26]; *Al-Basry v Maharaj* [2022] NSWCATCD 9 at [70].

56 The issue that then arises is whether the Tenants terminated the Agreement for a reason permitted by the Act, or whether they abandoned the Premises within the meaning of s 106 of the Act.

## Did the Tenants terminate the Agreement for a reason permitted by the Act?

57 Section 81 of the Act sets out the circumstances in which a residential tenancy agreement will terminate. It relevantly provides (bold in original):

- (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 agreement 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).

58 The circumstances in which a tenant may seek bring a residential tenancy agreement to an end are set out in ss 98, 100, 103, 103A, 104, 105B, and 109 of the Act. In this case, the Tenants rely on s 103 and 103A of the Act only.

### *Section 103 of the Act*

59 As noted above, the Tenants sought to “*update*” their application to rely on s 103 of the Act. It provides:

- (1) The Tribunal may, on application by a tenant, make a termination order if it is satisfied that—
  - (a) the landlord has breached the residential tenancy agreement, and

- (b) the breach is, in the circumstances of the case, sufficient to justify termination of the agreement.
- (2) In considering the circumstances of the case, the Tribunal may consider (but is not limited to considering) the following—
  - (a) the nature of the breach,
  - (b) any previous breaches,
  - (c) any steps taken by the landlord to remedy the breach,
  - (d) any steps taken by the tenant about the breach,
  - (e) the previous history of the tenancy.
- (3) The Tribunal may refuse to make a termination order if it is satisfied that the landlord has remedied the breach.
- (4) A tenant may make an application under this section without giving the landlord a termination notice.
- (5) The Tribunal may make a termination order under this section that takes effect before the end of the fixed term if the residential tenancy agreement is a fixed term agreement.

60 The effect of s 103 of the Act is that the Tribunal may make a termination order on application by a tenant in circumstances where no notice of termination has been given. Critically, however, s103 of the Act does not provide a basis for a tenant to unilaterally bring a tenancy agreement to an end. Rather, a tenancy will only come to an end under s 103 of the Act when the Tribunal makes an order pursuant to s 103(1) on the application of a tenant: see s 81(d) of the Act.

61 Here, the Tenants provided vacant possession of the premises a little over 3 weeks prior to commencing proceedings RT 23/24205. The application was filed in those proceedings did not seek any order for termination, although as observed above the Tenants seek to “*update the application*” to include a reference to ss 103 and 103A of the Act. In that context, the material filed by the Tenants includes a copy of the application that has been annotated by hand to include in the “*Orders Sought*” an “*termination order where the landlord has breached the residential tenancy agreement*” pursuant to s 103 of the Act. The relevant breach is said to be of clause 19.6 of the Agreement.

62 Relevantly, clause 19.6 of the Agreement provides:

19. The landlord agrees:

...

19.6 to comply with all stator obligations relating to the health or safety of the residential premises

- 63 In my view, the Tenants reliance on s 103 of the Act does not advance their case. That is because (as observed above) it provides a basis for a tenant to seek a termination order from the Tribunal, but does not of itself, entitle a tenant to bring a tenancy agreement to an end, including by vacating the relevant residential premises prior to the expiry of the fixed term.
- 64 Accordingly, in my view s 103 of the Act did not operate to provide a basis for the Tenants to have brought the tenancy to an end on 29 April 2023 when the Tenants gave notice that they were “*pull[ing] out of the lease*”, or when they returned the keys (and thus provided vacant possession to the Landlords) on 1 May 2023.
- 65 As observed above, the Tenant’s submissions on this issue allege that the Landlords failed to provide the premises in a state that was “*reasonably clean or fit for habitation*”. The Landlords’ obligations in that respect are found in s 52 of the Act, which relevantly provides:

52 Landlord’s general obligations for residential premises

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

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

- (a) are structurally sound, and
- (b) have adequate natural light or artificial lighting in each room of the premises other than a room that is intended to be used only for the purposes of storage or a garage, and
- (c) have adequate ventilation, and
- (d) are supplied with electricity or gas and have an adequate number of electricity outlet sockets or gas outlet sockets for the supply of lighting and heating to, and use of appliances in, the premises, and
- (e) have adequate plumbing and drainage, and
- (f) are connected to a water supply service or infrastructure that supplies water (including, but not limited to, a water bore or water tank) that is able to supply to the premises hot and cold water for drinking and ablution and cleaning activities, and
- (g) contain bathroom facilities, including toilet and washing facilities, that allow privacy for the user.

