



Civil and Administrative Tribunal
New South Wales

Case Name: Yan v Yan; Yan v Yan
Medium Neutral Citation: [2023] NSWCATCD 143
Hearing Date(s): 5 September 2023
Date of Orders: 30 October 2023
Decision Date: 30 October 2023
Jurisdiction: Consumer and Commercial Division
Before: J Alder, General Member
Decision: RT 23/23449 – Tenants’ application

1. The landlord, CHENYANG YAN, UNIT 3327 65 Tumbalong Boulevard SYDNEY NSW 2000 Australia, is to pay the tenant, ZIYU YAN and Jiaming Lin and Liang Wang, 7 Kent Road MASCOT NSW 2020 Australia, the sum of \$2,210.00 on or before 06-Nov-2023.

Reasons :

• Under s 187(1)(d) compensation for breach of s 63 - \$2,210.00

2. The Rental Bond Services is directed to pay the tenant, ZIYU YAN and Jiaming Lin and Liang Wang, 7 Kent Road MASCOT NSW 2020 Australia, the whole bond plus interest of Rental Bond number T558673-1.

NOTE: All rental bond payments are made by electronic transfer to a nominated bank account. If you have not already provided bank account details to NSW Fair Trading please contact 13 32 20 or email bondclaims@finance.nsw.gov.au

If you do not receive the money payable to you as directed by this order, you can get a certified copy of this money order from NCAT. You can

then register it with the Local or District Court to enforce the order. For more information about enforcing money orders, visit the NCAT website www.ncat.nsw.gov.au.

Note: Failure to pay the money owed by this order in the time directed can result in enforcement action being taken in the Local or District Court. If this happens additional costs and interest can be added to the amount payable.

RT 23/29452 – Landlord’s application

The application is dismissed because:

Having considered the material placed before it, the Tribunal is not satisfied (at the civil standard of proof) that the grounds required to make the orders sought have been established.

Catchwords:	LEASES AND TENANCIES – breach of agreement – termination by Tribunal – breach sufficient to justify termination in the circumstances of the case – abandonment - break fee – rental bond – failure to lodge bond – landlord’s obligation to maintain premises in a reasonable state of repair – compensation
Legislation Cited:	Residential Tenancies Act 2010 (NSW), ss 21, 29, 33(2), 37, 43, 45, 51(3), 63(1), 65(3)(b), 65(3A), 81(4)(d), 103, 106, 107, 162(3), 166, 175, 187(1)(d) Residential Tenancy Regulations 2019 (NSW) Civil and Administrative Tribunal Act 2013, ss 36(1), 38(4)
Cases Cited:	Abdel-Messih v Marshall [2018] NSWSC 648 Panico v Crompton & Jennings [2015] NSWCATAP 110
Category:	Principal judgment
Parties:	Ziyu Yan, Liang Wang and Jiaming Lin - applicants/cross respondents (tenants) Chenyang Yan – respondent/cross claimant (landlord)
Representation:	The applicants/cross-respondents were represented by Mr Ziyu Yan The respondent/cross claimant was self represented

and represented by Mr Clay (Linran) Sun, Senior
Property Manager of IPan Realty

File Number(s): RT 23/23449, RT 23/29452

Publication Restriction: None

REASONS FOR DECISION

Introduction

- 1 The parties entered into a standard form residential tenancy agreement (**RTA**) on 20 February 2023 for a period of 12 months at a rental of \$1,700 per week in respect of a fully furnished 3 bedroom unit in the Summit Apartments complex in George Street, Sydney (**Premises**). The tenancy commenced on 20 February 2023 and expired on 19 February 2024.
- 2 There are approximately 400 units in two Summit tower blocks, each with 30 levels containing 6 units on each level.
- 3 The tenants vacated early, on or about 20 May 2023.
- 4 The Tribunal notes the parties have entered into a written “Supplementary agreement to the Residential Tenancy Agreement” (**Supplementary RTA**) also on 20 February 2023.
- 5 To the extent there is any inconsistency between the Supplementary RTA and any term of the RTA or any section of the Residential Tenancies Act NSW 2010 (**Act**) or the Regulations, the terms of the Act and the Regulations will prevail: s 21 of the Act.

