AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: Andrea Hookway v Melinda and Ian Boxsell [2008] ACTRTT (19)

RT 674 of 2008

Catchwords:

Tribunal: A. Anforth, Member

Date: 10 October 2008

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 674 of 2008

ANDREA HOOKWAY
(Applicant/Landlord)

AND:

MELINDA BOXSELL AND IAN BOXSELL
(Respondent/Tenants)

DECISION

Tribunal :A. Anforth, Member

Date :4 September 2008

Decision (as amended):

1. The tenants are to pay the landlord/lessor the sum of $2948.57 for unpaid rent for the period until 4 September 2008:
2. The tenants are to pay the landlord/lessor the sum of $ being compensation for:
   - compensation for future rent loss of $285.00
   - compensation of $375 for advertising and reletting fee
3. Taking into account the $2948.57 for rent arrears and $660 for compensation, the total amount owed by the tenant to the landlord/lessor is $3608.57.
4. That amount is to be paid on or before 3rd October 2008.

…….
Member

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 674 of 2008

ANDREA HOOKWAY
(Applicant/Landlord)

AND

MELINDA BOXSELL AND MELINDA BOXSELL
(Respondent/Tenants)

REASONS FOR DECISION

Overview:

1. This case concerned a residential tenancy between the above parties in respect of premises at 32 Lycett Street, Watson in the ACT. The tenancy was for a period of 12 months from 19 January 2008 to 17 January 2009 at a rent of $430.00 per week. A bond of $1720.00 was paid and lodged with the Office of Rental Bonds.

2. The tenancy agreement was in standard form containing no special clauses and no endorsed clauses. The standard form tenancy agreement simply replicates the prescribed terms of the schedule to the *Residential Tenancies Act 1997* (the Act).

3. On 24 June 2008 the tenants gave the landlord written notice that they intended to break the fixed term tenancy and vacate the property on 16 July 2007. The tenants in fact vacated on 18 July 2008 and paid no rent beyond this date. The landlord advertised the property unsuccessful at $450pw for two weeks from 5 July 2008, then at $440pw on 19 July 2008 and finally at $430pw from 26 July 2008. By the time of the hearing before the Tribunal on 4 September 2008 the landlord not secured a new tenant.

4. The landlord sought compensation under section 107 of the Act for the lost rent between 19 July 2008 and 4 September 2008 (being the date of hearing at the Tribunal) with ongoing compensation for the balance of the fixed term or until a new tenant was found, up to the statutory cap of 25 weeks provided for in section 107. In addition the landlord sought the cost of the advertisements.

5. Both parties appeared before the Tribunal. The tenants propounded an argument based on a particular construction of section 107 which they contended absolved them of liability for rent beyond 18 July 2008. The Tribunal informed the tenants that it was aware of the argument but had rejected it on prior occasions and saw nothing in the tenants arguments to change its mind. The consequence was that the tenants were liability for compensation for the abandonment of the fixed term lease. The precise amount of the compensation payable remained in issue.

6. In accordance with its usual practice and section 121 of the Act, the Tribunal embarked on a process of endeavouring to bring the parties to an agreed outcome. The Tribunal pointed out to the tenants the extent of their past and future exposure to compensation depended on when a new tenant was found by the landlord and

whether the landlords' actions in endeavouring to find a new tenant from 19 July 2008 satisfied the landlord's duty to mitigate her losses set out in section 38 of the Act.

7. The parties came to an agreement that the tenants pay the landlord loss of rent to the date of the Tribunal and the advertisement costs. The parties reached a further agreement by way of accord and satisfaction, that the landlord accept payment of $15pw for the balance of the fixed term in full and final satisfaction of any further claims by the landlord for compensation.

8. The Tribunal recorded this consent decision. Initially the Tribunal wrongly calculated the compensation for future rent loss at $15pw over a 12 months period instead of only for the balance of the fixed term. This error was subsequently brought to the Tribunal attention by the parties and it was corrected by the Tribunal. The terms of the order set out above contain the correction.