...

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

Note—

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

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

66 Clause 19.1 of the Agreement contains relevantly identical obligations.

67 The word “*provide*” in s 52(1) of the Act indicates that the temporal focus for the performance of the obligation is the date on which possession of premises passes from the landlord to the tenant: see *Duffey v Tunteveski; Tuntevski v Duffey* [2020] NSWCATCD 24 at [65].

68 Therefore, for the Landlords to have been in breach of their obligations under s 52(1) of the Act, the premises must not have been reasonably clean or fit for habitation at the start of the tenancy – i.e., on 28 April 2023: *Bhandari v Laming* [2015] NSWCATAP 224 at [37]; *Srisivalingam v O'Leary* [2023] NSWCATAP 40 at [59].

69 In *Moffatt v Muscat* [2023] NSWCATCD 13 at [30], the Tribunal described the general test for habitability of premises as follows:

The test at general law for the habitability of premises has remained in essential respects the same for more than 130 years, although the lens through which the test is viewed reflects contemporary standards. Residential premises will be fit for habitation if they may be dwelt in with safety and reasonable comfort having regard to contemporary standards of living: *Proudfoot v Hart* [1890] UKLawRpKQB 72; (1890) 25 QBD 42. However, premises will not be found uninhabitable lightly: *De Soleil v Palmhide P/L* [2010] NSWCTTT 464.

70 Similarly, in *Cowling v Tran; Tran v Cowling* [2022] NSWCATCD 128 at [34], the Tribunal described the test for habitability as follows:

A residential premises is fit for habitation if it is able to be used and dwelt in by a tenant with safety and reasonable comfort having regard to contemporary standards: *Menashi v Ly* [1997] NSWRT 162. The cases have stated that a finding of uninhabitability is a difficult test to satisfy and should not be found lightly: *Bannister v Cheung* [2014] NSWCATCD 105 at [20].

See also *Roberts v NSW Aboriginal Housing Office* [2017] NSWCATAP 9 at [117].

71 The presence of pests in the residential premises at the commencement of the tenancy may, in certain circumstances, be capable of constituting a breach of a



landlord's obligation under s 52(1) of the Act. However, like the presence of mould, in my view, the mere presence of pests at the commencement of a tenancy does not establish that there has been a failure by a landlord to comply with that obligation. Rather, it is the nature and extent of the presence of pests that must be considered in determining whether the premises are "*reasonably clean*" or "*fit for habitation*": see e.g., *Roberts v NSW Aboriginal Housing Office* (*supra*) at [119].

- 72 Whilst I accept that the Tenants found insects and cockroaches in the Premises on 29 April 2023, I am not satisfied that they have established that there was a breach of the obligation in s 52(1) of the Act (and the equivalent obligation on cl 19.1 of the Agreement) to provide the Premises in a reasonable state of cleanliness and fit for habitation. In particular, I am not satisfied on the evidence before the Tribunal the Premises were "*infested*" with cockroaches and other insects at the commencement of the tenancy as alleged by the Tenants.
- 73 In this respect, an "*infestation*" in the context of pests or vermin suggests that the Premises were "*overrun*" with pests: *Australian Concise Oxford Dictionary*, 6th Ed. Having regard to the images in evidence, the videos, the description of the pests observed in the contemporaneous emails, and the oral evidence of the parties, I am not satisfied that the Premises can be regarded as having been "*overrun*" with cockroaches and other insects.
- 74 Further, whilst I accept that there were some cockroaches and other insects present in the Premises on 29 April 2023, I am not satisfied on the evidence before the Tribunal that the nature and extent of the pests that were found the Premises were to such a level so as to render them uninhabitable in the sense that they could not be occupied safely and with a reasonable degree of comfort having regard to contemporary standards. Similarly, I am not satisfied that the presence of pests in the Premises on 29 April 2023 rendered them "*not reasonably clean*" at the commencement of the tenancy. In reaching those conclusions, in my view it is particularly noteworthy that the Guardian Pest Control described the pest activity that was treated on 2 May 2023 as being "*small*".