Tenants’ Proceedings - RT 23/23449

- 6 On 19 May 2023, one of the tenants, Mr Ziyu Yan, filed a Tribunal application seeking an order under s 103 of the Act that the RTA be terminated on the basis of a breach by Chenyang Yan (**landlord**) of his obligation to repair or properly maintain the Premises in relation to air conditioning and other issues. An order for the bond of \$6,800 was sought plus compensation of \$5,525 for the broken air conditioner (calculated at 25% of the rent for 13 weeks) and a broken dryer and other minor repairs. An order was also sought that the Premises were partly uninhabitable under ss 43/45. However ss 43/45 only

apply in the absence of a breach by the landlord. Given I have determined that there has been a breach, I do not consider ss 43/45 to be relevant.

Landlord's Proceedings RT 23/29452

- 7 On 27 June 2023, the landlord filed a Tribunal application for \$6,467 under s175 (and ss 187 and 107), seeking most of the Bond for the following items:
- (1) a break fee of three weeks rent \$5,100
 - (2) cleaning \$1,067
 - (3) three swipe cards \$300.

Procedural history

- 8 The tenant's application came before the Tribunal for a conciliation hearing on 20 June 2023. Both Ziyu Yan and the landlord appeared. Ziyu Yan had been approved to appear virtually as stated in the Notice of Hearing dated 9 June 2023. The Member made directions:
- (1) joining as applicants the other two named tenants on the RTA, Jiaming Lin and Liang Wang
 - (2) directing Ziyu Yan provide email addresses for the other two tenants OR a written authority to appear on their behalf, by 22 June 2022
 - (3) giving the landlord leave to file a cross application by 27 June 2023 and for the two matters to be heard together
 - (4) for the tenants to file and serve documents by 4 July 2023
 - (5) for the landlord to file and serve documents by 18 July 2023
 - (6) allowing the landlord to serve Jiaming Lin and Liang Wang by email
 - (7) adjourning the matter for hearing.
- 9 On 20 June 2023, the landlord emailed the Registry requesting if he could serve all 3 tenants (not just serve Jiaming Lin and Liang Wang) by email.
- 10 On 21 June 2023, the parties agreed amongst themselves to serve each other by email.
- 11 On 21 June 2023, Ziyu Yan provided to the Registry email addresses for Jiaming Lin and Liang Wang.
- 12 The tenants filed and served their documents electronically on 5 July 2023 being the condition report and a PDF (21 pages).

- 13 The landlord filed hard copy documents on 14 July 2023 (226 pages) and served them by email on the tenants (**see further at pars 18 to 27 below**).
- 14 The file reflects Member Gardner requested the Registry list the matter for either a phone hearing or virtual hearing on the next occasion, since at least one of the tenants lived in China.
- 15 A Notice of Virtual Hearing for 5 September 2023 at 2.15pm (for landlord's application RT 23/29452) was sent by the Registry to the landlord by email on 10 July 2023 and to the tenants by email on 18 July 2023. Another Notice of Virtual Hearing containing the same information for the tenants' application RT 23/23449 was again sent by email to the landlord on 10 July 2023.
- 16 At the final hearing before me on 5 September 2023, one of the tenants, Mr Ziyu Yan participated by virtual hearing from China. He was assisted by a Mandarin interpreter. The other two tenants did not appear. Ziyu Yan said they were studying. Ziyu Yan represented Jiaming Lin pursuant to a written authority dated 21 June 2023. Ziyu Yan said that he was also representing Liang Wang.
- 17 The landlord appeared in person. Mr Clay Sun of Ipan Realty (**Agent**) also appeared in person on behalf of the landlord.

Landlord's purported amendment/no ledger provided by landlord or Agent/ no evidence of Bond return

- 18 By his documents filed 14 July 2023, the landlord purported to amend his application.
- 19 He has not sought leave of the Tribunal to amend.
- 20 He seek further orders :
 - (1) that the tenants' proceedings be dismissed for non-compliance with Tribunal orders
 - (2) a penalty for non-compliance with Tribunal orders (par 5, 8)
 - (3) the tenants' evidence not be admitted.
- 21 The landlord no longer seeks an order under s 175 for the Bond, but seeks compensation under s 107 in lieu thereof. It is unclear if the Bond has been returned to the tenants. The bond search on the Tribunal file suggests it is held at the Bond Board. The landlord's chronology refers to:

- (1) The landlord receiving a bond of \$6,800 from the tenants on 20 February 2023
- (2) The landlord not lodging the bond at the Rental Bond Board
- (3) The landlord setting up a bond account with Rental Bonds online on 12 May 2023
- (4) At the direction of the landlord, the tenants making another bond payment of \$6,800, direct to the Bond Board on 13 May 2023
- (5) The landlord making a bank transfer of \$6,800 to Ziyu Yan on 16 May 2023.