9. Subsequent to the consent ordered being made the tenants have sought reasons for the decision. They have made a range of complaints about the conduct of the proceedings and, if the Tribunal correctly understands the complaints, the tenants claim that there was no true consent in that their will was overborne by unspecified conduct of the Tribunal member in failing to assist them to conduct their case, sufficient to justify the use by the tenants of adjectives such as "disgusted", "inherently unfair" and allegations that their claims were simply ignored by a "disinterested" tribunal member.

10. In deference to the strength of feeling displayed in the tenants' complaints the Tribunal has set out its reasons it full and in so doing has attempted to address the tenants' complaints.

The proceedings:

11. The landlords filed their application with the Tribunal on 15 August 2008 seeking an order under section 107. At this time no new tenant had been found.

12. Annexed to the application was a copy of the residential tenancy agreement and a copy of the tenants' letter of 24 June 2008 giving notice of their intention to vacate on 16 July 2008 in order to take up residency in their new home. That letter said, among other things "this should work in with our requirements to give 21 days notice". The Tribunal assumed the tenants had mistakenly referred to the right of a tenant to give 3 weeks notice of intention to terminate a tenancy after the end of the fixed term which was not relevant to the present case. Save in the case of consent by the landlord, breach by the landlord or on significant tenant hardship grounds there is no right in the Act for a tenant to terminate a fixed term tenancy by 21 days notice. The tenants later acknowledged this mistaken understanding on their part which they attributed to the incorrect advice from the landlord's agent.

13. The matter was listed for hearing on 4 September 2008 at 2pm in a Tribunal list day along with other matters.

14. On 21 September 2008 the landlord notified the Tribunal in writing of its wish to amend its application to seek compensation for lost rent into the future until such time as a new tenant was found.

15. On 4 September 2008 Mr Andrighetto, real estate agent, appeared for the landlord and both tenants appeared in person.

16. The tenants tendered a written statement setting out their case, which read as follows:

> 1.19th January 2008. Beginning of our 12-month lease for the above premises.
>
> 2. 12th June 2008. I gave 5 weeks verbal notice for ending our lease 6 months early to our property manager Clare Davies at the Wright Dunn offices on Thursday 12th June 2008. The date elected to was 18th July 2008. I informed Ms Davies that we were happy to allow access to the property for prospective tenants as she required.
>
> 3. I was told at this time by Ms Davies that I am required to submit a written notice of intention to end the lease 21 days prior to the elected date. (I have since been advised by the Tenancy Advice Service that this was incorrect advice).
>
> 4. 26 June 2008. The Wright Dunn office received and accepted our written notice to break lease (21 days prior to the elected date of 18th July 2008) and have a final inspection carried out.
>
> 5. No advertising of the premises occurred the following weekend (Saturday 28th June 2008)
>
> 6. 30th June 2008 (Monday). We were not made aware at the time by the agent, but advertising appears to have commenced on Allhomes according to the printout forwarded us by the Tribunal from Wright Dunn. The printout however is of the advertisement as it currently appears - not in fact of the ad as it appeared on 30th June 2008. As the information on the advertisement under the subtitle *Listing Age and Views* indicates, the ad has been 'updated' (edited) - the last edit occurring on 11th July 2008. This is important as;
>
> 7. 5fh July 2008 (Saturday), Wright Dunn advertised the property in the Canberra Times Classifieds (copy attached) at $450 per week - an amount nearly 5% above the rent we were paying for our 12-month lease period.
>
> NB. I would like it noted that the property was advertised at $420 per week in January 2008 before we took on the lease. The first inspection period that I was aware of, allowing 45 minutes access, attracted no prospective tenants. The second and subsequent inspection time I was aware of was attended by myself and only one other prospective tenant. It was mine and my husband's opinion that the rent being asked was much too high, but we urgently needed to secure a rental property (for reasons I am happy to explain if required) so we applied for the lease, offering an extra $10 per week as we had a large dog. Thus it should be considered that we were already paying above market value even then.
>
> 8. 9th July 2008 (Thursday). We allow access (the first required) to the premises for prospective tenants. The time-frame Wright Dunn allotted was 15 minutes. I am later informed by Ms Davies that there was no interest but that the owner came through.
>
> 9. 12th July 2008 (Saturday). The property is again advertised in the Canberra Times Classifieds at $450/week. Another 15 minute viewing window is organised and made available. No prospective tenants turn up.
>
> 10. 15th July 2008 (Tuesday). A 15-minute viewing is organised for an interested family of prospective tenants. My husband and I are present at the property during the inspection as we are cleaning after our furniture removal. I spoke with the prospective tenants who informed me that they were desperate for a rental property as they were having to vacate their current rental property by mid the following week. They said they liked the house very much but that they were not

