

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

DE FREITAS DE LACERDA & ANOR v HE (Residential Tenancies) [2020] ACAT 119

RT 528/2020

RT 563/2020

Catchwords:

RESIDENTIAL TENANCIES – does section 45 of the *Residential Tenancies Act 1997* apply retrospectively – effect of lessors’ failure to comply with section 29(1) of *Residential Tenancies Act 1997* on evidence of condition of premises at commencement of tenancy – application to remove or amend entry on tenancy database – whether the tenant was living in a COVID-19 affected household – application dismissed

Legislation cited:

Residential Tenancies Act 1997 ss 29, 30, 45, 62, 63, 156, standard term 64

Subordinate

Legislation cited:

Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3) DI 2020-267

Tribunal:

Senior Member E Ferguson

Date of Orders:

21 October 2020 and 18 December 2020

Date of Reasons for Decision:

24 December 2020

**AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL**

**RT 528/2020
RT 563/2020**

BETWEEN:

**ANA PAULA DE FREITAS DE LACERDA
CLINTON WONG**
Applicants/Lessors

AND:

HONGGUANG HE ALSO KNOWN AS MICHAEL HE
Respondent/Tenant

TRIBUNAL: Senior Member E Ferguson

I heard these matters over two days, 21 October 2020 and 18 December 2020.

On 21 October 2020 I made the following orders in relation to the lessors' claim and part of the tenant's counterclaim. Order 1 related to both the claim and counter claim; orders 2 to 4 related to the claim.

At orders 5 and 6 I adjourned the balance of the counter claim not addressed by Order 1 for determination on a date to be advised to the parties and directed the tenant to provide further evidence.

ORDER

DATE: 21 October 2020

The Tribunal orders that:

1. The tenancy ended on, and includes, 17 May 2020.
2. The tenant shall pay to the lessor within 28 days the sum of \$5,773.99 comprising:
 - (a) \$5,159.29 for:

- (i). \$1,262.15 being \$1,505.72 for arrears of 17 days rent at \$88.57 from 1 May 2020 to 17 May 2020 inclusive, less \$243.57 rent in credit; plus
 - (ii). \$3,897.14 compensation for loss of rent from 18 May 2020 to 30 June 2020 inclusive i.e. 44 days at \$88.57 per day due to break lease pursuant to section 62(1) of the *Residential Tenancies Act 1997*.
 - (b) \$159.20 ACAT application fee;
 - (c) \$100 for cleaning;
 - (d) \$100 for patch and paint scratches on wall;
 - (e) \$255.50 to change locks.
3. ACT Rental Bonds on behalf of the Territory is directed to release the entire bond \$2,480 to the lessor to be credited against the sum owed by the tenant at Order 2.
4. The tenant shall pay the balance of the amount order at Order 2 within 28 days by direct deposit to the nominated account of the lessor's agent.

Counter claim

5. The tenant's counter claim is adjourned to a date to be advised to the parties for determination of the tenant's application to remove or amend his database listing pursuant to section 99 of the *Residential Tenancies Act 1997*; provided that the tenant shall provide to the tribunal and the lessor by 4 November 2020 evidence to demonstrate that the tenant is a member of an "impacted household" at the relevant time and that clause 12 of the Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3) applies, including but not limited to:
- (a) proof of JobSeeker or JobKeeper payment;
 - (b) proof of termination or stand-down such as a statutory declaration, letter or signed statement from the employer/s;

- (c) proof of loss of work such as rosters showing a reduction in hours;
- (d) proof of prior income such as group certificates, pay slips or bank statements; any other information that demonstrates that the tenant is a member of an impacted household and that the declaration applies.

6. Should the tenant not provided evidence in accordance with Order 4 his application shall be dismissed.

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**RT 528/2020
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BETWEEN:

**ANA PAULA DE FREITAS DE LACERDA
CLINTON WONG**
Applicants/Lessors

AND:

HONGGUANG HE ALSO KNOWN AS MICHAEL HE
Respondent/Tenant

TRIBUNAL: Senior Member E Ferguson

DATE: 18 December 2020

ORDER

The Tribunal orders that:

1. The tenant's application to the Tribunal for a determination to remove or amend his rental database listing with relation to the subject tenancy is dismissed.