22 Inexplicably, neither the landlord nor Agent have provided a ledger or receipts to allow the Tribunal to verify the above.

23 I do not understand why, when the tenants had already paid a bond of \$6,800 direct to the landlord in February 2023 (which the landlord had failed to lodge), the landlord did not lodge that first bond that he said: “*was always in the safekeeping of the landlord*” (p 140, par 19(b)) and why instead the landlord required the tenants to pay another bond direct to the Bond Board in May 2023 and the landlord reimbursed the tenants.

24 The above conduct of the landlord is highly unsatisfactory.

25 I can only assume that the Bond Board still holds the tenants’ bond.

26 For reasons given at **paragraphs 32 to 41 below**, I reject the application to dismiss on procedural grounds. The tenants have more than reasonable prospects of success on their substantive case to recover their bond, as will be seen from my Consideration at **paragraphs 86** and following below.

27 I also note that while the Tribunal has power to determine rights and liabilities of landlords and tenants, the Tribunal has no power to administer penalties as between tenants and landlords

Correspondence from landlord after the final hearing on 11 September 2023

28 Following the hearing, on 11 September 2023 the landlord emailed the Registry stating that he had been denied procedural fairness because after the first hearing on 20 June 2023, he had not been informed the tenants had made various applications for:

- (1) a virtual hearing on 5 September 2023

- (2) electronic lodgement of their documents
- (3) representation on behalf of Liang Wang beyond the specified 2 day period

29 Issues (2) and (3) had been raised by the landlord in his documents filed on 14 July 2023, at which time he also complained that the tenants had served their documents on him 1 day late.

30 The landlord did not copy the tenants into his correspondence to the Tribunal Registry on 11 September 2023. As far as the Tribunal is aware, the tenants have not been given an opportunity to respond. The landlord continued to correspond with the Registry on 11 September 2023 and again on 19 September 2023, again without informing the tenants. The landlord had not been given leave by me to make further submissions after the hearing. On this basis, I should not allow his submission to be entertained.

31 However, so as to address the landlord's apparent grievances, I have dealt with his concerns below. Any responses from the tenants would not have altered my decision in any event to refuse his application, which at its core is an application to dismiss on procedural grounds.

32 Firstly, the landlord seeks copies of all applications made by the tenants after the first hearing on 20 June 2023. It is clear to me from reading the file that no such applications have been made by any of the tenants after the conciliation, as the landlord speculates.

33 As mentioned, the Member himself allocated the virtual/telephone hearing following the conciliation hearing on 20 June 2023. The landlord would have been on notice from reading (both) Notices of Hearing dated 10 July 2023 which were each sent to him by email, that all parties were able to attend virtually or by telephone on 5 September 2023.

34 Whilst there was no application made by the tenants to file their documents electronically prior to filing, or prior to the hearing, I grant the tenants leave to do so. This is because Ziyu Yan informed me at the hearing he had filed the documents by email as he currently resides in China and was not due to return to Australia until 11 September 2023. In retrospectively granting leave to Ziyu Yan to file his documents electronically, I have had regard to the Tribunal's

guiding principle, which is to achieve a resolution of the real issues in dispute in a just, quick and cheap manner, and in such a way that the cost to the parties and the Tribunal is proportionate to the importance and complexity of the subject matter of the proceedings: s 36(1) Civil and Administrative Tribunal Act 2013 (**NCAT Act**) and to act without regard to technicalities: s 38(4) NCAT Act.