prepared to pay the level of rent being asked. Ms Davies confirmed this to me after they had left. When I queried Ms Davies over the increased amount of rent being asked for, Ms Davies said she was "testing the market" but that they only did so at the increased amount for the first week of advertising.

11. 18th July 2008 (Friday). We have vacated and cleaned the premises as per our notification.

12. 19th July 2008 (Saturday). The property is advertised in The Canberra Times Classifieds at $440/week.

13. 22nd/23rd July 2008 (Tuesday/Wednesday[?]). Ms Davies telephoned to advise me that my last rent cheque posted nearly 2 weeks prior had not been received but that she would look further for it and get back to me. During the course of the phone call I indicated my growing concern at the premises not having re-rented. I suggested that the advertised rent amount be reduced in order to secure a new tenant and that we provide reasonable compensation for the disparity between our agreed lease amount and a lower amount agreed to by a new tenant. Ms Davies dismissed this suggestion as "too complicated", though I could not perceive any unreasonable complexity in such a strategy.

NB. I also queried the lack of my requested final inspection for 18th July and Ms Davies informed me that one couldn't be carried out until a new tenant was secured and that I must retain the keys to the property as my husband and I would continue to be responsible for the condition of the property until a new tenant was found - even though Wright Dunn had accepted my notice to end the lease. I subsequently encountered a tradesman inside the property on a visit to collect mail. Neighbours of the property confirmed that other workmen had been at the premises prior to my encounter, unbeknown to us. Given that Ms Davies had insisted we remained at this time liable for the condition of the property, I find it a breech of our agreement that we were not informed of the tradesmen access to the property. We were also not being informed of any inspections that may have been taking place at the premises.

14. 26th July 2008 (Saturday). The property was advertised in The Canberra Times Classifieds at $430/week (attached).

15. 28th July 2008 (Monday). Ms Davies telephoned me to advise me that our lost rent cheque has not been received. I agreed to send another as replacement.

16. 29th July 2008 (Tuesday). I cancelled the unreceived cheque and sent to Wright Dunn the replacement cheque along with a copy of my request to our credit union for cancellation of the cheque (attached). I also sent a letter requesting that Wright Dunn do not present the cheque should it be found, as it would incur a $35 fee on our account (attached).

17. 31st July 2008 (Thursday). Wright Dunn presented the replacement cheque (statement attached).

18. 1st August 2008 (Friday). Upon advice from TAS, I attempted to return the keys for 32 Lycett Street to the Wright Dunn office and Ms Davies refused to accept them. Uncertain of my rights in the face of Ms Davies stern refusal, I retained the keys.

19. 4th August 2008 (Monday). Wright Dunn presented the original "unreceived" rental cheque against my written request incurring a $35 fee on our account (statement attached).

20. 7th August 2008 (Thursday). On further advise from TAS (after failing to get through to them for days), I delivered the keys to the Wright Dunn office with a letter (attached). The letter outlined the confusing and unreasonable nature of Wright Dunn's procedures in our case and requested a final inspection immediately along with the release of our bond. In the letter, I also offered, in accordance with our agreement, 50% of one week's rent being for advertising costs to re-rent the property ($215). Accepting that the property could have reasonably taken a month from my written notice (6 weeks from my verbal notice) to re-rent, and therefore be vacant as such for the period of a week, I offered compensation of one week's rent as well ($430), amounting to $645 which I offered to pay by cash or cheque as the agent required.

21. 8th August 2008 (Friday). Ms Davies contacted me to organise a final inspection of 32 Lycett Street on the following Monday. No other information was given.