.....Signed.....
Senior Member E Ferguson

REASONS FOR DECISION

1. On 23 July 2020 the lessors filed an application against the tenant (RT 528/2020) claiming rental arrears, compensation for loss for of rent arising from the tenant breaking the lease, and compensation for the cost of cleaning and repairs caused by the tenant's failure to leave the premises in the required condition at the end of the tenancy.
2. The tenant sought to recover his bond from ACT Rental Bonds (**ARB**). The lessors objected to the bond being released to the tenant on the same grounds which formed the basis of his, yet to be determined, application to the Tribunal.
3. On 3 August 2020 the ARB referred the dispute regarding release of the bond to the ACAT. The tribunal allocated the file number RT 563/2020 to the ARB referral.
4. As both RT 528/2020 and RT 563/20 relate to the same issues the Tribunal dealt with them together.
5. The tenant's position was that he was not liable to compensate the lessors and he sought the return of his bond. However, during the course of the hearing, he made some concessions regarding his liability for cleaning and repairs.
6. The tenant counter claimed seeking an order terminating the tenancy, notwithstanding that he had already vacated the premises, and five other orders some of which were more properly characterised as a response to the lessors' application. At the hearing the only orders the tenant pressed were:
 - (a) The tribunal to terminate the tenancy; and
 - (b) "We ask Mr Cross to remove me from the blacklist (TICA)".
7. The tenant represented himself at the hearing, with the assistance of an interpreter. The lessors were represented by Mitchell Cross of PRD real estate (**PRD**). PRD took over management of the rental after the tenant vacated and most relevant interactions occurred between the tenant and the previous agent, Brian Nancarrow. Accordingly, in this decision a reference to 'the agent' means

the previous letting agent, Mr Nancarrow, and a reference to PRD means the current letting agent.

Termination of the tenancy; rental arrears and loss of rent

8. The tenancy was for a fixed term of 12 months ending on 30 June 2020. It was not disputed that the tenant vacated the premises on 17 May 2020 during the fixed term without giving the lessors prior notice.
9. The tenant sought an order pursuant to section 45(b) of the *Residential Tenancies Act 1997 (RTA)* terminating the tenancy. As I understood it, his position was that such an order would apply retrospectively and have the effect of relieving him of his liability both for rent before he moved out, and the lessors' loss of rent consequent upon his vacating of the premises. Although such a proposition was in my view flawed, I did not need to consider it in detail as I found that section 45 did not apply in the circumstances for the reasons set out below.

Tenant's application to retrospectively terminate the tenancy pursuant to section 45 of the RTA

10. Section 45 relevantly provides:

Damage, injury or intention to damage or injure

On application by a tenant, the ACAT may terminate a residential tenancy agreement effective immediately if satisfied that the lessor has intentionally or recklessly caused or permitted, or is likely to so cause or permit—

- (a) serious danger to the premises or to property of the tenant; or*
- (b) injury to the tenant or a member of the tenant's family.*

11. The tenant based his application to terminate the tenancy on allegations that the agent had engaged in intimidating and threatening behaviour which had a serious impact upon the tenant, his wife and his flatmate and ultimately led to them vacating the premises. The tenant did not assert that the flatmate was a member of the tenant's family. However, the tenant's wife would be a member of the tenant's family for the purposes of section 45(b).