- 35 In relation to the representation of Liang Wang, the landlord now says I should disregard evidence of Ziyu Yan as his representation of not just Liang Wang, but also Jiaming Lin, is “vitiating” as an authority was not received from Liang Wang. The landlord also argues that both Jiaming Lin and Liang Wang were available to attend in person as they are in Sydney.
- 36 I have not disregarded evidence given at the hearing by Ziyu Yan. He was entitled to appear virtually and give evidence on behalf of himself, at the very least. It does not make sense that his authority to represent Jiaming Lin is “vitiating” since Jiaming Lin provided a written authority. Further, Ziyu Yan provided an email address for Liang Wang in the alternative to providing an authority, as per order 4 made on 20 June 2023. In any event, Liang Wang (or any absent party) is bound by the orders I have made, regardless of whether he appeared or not. Further, if I was to accept the landlord’s proposition, then I should also disregard the evidence of the landlord’s Agent as no managing agency agreement has been provided by the landlord to demonstrate the Agent’s authority to appear.
- 37 The landlord now says that the hearing should have been adjourned to allow the other two tenants to attend in person, although no application for an adjournment was made at the time. The landlord was on notice of the virtual hearing 3 weeks before the hearing date. He could have objected at the time, but chose not to. It would have been a waste of the parties and the Tribunal’s time to adjourn the hearing when parties were present and ready to present their cases.
- 38 As to the landlord’s complaint that the tenants served their documents on him 1 day late, I see no real prejudice in the tenants providing their documents one day late. The landlord had ample time to respond and cannot have been

genuinely prejudiced, given he filed his documents 4 days early. This argument is disingenuous.

39 The landlord also says Ziyu Yan's interpreter misinterpreted some words at the hearing on 5 September 2023. He has given no specific examples, so I have not entertained this submission.

40 In summary, I can see no evidence of a denial of procedural fairness to the landlord.

41 Conversely, it is the tenants who have been denied procedural fairness by the landlord's attempts to improve his case and make submissions after the hearing has closed, without informing the tenants or allowing them an opportunity to respond to his allegations.

Matters not in dispute

42 There was no dispute in relation to the following matters:

- (1) The tenants vacated the Premises on or about 20 May 2023 and the landlord obtained possession on 29 May 2023 when he returned from overseas and obtained the keys.
- (2) The tenancy was self-managed.
- (3) The Bond paid direct to the landlord was not lodged by the landlord at the Rental Bond Board until just prior to the tenants vacating. This is a breach of s 162(3) of the RTA which requires the Bond to be lodged within 10 days, which attracts a civil penalty. If the landlord/agent does not deposit the bond within the required period, they can be fined up to \$2,200.
- (4) The tenants paid 3 months' rent in advance of \$22,100. This is a potential breach of s 33 of the Act and the RTA which prohibits a landlord from requiring more than 2 week rent in advance, in the absence of any agreement by the tenant. This also attracts a civil penalty.
- (5) There are two versions of the ingoing condition report, neither of which is signed by either party and nether is accompanied by photos.
- (6) The Premises were re-let for \$1,600 per week from June 2023.
- (7) The tenants had paid rent up to around 20 May 2023.
- (8) There is no rent ledger in evidence.
- (9) There is a break fee term within the RTA which provides as follows:
"Clause 51

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 ... (51.2) 3 weeks rent if 25% or more but less than 50% of the fixed term has expired,...

This clause does not apply if the tenant terminates a ...residential tenancy agreement early for a reason that is permitted under [the Act].

Note: Permitted reasons for early termination include ... breach of the agreement by the landlord ...”

Relevant sections of the Act

Circumstances of termination

43 Section 107(1) of the Act provides that the Tribunal may 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. The power is not mandatory, it is at the Tribunal’s discretion. The Tribunal has a discretion to refuse to award compensation to the landlord in appropriate cases - *Abdel-Messih v Marshall* [2018] NSWSC 648 at [36]. Relevant to this tenancy agreement, there is no longer any obligation on the landlord to mitigate his losses.

44 Section 103 provides:

103 BREACH OF AGREEMENT--TERMINATION BY TRIBUNAL

(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.

- 45 The tenant must be able to justify the breach at the time of vacating. Neither s 103 nor the Regulations specify any particular time for bringing the termination application.
- 46 Abandonment occurs when a tenant vacates within the fixed term of a lease without the consent of the landlord or without a Tribunal order (such as under s 103).
- 47 If there is a finding that the tenancy was abandoned, then as a matter of law, by operation of s 81(4)(d) of the Act, the tenancy has already terminated.