- 75 For the same reasons, I am not satisfied that the Tenants have established that the Landlords were in breach of the obligation in clause 19.6 of the Agreement by failing to comply with applicable statutory requirements for the health and safety of the Premises. In advancing this aspect of their case, the Tenants did not identify any particular statutory obligation that they alleged had been breached by the Landlords. They did, however, place significant reliance on the tenant's information statement published by NSW Fair Trading (which I have considered). However, having regard to the conclusions reached above, I am not satisfied that the Tenants have established that the landlords were in breach of their obligations in cl 19.6 of the Agreement by reason of the presence of cockroaches and insects at the Premises on 29 April 2023.
- 76 Accordingly, whilst I accept that the Tenants' concerns about the presence of pests in the Premises were genuinely held, the questions as to whether the Landlords had failed to comply with their obligation in s 52(1) of the Act to provide the Premises in a "*reasonable state of cleanliness and fit for habitation*", or breached cl 19.6 of the Agreement, are not determined by their subjective views as to those matters. Rather, it is the objective evidence that is determinative. For the reasons outlined above, on the objective evidence before the Tribunal, I am not satisfied that the Tenants have established that the Landlords were in breach of their obligations under s 52(1) of the Act or cl 19.6 of the Agreement as alleged.
- 77 Accordingly, even if the Tenants' reliance on s 103 of the Act provided a basis for the Tribunal to make a termination order on grounds that the Landlords had failed to comply with s 52(1) of the Act and/or cl 19.6 of the Agreement (which in my view it does not) I would have declined to make such an order in any event.
- 78 Further, even if I were wrong about all of that, I have concluded below that the Tenants abandoned the Premises on 1 May 2023 when they returned the keys in the context of having notified the Landlords' agent that they were "*pull[ing] out of the lease*". By reason of the operation of s 81(4)(d) of the Act, the Agreement came to an end on that date. In those circumstances, even if an application for a termination order under s 103 could now be made, the

Tribunal lacks any power to order the termination of a residential tenancy agreement that has already come to an end by operation of law.

*Section 103A of the Act*

79 As noted above, the Tenants also rely on s 103A of the Act. Section 103A provides:

- (1) The Tribunal may, on application by a tenant, make a termination order if it is satisfied that—
  - (a) the landlord has contravened section 26, and
  - (b) the contravention is, in the circumstances of the case, sufficient to justify termination of the agreement.
- (2) A tenant may make an application under this section without giving the landlord a termination notice.
- (3) The Tribunal may make a termination order under this section that takes effect before the end of the fixed term if the residential tenancy agreement is a fixed term agreement.
- (4) The Tribunal may order the landlord to compensate the tenant for any costs incurred by the tenant as a result of the termination of the residential tenancy agreement under this section.

80 In advancing a claim under s 103A of the Act, the Tenants allege that the Landlords' agent contravened s 26(1) of the Act, which relevantly provides:

**26 Disclosure of information to tenants generally**

(1) **False representations** A landlord or landlord's agent must not induce a tenant to enter into a residential tenancy agreement by any statement, representation or promise that the landlord or agent knows to be false, misleading or deceptive or by knowingly concealing a material fact of a kind prescribed by the regulations.

...

81 The Tenants allege that Landlords' agent contravened s 26(1) of the Act by inducing the Tenants to enter into the Agreement by "*making statements that the landlord's agent knowledge to be false, misleading or deceptive or by knowingly concealing a material fact*". In particular, the Tenants allege that the Landlords' agent "*failed to tell the tenants that significant health risk exists due to infestation of the premises*". The Tenants also point to the fact that the incoming inspection report indicated that there were no pests present in the Premises.

82 For the same reasons as set out in relation to the Tenants' reliance on s 103 of the Act, I do not consider that their reliance on s 103A advances their case.