12. I found the tenant had failed to establish on the evidence his allegations regarding the conduct of the agent; or that if such conduct had occurred it had caused or was likely to cause injury to him or his wife.
13. Further, even if the tenant had established the facts he asserted, section 45 would not have enabled me to retrospectively terminate the tenancy. The reasons for my conclusions are set out below.
14. In April 2020 the tenant requested that the lessors reduce his rent by 25% because of the financial impact he claimed the COVID-19 pandemic was having on members of his household. The lessors' agent refused the request. It is not clear whether the agent conveyed the request to the lessors. Despite the refusal from then on the tenant unilaterally reduced the rent he paid by 25%.
15. The tenant alleges that on two separate occasions, on or about 20 and 21 April 2020, he was approached by the agent in a public place. He said that the agent demanded that he pay the rental arrears and used language that was abusive and threatening. He said that the agent also made a reference to having access to the premises, which he interpreted as an implied threat.
16. The agent, Mr Nancarrow, gave evidence by phone. He admitted that he had encountered the tenant in the street around the times alleged but denied that he had used abusive or threatening language. The agent told the Tribunal that on both occasions they had a brief conversation during which he asked the tenant to visit his office to discuss the outstanding rent issue.
17. The only evidence before me of what was said when the tenant and the agent met in the street was their conflicting accounts. This evidence was evenly balanced and there was no basis on which to prefer the tenant's version of events over that of the agent. Accordingly I was not satisfied that tenant had discharged the onus of proving his allegations.

18. On 11 May 2020 the agent issued the tenant with a notice to remedy for unpaid rent. The tenant responded by email on the same day saying that he intended to continue to pay 75% of the rent for six months and stating:

If you or any of your team members threaten me again, as of 20 and 21 April 2020, we will stop from now on for both properties in U320 Founders Lane and U156 Highgate. We will then take further legal actions to the Magistrates Court.

If you serve us a Vacate Notice, we would leave this to ACAT for further action.

I am happy to call your agency to reach an agreement if you want to resolve this. If so please let me know when you will be available.

19. It seems no further interaction occurred between the agent and the tenant before he vacated the premises without notice on 16 May 2020. On 17 May 2020 the tenant emailed the agent to notify him that he had vacated the premises citing the agent's failure to consider his request for a rent reduction and the incidents in April which he claimed left him, his wife and flatmate feeling "distressed, devastated and traumatised". Neither the tenant's flatmate nor wife witnessed the incidents referred to, but the tenant told the Tribunal that he later described the events to them.
20. When I asked the tenant why he did not apply to the tribunal for termination pursuant to section 45 after his encounters with the agent, rather than waiting for several weeks before leaving without notice, he said that he was worried that the agent would take some retaliatory action against him if he did so and he wanted to make sure he had somewhere to go before he left.
21. I found the tenant's assertion that he was forced to move out without alerting the lessors of his intention due to fear of retaliation implausible.
22. The tenant in his email to the agent on 11 May 2020 does not sound intimidated, indeed he tells the agent he will stop paying rent on the both properties he was renting from the lessors and take legal action against the agent if "you or any of your team members threaten me again". As it happened the agency had no further contact, threatening or otherwise, with the tenant prior to him vacating the premises.

23. No medical or other objective evidence was adduced by the tenant to support a finding that either he or his wife suffered any injury as a result of his encounters with the agent, or that either of them was likely to.
24. The tenant made it clear from his email that he intended to stay in the premises and that he would resist any attempt made by the lessors or their agent to remove him for rental arrears.
25. Most importantly even if I had preferred the tenant's version of events it would not constitute grounds for retrospectively terminating the tenancy and relieving him of his obligation to pay rent.
26. The effect of section 45 cannot operate to:
 - (a) automatically terminate the tenancy; or
 - (b) retrospectively terminate the tenancy; or
 - (c) authorise the tenant to unilaterally terminate the tenancy.
27. The tenancy can only be terminated by the Tribunal on application by the tenant. Upon that application the Tribunal has a discretion to terminate the tenancy *immediately* (not retrospectively).
28. I found that the tenancy terminated on 17 May 2020 pursuant to section 62 of the RTA, before the tenant applied for an order under section 45, by reason of the tenant's abandonment of it during the fixed term.