Landlord's obligation to repair

- 48 Section 63 deals with the landlord's obligations during and at the start of the tenancy. Section 63(1) provides 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.
- 49 Section 65 provides certain defences, namely that the landlord must be on notice of the need to repair: s 65(3A) and is only required to act with reasonable diligence: s 65(3)(b).

Tenant's obligations upon vacating

- 50 Section 51(3) sets out the obligations of the tenant when giving vacant possession of the leased premises back to the landlord. The obligations include – removing all personal items from the premises, leaving the premises as nearly as possible in the same condition as at the beginning of the tenancy (fair wear and tear excepted), leaving the premises reasonably clean, removing all rubbish from the premises and returning all keys.
- 51 “Fair wear and tear” means damage or deterioration that arises from the reasonable use of the house for its intended purpose and the ordinary operation of natural forces. The test is objective and should not be approached from the perspective of a “fastidious and obsessive landlord”: *Panico v Crompton & Jennings* [2015] NSWCATAP 110 at [24].

- 52 Neither condition report has been signed by either party as neither could agree on the other's version.
- 53 An ingoing or outgoing condition report that has not been prepared as required by the Act (see s 29) and Regulations does not prevent the landlord from raising a claim based on the condition of the property at the end of the tenancy, but the irregularities in the reports goes to the weight of the evidence.
- 54 Section 166 of the Act sets out the items that may be the subject of a rental bond claim by a landlord, such as the reasonable cost of repairs and cleaning, rent and replacing locks. It is not an open ended security deposit for the landlord's "expenses" during the lease period or for "any breach of any provision" of the RTA and Supplementary Agreement dated 20 February 2023, as the landlord purports to have it secure, with reference to the signed "Rental Bond Receipt" he has given to the tenants (p 67).

Tenants' evidence

- 55 The tenants relied on documents filed electronically on 5 July 2023 which included a chronology, written submissions, photos and copies of correspondence with the owner.
- 56 When questioned as to why they paid so much rent in advance, Ziyu Yan said there were so many students coming from China, they had no rent history and prices were soaring.
- 57 He noticed the air conditioner unit when he inspected on 17 February 2023 and assumed it was working.
- 58 The landlord agreed to fix it and this was noted on the ingoing report: the landlord typed in: "AC repairman will come to insect and fix." (p 202).
- 59 In a WeChat conversation on 2 March 2023, in response to the tenants' query as to when the AC would be fixed, the landlord said: "*Because the AC is so old, the repair cost is expensive. I prepare to buy a new AC to install.*"
- 60 On 6 March the landlord said in a WeChat the cost to replace was \$12,000 and he had ordered fans.

- 61 On 22 March the landlord said in a WeChat: “*The motherboard [of the AC] is broken. The repair person will come to replace it after he find a compatible one.*”
- 62 They were impacted by the heat and had to seek refuge in public places with air conditioning, such as the library. They had trouble sleeping and one of the tenants was unwell.
- 63 The landlord then told them the building’s AC system was not working and it would not make sense to fix the AC in their unit.
- 64 They became fed up with the lack of repairs to the AC as promised and on 19 May 2023 filed a Tribunal application to seek an order for early termination. They moved out on 20 May 2023 and notified the landlord on 21 May 2023.
- 65 In response to the bond claim, the premises were dirty when they moved in. They rely on photos showing dirt and grime. They returned the ingoing condition report on 12 March 2023 noting stained walls and floors, unclean and greasy cupboards, greasy stove, oven and fan and unclean wardrobes. They also noted broken items such as blinds, toilet sink, window locks.
- 66 The swipe cards were all returned and they dispute any cost to re-issue them.

Landlord’s evidence

- 67 The landlord’s documents included a chronology, cross claim and defence.
- 68 The landlord advertised the Premises for rent on the Chinese website, Sydney Today. The advertisement did not refer to air conditioning.
- 69 On 17 February 2023 the tenants inspected the Premises and had no issues.
- 70 The tenants agreed to pay 3 months’ rent (\$22,100) and 4 weeks bond (\$6,800) in cash.
- 71 He arranged a professional cleaner to clean on 23 February 2023, before the tenants moved in and paid \$566. He says he took photos on the same day after the clean. He relies on those photos.
- 72 He sent the ingoing report to the tenants on 25 February 2023 and noted he would have a repairperson inspect and fix the AC.