22. 11th August 2008 (Monday). I met Ms Davies at the property for the final inspection. The inspection was carried out uneventfully and upon signing for the release of the bond, Ms Davies informed me that new tenants had been found (presumably the previous week) but that we would be liable for rent until the new tenants began their lease on 25th August 2008. When I indicated that I believed this was unreasonable, Ms Davies told me that Wright Dunn was taking the matter to the Residential Tenancies Tribunal.

23. 20th August 2008 (Wednesday). We received RTT documents.

24. 25th August 2008 (Monday). We received the copy of a letter from Wright Dunn Real Estate to the RTT (via the RTT) regarding the decision of the prospective new tenants to reject the property and withdraw their application at the time of the lease signing. The letter advises that the lessor is now claiming compensation for loss of rent up until the end of the lease or until another tenant has been secured.

Summary

We are cognizant that under Section 107 of the Residential Tenancies Act 1997 (the Act) that a tenant may be liable to compensate a landlord for losses incurred as a result of early termination of the tenancy. However, we are also aware that under Section 38 of the Act:

A person who, apart from this section, would be entitled to compensation under this act is not entitled to the compensation, or part of it, where the loss, or part of the loss, to be compensated could have been reasonably avoided.

In light of the above it needs to be considered that we, the tenants, made every effort to lessen the losses associated with ending our tenancy early by

- notifying the agent as early as possible of our need to end the lease - 5 weeks verbal notice whereupon I expressed our willingness to make the premises presentable and accessible as the need arose, and 3 weeks written notice (as advised by the agent), clearly stating our removal date, the booking for a cleaner and a nominated date for final inspection
- Verbally offering to pay the shortfall for the remainder of the original lease period if the rental fee needed to be reduced to secure a new tenant and suggesting that the increase in rent for the premises advertised by your agency for the initial viewing(s) was inappropriate and above market value for the premises.(during a phone call to Ms Davies early in the week of 21st July).

Conversely the agent has not made reasonable effort to mitigate our losses by

- repeatedly advertising the premises at around 5% increased rent (considered an attempt at 'improvement' on our lease), and upon my querying this, telling me you were "testing the market", meanwhile conceding that a comparable property in the same suburb just rented for significantly less ($410) than the asking amount for 32 Lycett Street.
- effectively misreading/ignoring the continuing lack of interest in the property at it's advertised rent though it has been almost 3 months since my verbal notification to end the lease and 9 weeks since my written notification, in a rental market that registers a 2% vacancy rate
- making the premises available for inspection for only 15 minute intervals
- Carrying out repairs and maintenance after our vacation of the property (the date of our nominated termination of tenancy), without our knowledge though you had insisted I keep the keys to the premises and insisted that we were therefore liable for the condition of the premises
- dismissing our offer to compensate any negative disparity between our weekly rental amount and the rent paid by new tenants as "too complicated" even given that prospective tenants with an extremely urgent need for a property have expressed their interest in the premises (see 15th July 2008)

We truly believe that in the current rental market, reasonable effort by Wright Dunn to secure a new tenant for the property could have been easily achieved by the end of our tenancy if:

- more than one 15 minute period on a weekend (and 2 of the same length on weekdays) was organised whereupon the property was open for inspection prior to the ending of our tenancy

- the rent was not increased (beyond an already higher-than-market-value amount being paid during our tenancy)
- the continuing lack of interest in the property was interpreted competently and fairly as a negative response to the high advertised rent and resulted in the reduction of the rent to something more closely resembling market value
- the significantly lower advertised rents of comparable available properties in the area were taken into account (attached) and again used to influence the rental price on 32 Lycett Street
- Wright Dunn had considered our offer to reasonably compensate for a disparity if a reduced rent may have needed to have been negotiated with new tenants

Perhaps the best test of reasonable effort to re-rent the above premises is to compare what Wright Dunn might do in a situation of renting a property that was not in a break lease situation. I cannot believe that in a rental climate of a 2% vacancy rate, a neat, renovated house in a sought-after suburb would reasonably sit for 9 to 11 weeks unrented. I believe we, as tenants in this break lease situation are being taken advantage of on a gross level.

Regarding the prospective new tenancy which has recently fallen through, it would seem that an unusually long period lapsed between the tenants application/registration of interest and the date organised for the lease signing. I believe the agent would not be so relaxed (lax) if this was not a break lease situation. Again, there is not a reasonable effort being made to mitigate our losses. In fact I believe there's none.