Lessors' claim for compensation for tenant breaking the lease and rental arrears

29. Under section 62 of the RTA a lessor is entitled to the following compensation for the tenant breaking the lease:
 - (a) Compensation for loss of rent up to the end of the fixed term (subject to the lessor's duty to mitigate her loss under section 36).
 - (b) Reasonable costs of advertising.
30. The premises were re-let by PRD at a reduced rental when they took over management after the expiration of the fixed term. Although, she did not differentiate between the two claims in her application, the lessors effectively

sought to recover lost rent up to and including 30 June 2020, being the end of the fixed term, and arrears of rent up to the date the tenant vacated.

31. I was satisfied that the lessors, or their agents, took reasonable steps to limit her loss by advertising promptly on 19 May 2020 and reducing the rent from \$620 to \$580. Accordingly, I allowed the lessors' claim for loss of rental at the rate agreed in the tenancy agreement up to and including 30 June 2020.
32. The lessors also claimed \$295 for advertising the premises for re-letting. I did not allow this part of the claim having regard, pursuant to section 62(3)(b), to the fact that she would have had to incur this cost in just over a month if the tenancy had run its full term.
33. The tenant is also liable for rental arrears incurred to the date the tenancy terminated based on the rent agreed in the tenancy agreement, there being no subsequent agreement to reduce that amount.

Cleaning and repairs

34. The lessors relied on the incoming condition report prepared by the previous agent as evidence of the condition of the property at the commencement of the tenancy.
35. I found that the report did not comply with the requirements of section 29(1) of the RTA. It was not signed by either the lessors (or their agent) or the tenant. The tenant said he did not receive it, and no evidence was adduced from the agent who prepared the report that it was given to the tenant as required or at all.
36. As I found that the lessors had not complied with section 29(1) of the RTA, I accepted the tenant's evidence as to the condition of the property at the commencement of the tenancy pursuant to section 30(3) of the RTA.

Cleaning

37. The lessors claimed that the tenant contravened his obligation under clause 64(a) of the Standard Residential Tenancy Terms to leave the premises in substantially the same state of cleanliness as it was at the commencement if the

tenancy.¹ The lessors claimed an amount of \$350 for cleaning the items identified in their final inspection report based on an invoice from the cleaning company that had cleaned the premises after the tenant vacated.

38. The tenant said that he had engaged a professional cleaner to clean the premises when he vacated. He disputed many of the items claimed by the lessors but admitted that some minor items required further cleaning to return them to the same standard as at the start of the tenancy. However he argued that the amount claimed was excessive and disproportionate to the relatively minor nature of the cleaning required.
39. The items the tenant admitted responsibility for were:
- (a) The bin needed to be emptied.
 - (b) Water residue remained in sink.
 - (c) The bottom of the oven required cleaning.
 - (d) Lint to had to be removed from the washing machine.
 - (e) There were marks on the floor.
40. He said that these items would only take a short time to attend to – he suggested that \$50 was a more appropriate amount for cleaning. He told the Tribunal that he was a professional cleaner and would only charge that amount.
41. In the absence of objective evidence regarding the cost of cleaning the admitted items, I allowed the sum of \$100 to cover the lessors' reasonable cleaning costs.

Damage to premises

42. The lessors also claimed that the tenant had contravened clause 64 of the standard terms by leaving the premises in a substantially worse condition than it was at the commencement in particular:
- (a) there were scratches to the walls; and

¹ Schedule 1 to the RTA

- (b) the tenant failed to return all the sets of keys resulting in the lessors having to engage a locksmith to replace locks.
43. The tenant admitted liability for repairs to scratches to walls but disputed quantum. In the absence of any contrary evidence of rectifying the damage I allowed a reduced amount of \$100 to reflect the relatively minor nature of the damage.
44. The tenant admitted that the keys were not returned to the lessors' agent at the end of the tenancy but denied responsibility.
45. He said that he asked this flatmate to post the keys to the agency and that the agency should have followed up with the tenant when they did not receive them rather than incurring the cost of replacing the locks.
46. I do not accept the tenant's argument. It seems that the tenant originally advised the agent that the keys would be left in the mailbox of the premises and never told them otherwise. When the agent did not find the keys where the tenant told them they would be the lessors acted reasonably in replacing the locks after waiting several weeks. Accordingly, I allowed the total cost incurred by the lessors to replace the locks as evidenced by the invoice adduced in evidence.