- 83 Like s 103 of the Act, s 103A provides a basis on which a tenant may make an application to the Tribunal for a termination order. It does not provide a basis for a tenant to unilaterally bring a tenancy agreement to an end. No such order had been made at the time that the Tenants provided vacant possession of the Premises to the Landlords on 1 May 2023 by returning the keys.
- 84 Further, even if it was open to the Tenants to now seek an order under s 103A of the Act, I would not have made such an order in any event. That is because I am not satisfied that the Tenants have established that the Landlords' agent made any statement that the agent knew to be "*false, misleading or deceptive*", nor am I satisfied that the Tenants have established that the Landlord's agent "*knowingly concealed a material fact of a kind prescribed by the regulations*".
- 85 In this respect, I accept the evidence of the Landlord's agent that at the time the Premises were inspected for the purposes of preparing the incoming inspection report that no evidence of pests was seen during a thorough inspection. Further, as set out above, I am not satisfied that the Premises were "*infested*" with pests as alleged by the Tenants. In those circumstances, I am not satisfied that the Landlords' agent made any "*statement, representation or promise that the landlord or agent knows to be false*" as to the presence of otherwise of pests in the Premises, whether in the Incoming Condition Report or otherwise.
- 86 As to the allegation that the Landlords' agent "*knowingly*" concealed a material fact of a kind prescribed by the regulations, cl 8(b) of the *Residential Tenancies Regulation 2019* (NSW) provides that for the purposes of s 26(1) of the Act, it is a prescribed material fact that:
- ...the residential premises are subject to a significant health or safety risks that are not apparent to a reasonable person on inspection of the premises.
- 87 Having regard to the conclusions I have reached above; I am not satisfied that the Premises were subject to "*significant health or safety risks*" due to the presence of pests. Further, even if I were wrong about that, for the reasons outlined above, I am not satisfied that the Landlords' agent knew of such a fact and thus can be said to have "*knowingly concealed it*" in circumstances where I accept as truthful Mr Carr's evidence that no evidence of pests was observed when inspecting the Premises prior to the commencement of the tenancy.

88 Accordingly, I am not satisfied that the Tenants have established that the Landlords' agent was in breach of s 26(1) of the Act as alleged. It follows that even if a claim could be made for a termination order under s 103A of the Act, I would not have made such an order in any event.

89 Further, even if I were wrong in each of those conclusions, I have concluded below that the Tenants abandoned the Premises on 1 May 2023 when they returned the keys in the context of having notified the Landlords' agent that they were "*pull[ing] out of the lease*". By reason of the operation of s 81(4)(d) of the Act, the Agreement came to an end on that date. In those circumstances, even if an application for a termination order under s 103A of the Act could now be made, the Tribunal lacks any power to order the termination of a residential tenancy agreement that has already come to an end by operation of law.

*Sections 98, 104, 105B, and 109 of the Act*

90 The Tenants did not rely on these provisions. Accordingly, it is not necessary to consider their application in any detail. For completeness, however, it is sufficient to observe that none of the circumstances that attract their operation exist in the present case.

*Conclusion*

91 For those reasons, I am not satisfied that the Tenants have established that they were entitled to terminate the Agreement for a reason permitted by the Act. Nor am I satisfied that the Tenants are entitled to have the Tribunal made a termination order in these proceedings, whether under s 103 or s 103A of the Act.

92 It follows that I am not satisfied that the Tenants have established that they were entitled to bring the tenancy to an end on 1 May 2023 when they provided vacant possession of the Premises to the Landlord.

93 Finally, I note that the Tenants have alleged that the Agreement was "*void*" by reason of the alleged breaches of the Landlords which I have considered above. Briefly stated, it is incorrect to say that the effect of ss 103 and 103A of the Act is to render a residential tenancy agreement "*void*". Rather, the effect of those provisions is to provide the power for the Tribunal to make a termination order in particular circumstances.

## Did the Tenants abandon the Premises within the meaning of s 106 of the Act?

94 Section 106 of the Act provides:

- (1) The Tribunal may, on application by a landlord, make an order declaring that the tenant abandoned the residential premises on a specified day.
- (2) The tenant is taken to have abandoned the residential premises on the specified day.
- (3) The landlord may take immediate possession of residential premises that have been abandoned by the tenant if there are no remaining occupants.

Note—

The residential tenancy agreement is terminated if a tenant abandons the residential premises (see section 81(4)(d)).