- 73 The RTA does not refer to air conditioning as an inclusion.
- 74 He only agreed to fix the air conditioning if the cost to repair was reasonable.
- 75 The building's central Heating Ventilation and Air Conditioning system was broken, so it was futile to expect the AC in the Premises to work as it was controlled by the central unit. It was out of the landlord's control to be able to fix. The central unit was not fixed until around 24 April 2023.
- 76 Before he knew the central system was broken, he did make some enquiries as to the cost to repair. His oral evidence was he spoke to 3 different technicians and obtained a quote from one to repair for \$15,000. In a WeChat conversation on 6 March 2023, he told the tenants the replacement cost was \$12,000.
- 77 He bought 3 fans for the tenants to use as a cheaper option.
- 78 Between 10 March and 11 April 2023, he was in contact with Casey of Arncliffe Babylon Air Conditioning & Electrical Wholesale to discuss options to either repair or replace the AC. He paid a \$300 deposit to book an onsite visit by a technician from Babylon. On 22 March 2023, the technician attended and the issue was found to be a broken motherboard.
- 79 He was not able to source the broken part.
- 80 All facilities, except the dryer and AC were working when the tenants moved in. He purchased and had installed a new dryer 2 weeks after the tenants moved in, on 7 March.
- 81 He carried out repairs as requested, such as the wheels on the wardrobe and bathroom taps and purchased replacement globes.
- 82 On 20 February 2023, he paid \$300 to the building manager for 3 swipe cards. He agrees they were returned, but claims the cost to re-issue them for new tenants.
- 83 On 21 May 2023, the tenants notified the Agent by WeChat they had moved out the day before. The landlord was overseas at the time. He was not told earlier and he would have been happy to negotiate. He submits the tenants abandoned the tenancy and he is entitled to the break fee.

- 84 The landlord relies on photos taken on 29 May 2023 after the tenants vacated, which was the day he returned from overseas and obtained possession. He found the Premises were dirty, with rubbish left behind and globes did not work. He paid a professional cleaner \$1,067 - \$825 for cleaning and \$242 for rubbish disposal.
- 85 He has since re-let the Premises at \$1,600 per week from June 2023. He disclosed to the new tenants that the AC was not working.

Consideration – is the landlord in breach of the RTA?

- 86 I am satisfied on the evidence that the landlord is in breach of its obligation under s 63 for his failure to repair the air conditioner for 3 months as he stated he would in the ingoing condition report. It was not working for the whole of the time the tenants lived there. This is not a reasonable timeframe for a tenant to be without this amenity, which had been promised to be fixed, particularly in February and March, which are typically humid months in Sydney.
- 87 It is no defence to blame a Strata Corporation or a building manager as the landlord's duty to repair and maintain premises is non delegable. Even if the building's central unit was not working (which appears to have been the case from 18 March 2023 to 24 April 2023), the landlord has not proven a causal link to the AC in the Premises not working. He merely asserts the central AC unit controls the AC unit in the Premises without any corroborative expert evidence. The air conditioner in the Premises did not work from the start of the tenancy, so I take this to mean it must be an issue unrelated to the main AC, which worked for at least the first few weeks of the tenancy. There are some 400 units in the complex. I find it implausible that every unit's AC is inoperable because of the central system not working. Further, the central AC appears to have been fixed around 24 April 2023, so the tenant was no longer in a position to blame the building manager from that point onwards.
- 88 Nor is it a defence to plead the landlord is impecunious and the repairs are too expensive. The landlord told the tenants he would buy a new unit because the current unit was old and the cost to repair was prohibitive. Not only has the landlord not repaired, but he did not buy a new unit.

89 There is nothing in the ingoing report to suggest that the landlord would only repair or replace the unit if the cost suited him. Whilst s 63 is couched in terms of reasonableness, no quotes to repair or replace have been provided by the landlord so that the Tribunal may reach its own conclusion as to what is a reasonable cost. I find it unusual there are no AC quotes or reports provided by the landlord, particularly when the landlord said he had contacted three technicians and was in contact with one of those technicians regularly for a month (p 147) and one in fact attended on 22 March 2023. I would have expected to see a service report or an invoice (the landlord says he paid a \$300 deposit to secure an inspection), especially when the landlord went to the trouble to compile all the notifications from the building manager as to the state of repair of the central AC.