The counter claim - tenancy database

47. The tenant applied for an order to remove personal information regarding himself listed in a residential tenancy database by PRD in relation to the tenancy.
48. Mr Cross told the Tribunal that the listing to which the tenant objected referred both to the tenant's failure to pay rent under the tenancy agreement and to his failure to leave the premises in a clean condition.
49. The entry in relation to rental arrears related, either wholly or in part, to a period after 22 April 2020, during which, according to the tenant, members of his household suffered a loss of income due to the COVID-19 pandemic.
50. This raised the question as to whether the listing, at least insofar as it relates to failure to pay rent, was permitted under the recent amendments to the RTA

enacted to address the impact of the COVID-19 pandemic on renting households,² and the Minister's disallowable instrument made pursuant to those amendments³ and if it was not permitted, whether I had power to amend or remove the listing pursuant to section 99.

51. The particular issue raised was whether the tenant was a member of an "impacted household" as defined by clause 8 of the Residential Tenancies (COVID-19 Emergency Response) Declaration 2020 (No 3) (**Declaration 3**) at the relevant time and as such was entitled to the protection of clause 12 of the Declaration which prohibits listings in relation to failure to pay rent by an impacted household during the moratorium period (which commenced on 22 April 2020).
52. I adjourned the tenant's application on the tenancy database issue to a date to be advised to give him an opportunity to provide evidence on the issue of whether clause 12 of Declaration 3 applied to his circumstances. I made detailed orders to direct the tenant to the types of evidence which the Tribunal would consider relevant.
53. On 18 December 2020 I heard and determined the outstanding issue of the tenancy database listing.
54. After considering the evidence submitted by the tenant and both parties submissions I dismissed the counter claim because, in my view, the tenant had not established on the balance of evidence that he was living in a COVID-19 impacted household at the relevant time. The reasons for my decision are as follows.

The legal framework

55. Although the tenant did not specify the legal basis of his application, his authority to apply to the tribunal for orders to amend or remove a database listing derives from section 99 of the *Residential Tenancies Act 1997* which I have set out in full below:

² RTA Part 6

³ Section 156(1)(e) of Part 6 of the RTA

- (1) *If personal information about a person is listed in a residential tenancy database, the person may apply to the ACAT for an order under this section.*
- (2) *The ACAT may order a listing person to—*
 - (a) *remove stated personal information from the database; or*
 - (b) *amend the personal information in the database.*
- (3) *The ACAT may make the order only if satisfied—*
 - (a) *the personal information is inaccurate, incomplete, ambiguous or out-of-date; or*
 - (b) *the listing of the personal information is unjust in the circumstances, having regard to—*
 - (i) *the reason for the listing of the person's personal information; and*
 - (ii) *the person's involvement in the acts or omissions giving rise to the listing of the personal information; and*
 - (iii) *the adverse consequences suffered, or likely to be suffered, by the person because of the listing of the personal information; and*
 - (iv) *any other relevant matter.*

56. Section 156 of the RTA, which forms part of the recently enacted 'Part 6 COVID-19 emergency response', provides:

(1)The Minister may make a declaration in relation to the following matters for the purpose of responding to the public health emergency caused by the COVID-19 pandemic: including at ss(1)(e): prohibiting or limiting the matters that may be included in a residential tenancy database.

57. The Minister has made a series of Declarations pursuant to section 156 in response to the evolving COVID situation in the ACT. Declaration 3 is relevant to the timeframes in this case.