- (4) In determining whether a tenant has abandoned the residential premises the Tribunal may consider (but is not limited to considering) the following—
  - (a) the failure by the tenant to pay rent under the residential tenancy agreement,
  - (b) any evidence that the tenant no longer resides at the premises,
  - (c) any failure by the tenant to carry out any obligations relating to the residential premises under the residential tenancy agreement.

95 In *Darren and Julie Patterson v David Dawson* [2015] NSWCATAP 31 cited with approval in *Lethorn v Wagenheim* [2020] NSWCATAP 199 at [34]), the Appeal panel held (at [56]):

...abandonment occurs when a tenant vacates within the fixed term of a lease without the consent of the landlord or without a Tribunal order.

96 In *Residential Tenancies Law and Practice New South Wales*, 8th Ed, the learned authors describe the concept of abandonment of a residential tenancy as follows (at [2.81.9]):

An abandonment occurs when a tenant unlawfully vacates the property during the term of the tenancy...

...

In the context of residential tenancies, an abandonment occurs when:

- (a) a tenant vacates within a fixed term without the landlord's consent or without an order of the Tribunal; or
- (b) a tenant vacates within a periodic tenancy without giving the required notice.

97 In the present case, the Tenants vacated the Premises when they returned the keys on 1 May 2023. They did so without the consent of the Landlords and in circumstances where they had not sought, nor obtained, an order from the

Tribunal terminating the tenancy. As I have concluded above, the Tenants have not otherwise established that they were entitled by the Act to bring the tenancy to an end on 1 May 2023.

- 98 Accordingly, in accordance with the principles set out above, and having considered the factors set out in s 106(4) of the Act and the circumstances of the case as a whole, I am satisfied that the Tenants abandoned the Premises on 1 May 2023 for the purposes of s 106(1) of the Act.

### **ARE THE LANDLORDS ENTITLED TO THE LEASE BREAK FEE?**

- 99 In circumstances where the Tenants abandoned the Premises on 1 May 2023, the effect of s 107 of the Act is that the Tribunal may order the Tenants to pay compensation to the landlord for any loss (including loss of rent) caused by the abandonment.
- 100 As set out above, I am satisfied that the Premises were re-tenanted on 1 June 2023. Accordingly, following the Tenants' abandonment (within the meaning of s 106 of the Act) the Premises remained without a tenant for approximately 30 days.
- 101 In the circumstances of this case, I am satisfied that it is an appropriate case in which to exercise the discretion to award compensation in accordance with s 107 of the Act. In this respect, I am satisfied that the Tenants were not entitled to vacate the Premises on 1 May 2023 and that the Premises were then vacant for a little over four weeks.
- 102 Although, as indicated above, I accept that the views held by the Tenants as to the presence of pests and the suitability of the Premises for their needs were genuinely held, I do not consider that such views justify a refusal to exercise the discretion in favour of the Landlords in this case. In this respect, a refusal to exercise the discretion in s 107 of the Act based on the subjective views of the Tenants (no matter how genuine) would give primacy to those views over the objective facts as I have found them on the evidence before the Tribunal. Consistent with the approach taken in *Al-Basry v Maharaj* [2022] NSWCATCD 9 at [72], I am not satisfied that is an appropriate approach to the exercise of the discretion in s 107 of the Act.

- 103 Accordingly, I am satisfied that the Landlords are entitled to compensation in accordance with s 107 of the Act and that it is appropriate to exercise my discretion to award compensation in accordance with that section. As the Agreement was for a fixed term of less than three years, the relevant amount of compensation is 4 weeks rent: s 107(3) and (4).
- 104 Although the Tenants submitted that the Landlords had failed to mitigate their loss, no such obligation arises in circumstances where a tenant has abandoned a tenancy of a fixed term of less than three years: s 107(2) of the Act. In any event, even if that had been a relevant consideration, I am satisfied on the evidence that the Premises remained vacant for just over four weeks and that in those circumstances and that the Tenants have not otherwise established any failure by the Landlords to take such steps as were reasonable in an effort to mitigate that loss.