Is the breach sufficient to justify termination of the RTA?

90 In considering the circumstances of the case, the Tribunal may consider (but is not limited to considering) the matters in s 103(2): the nature of the breach, any previous breaches, any steps taken by the landlord to remedy the breach, any steps taken by the tenant about the breach and the previous history of the tenancy.

91 The air conditioner was mentioned in the ingoing report as to be repaired. It was not repaired.

92 I have seen no documentary evidence of what steps the landlord took to repair or replace it.

93 I have seen no evidence the landlord was prepared to negotiate on rent relief.

94 I do not consider the purchase of fans to be a comparable and viable solution.

95 In reaching my conclusion as to the seriousness of the breach, as envisaged by s 63(1), I have had regard to the rent payable. The tenants were paying significant rent for the Premises (\$1,700 per week) and are entitled to having working amenities and services.

96 I have considered the landlord's overall conduct during the tenancy, which I find in many instances to be unsatisfactory. It is clear from the correspondence that it was only after the landlord informed the tenants he had another

prospective tenant willing to pay more than 3 months' rent in advance, that they agreed to pay 3 months' rent in advance. I do not consider this to be a mutual agreement as there are elements of duress being applied by the landlord. I find this to be a breach of s 33(2) of the Act.

97 I also find the landlord has breached s 162(3) the Act by not lodging the bond within the 10 day time frame.

98 Contraventions of both these sections are sanctioned by penalties.

99 As already mentioned, whilst this Tribunal does not administer penalties in these circumstances, the NSW Department of Fair Trading may do so.

100 It is also a breach by the landlord not to keep a record of rent received: s 37. I have seen no evidence of any rent ledger.

101 Having experienced a broken AC since the start of the tenancy, the tenants' decision to end the tenancy in May 2023 was entirely understandable. I accept the tenants' evidence that they were impacted. From an objective point of view, I am satisfied that the circumstances of breach do justify termination of the tenancy, which I find was terminated on the date the tenants gave formal notice on 21 May 2023 with possession given on 29 May 2023 when the keys were obtained. I make a termination order to that effect under s 103. It follows that the tenants did not abandon the tenancy and are not liable to pay the break fee.

Are the tenants entitled to compensation?

102 In my view, the tenants are entitled to compensation for the breach of s 63 by the landlord.

103 I consider compensation quantified at 10% (\$170 per week) for 13 weeks to be reasonable assessment of the tenant's loss, which comes to \$2,210.

Bond claim

Swipe cards

104 The swipe cards were returned by the tenants and deactivated (presumably by the building manager) as they had the tenants names and photos affixed.

105 The landlord is not entitled to claim the cost to re-issue the three cards for his subsequent tenants as the tenants have not caused any loss to the landlord. This is a cost which the landlord would have had to pay in any event.

106 I disallow this claim.

Cleaning

107 There are no official photos attached to the ingoing and outgoing condition reports with which to compare the premises at the start of the tenancy.

108 The only photos in evidence are a sample taken by the landlord on 23 February 2023 and a further sample he took on 29 May 2023 of allegedly dirty areas at the end of the tenancy and some cardboard boxes said to have been left behind. It is unclear if the tenants received these photos when they moved in/vacated.

109 The landlord's photos of 29 May 2023 do not demonstrate overwhelming uncleanliness so as to warrant a \$1,067 cleaning bill. The standard is not perfection.

110 The tenant has also provided photographic evidence of dirty premises, but the photos are undated.

111 The text of the ingoing report (tenants' version) refers to existing dirtiness when they moved in, some of which the landlord admits. I am prepared to accept the Premises were unclean in part at the start.

112 I find that the landlord has failed to discharge his onus of proof that the Premises were left in a worse state when the tenants vacated in relation to cleaning and rubbish, when compared to when they moved in. I disallow this claim for insufficient evidence.

Orders

113 It follows that the landlord's claim is dismissed, the landlord is to pay the tenants compensation of \$2,210 within 7 days for breach of s 63 and the bond is to be released in full to the tenants.

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

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.