58. Section 12 of Declaration 3 is titled 'Restriction on listings in residential tenancy database' and states:

- (1) *A lessor, lessor's agent or database operator must not list personal information about a person in a residential tenancy database in relation to a breach of a residential tenancy agreement during the moratorium period if—*
 - (a) *the breach was for failure to pay rent under the agreement; and*

- (b) *at the time of the breach the person was a member of an impacted household.*
- (2) *To remove any doubt, subsection (1) applies even if—*
 - (a) *the moratorium period has ended; or*
 - (b) *after the moratorium period ends—*
 - (i) *the tenant remains in arrears for rent payable during the moratorium period; or*
 - (ii) *the residential tenancy agreement is terminated because of the breach for failing to pay rent in the moratorium period.*

59. Section 7 of Declaration 3 defines the key terms in section 11 as follows:

impacted household means a household—

- (a) *impacted by the COVID-19 pandemic; or*
- (b) *a member of which became eligible for the JobSeeker or JobKeeper payment from the Commonwealth on or after 20 March 2020.*

moratorium period means the period beginning on 22 April 2020 and ending on 22 October 2020.

60. I have a discretionary power under section 99 to make an order requiring a “listing person”, which includes a lessor’s agent,⁴ to amend or remove personal information in a database relating to the tenant’s tenancy. However, I can only exercise that discretion if I am satisfied of one or more of the matters set out in subsection (3) apply
61. The tenant was unable to tell me what the offending listing said so I accepted Mr Cross’ evidence that it reported that the tenant was both in rental arrears and had breached his obligation to leave the premises clean. On the first day of the hearing I found both those assertions to be correct.
62. In circumstances where the information listed is accurate and current the only basis upon which I could order the listing to be changed or removed was if it was unjust in the circumstances having regard to the specific matters set out in subsections(3)(b)(i) to (iv). Only (3)(b)(iv) *any other relevant matter* potentially applied in these circumstances.

⁴ Section 99(4) of the RTA

63. It was relevant for me to consider whether the listing in this case contravened section 12 of Declaration 3. If it did, it would in my view, be unjust to allow it to stand, to the extent of the contravention.
64. Firstly it is important to note that the prohibition on listing personal information in section 12 only applies to information regarding breaches for failure to pay rent.
65. The reference to the tenant's breach of his cleaning obligation was not prohibited by clause 12, it was not otherwise unjust, and therefore I had no power under section 99 to order that information be removed from the listing.
66. Turning to the part of the listing regarding rental arrears. Section 12 applies if both the reported breach happened during moratorium period; and the breach listed was for failure to pay rent; and at the time of the breach the tenant was a member of a COVID-19 impacted household.
67. During the period of the tenancy the tenant was liable to pay rent in accordance with the tenancy agreement – I have already found that the tenant breached that obligation. The breach occurred at the moment he failed to pay the rent when it fell due. Although his obligation to pay rent ended with the tenancy, he remained liable to compensate the lessors for the past breach so long as the rent remained in arrears.
68. At the time the tenant breached the agreement by failing to pay rent was he a member of a COVID-19 impacted household within the meaning of section 7 of Declaration 3?
69. The tenant relied on two documents to establish that he was a member of a COVID-19 impacted household when the breach for failure to pay rent, referred to in the database listing, occurred.
70. The first was his ACT Government payslip which relates to a period before the tenancy commenced on 14 June 2019. The second document was a Jobseeker statement which relates to benefits paid to the tenant between 15 June 2020 and 1 July 2020, almost a month after the tenancy ended.

71. He did not provide any financial documents for himself or other members of his household which related to the period between the moratorium period commencing on 22 April 2020 and the end of the tenancy on 17 May 2020.
72. In my view the tenant did not establish on the balance of evidence that, at the time he breached his obligation to pay rent under the tenancy agreement, he was a member of a COVID-19 impacted household.
73. The tenant failed to establish on the evidence that the listing of his personal information on the database in relation to rent arrears met any of the criteria necessary for me to exercise my discretion under section 99, in particular he failed to establish that the listing contravened section 12 of Declaration 3. Accordingly, I dismissed the tenant's counter claim.

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Senior Member E Ferguson

Date(s) of hearing

21 October 2020
18 December 2020

**First Applicant/Lessor:
Second Applicant/Lessor
Respondent:**

Mr Mitchell Cross, PRD, authorised representative
Mr Mitchell Cross, PRD, authorised representative
Dr Hongguang He