*What is the amount of lease break fee payable?*

- 105 Having regard to the conclusions I have reached; it is necessary to resolve the dispute between the parties as to the amount of rent payable under the Agreement.
- 106 The Landlords say that the rent payable was \$1,000 as the works that were the subject of the special condition had not yet commenced. The Tenants, on the other hand, say that the rent payable from the commencement of the tenancy was \$750 per week as the rent reduction set out in the Rent Reduction Special Condition was to take effect until such time as those works were complete.
- 107 In my view, on its proper construction, the Rent Reduction Special Condition operated so as to reduce the rent otherwise payable under the Agreement to \$750 per week from the commencement of the tenancy until such time as the contemplated works had been carried out. In my view, the language used in the special condition does not suggest that the rent reduction was to commence at some future time. Rather, it is expressed in the present tense – e.g., “...*there are currently Strata Building rectification works in progress...*”, and “...*the rental reduction shall continue until such time as the scaffolding erected has been removed...*”



108 In those circumstances, I am satisfied that the effect of the Rent Reduction Special Condition was that the rent payable for the Premises was \$750 per week from the commencement of the tenancy until such time as the works that were identified in the special condition were complete.

109 Having reached that conclusion, in my view the amount of compensation payable in accordance with s 107(4) of the Act is to be calculated at the rent payable for the Premises as at the date the entitlement to compensation arose – that is, \$750 per week.

110 In those circumstances, I am satisfied that the Landlords are entitled to \$3,000 in compensation pursuant to s 107 of the Act, being four week's rent at \$750 per week.

### **WHO IS ENTITLED TO THE RENTAL BOND**

111 As set out above, despite the many issues raised by the parties in these proceedings – as a matter of substance, they involved competing claims to the rental bond.

112 A rental bond is the property of the tenant and remains the property of the tenant unless a legitimate claim is established by the landlord. A landlord bears the onus of any claim it makes on the rental bond even where (such as here) a tenant seeks an order for the payment of the bond: see, e.g., *Russo v Brack* [2016] NSWCATAP 261 at [48].

113 Having regard to the conclusions I have reached; I am satisfied that:

- (1) the Landlords are entitled to recover the sum of \$3,000 from the rental bond by way of a lease break fee payable in accordance with s 107 of the Act;
- (2) the Tenants are entitled to have the balance of the rental bond returned to them.

### **ARE THE TENANTS ENTITLED TO RECOVER THE ADDITIONAL AMOUNTS CLAIMED?**

114 Having regard to the conclusions I have reached; I am not satisfied that the Tenants are entitled to recover any amounts from the Landlords in respect of electricity connection or mail redirection costs. That is because the Tenants have failed to establish any relevant beach of the Act or the Agreement by the

Landlords that entitled them to bring the Agreement to an end, and which might otherwise have provided a basis for the recovery of such costs. Accordingly, I reject that aspect of the Tenants' claim.

115 As to the Tenants application for costs, the usual position is that parties are to pay their own costs of proceedings before the Tribunal: s 60(1) of the *Civil and Administrative Tribunal Act 2013* (NSW). The Tribunal retains a discretion to award costs only if it is satisfied that there are "*special circumstances warranting an award of costs*": s 60(2) of the *Civil and Administrative Tribunal Act*. In considering whether there are "*special circumstances*" the Tribunal may have regard to the matters identified in s 60(3) of the *Civil and Administrative Tribunal Act*.

116 Having regard to the circumstances of this case, the conclusions that I have reached, and the matters set out in s 60(3) of the *Civil and Administrative Tribunal Act*, I am not satisfied that there are special circumstances warranting an award of costs in favour of the Tenants in this case. Accordingly, I reject that aspect of the Tenants' claim.

## **CONCLUSION**

117 For those reasons, I make the following orders:

- (1) Pursuant to s 106 of the Residential Tenancies Act, the Tribunal declares that the Tenants (Bechara Rizk & Ariye Atayi Juma) abandoned the residential Premises on 1 May 2023.
- (2) The Tenants (Bechara Rizk & Ariye Atayi Juma) are to pay the Landlords the sum of \$3,000.
- (3) The Rental Bond Services is directed to pay the landlords, EMILY LAI and ANDREW CHAO-HUNG LAI the sum of \$3,000 from the Rental Bond number T552102-8. Any amount received is to be credited against the money order. Any balance of the bond is to be paid to the tenants, BECHARA RIZK and ARIYE ATAYI JUMA.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.  
Registrar

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