Furthermore, we have found Wright Dunn's procedures to be confusing, misleading, intimidating and disconcerting and according to the Real Estate Institute, worthy of consideration by a regulatory body.

17. The tenants' statement had annexed to it a letter to the landlord's agent of 7 August in essentially the same terms as the statement itself; copies of various advertisements on Allhomes and the Canberra Times and a bank statement showing a dishonour fee of $35pw.

18. The copies of the attached advertisements show that the property was advertised on 5 and 12 July 2008 at $450pw, was then advertised at $440 pw on 19 July 2008 and was advertised at $430pw from 26 July 2008.

19. The hearing were sound recorded and is available for public scrutiny. At the hearing the Tribunal informed the tenants about their mistaken belief in relation to the right to give 21 days notice and explained that in the absence of consent, the tenants cannot terminate the fixed term lease save for breach by the landlord. There was no suggestion of breach on the landlord's part. The landlord's agent denied any consent and the tenants did not contest that denial and did not point to any alleged consent by the landlord.

20. The Tribunal engaged in a discussion with the tenants concerning the role of section 107. The Tribunal explained the position it had taken regarding the construction of section 107 in previous cases, which are dealt with below in detail. In short the Tribunal explained to the tenants why the landlord did not have to attempt to sign up a new tenant prior to the existing tenants giving vacant possession. The tenants said that understood and accepted that explanation.

21. The Tribunal engaged in discussion with the tenants concerning the tenants contention that the landlord had breached her duty to mitigate by advertising the premises at $450.00 for two weeks from 5 July and at $440.00 per week on 19 July 2008 before advertising at the present rent of $430.00 per week from 26 July

2008. The Tribunal explained that the landlord was under no obligation to advertise at all until vacant possession was given on 18 July 2008 and thereafter it was not automatically a breach of the duty to mitigate for the landlord to advertise at the slightly increased rent in a rising rent market. The Tribunal explained the reasoning underpinning this conclusion which is set out below in detail. The tenants said that they understood the point.

22. The Tribunal put the question to the parties as to whether they wish to adjourn the matter until a new tenant was found or whether they wish to attempt to settle the matter on the day. The tenants enthusiastically embraced the latter. At one point the landlords agent requested a short adjournment to take instructions from his client by phone on the point and on settlement negotiations.

23. The Tribunal informed the tenants that as things stood the tenants were at least liable for the landlord's loss of rent to the date of the hearing as no new tenant had been found, subject only to the tenants establishing any breach of the landlord's duty to mitigate. That present loss was quantified at the agreed sum of $2948.57. The Tribunal again explained to the tenants that it was their choice to have the matter adjourned for a hearing on the mitigation issue.

24. The Tribunal explained to the parties that there were potential gains and losses in either settling the matter at the hearing or adjourning the matter for a contested hearing on the mitigation issue. In addressing the tenants the Tribunal explained to the tenants that they might win or they might loose on the issue of the landlord's mitigation of rent loss to the date of the hearing. It was further explained that the landlord might find a new tenant quickly or they might not, and this would affect the tenants' exposure to compensation. The Tribunal explained that because any settlement was dealing with the uncertainty of future events there was necessarily a degree of speculation or assumption required in coming to any settlement. The tenants said they understood these issues and wanted to resolve the matter at the hearing.

25. The landlord's agent said that any settlement had to start with the full amount of the lost rent to the date of the hearing ($2948.57) and the advertisement costs of $375.00. In relation to the $2948.57 the tenants said "we can come at that" and agreed to that sum.

26. In relation to the advertising the tenants maintained that the costs of reletting should be capped at 1 weeks rent ($430.00). The landlord's agent pointed out that the claim for $375.00 was in fact less than $430.00. There was no challenged from the tenants to the fact that the landlord had expended this sum on advertisements. The only challenge was why the tenants should pay for the costs of the advertisements at $450 and $440 per week.

27. The negotiations then centered on the compensation for the loss of the future rent. The landlord suggested $30 pw for the balance of the fixed term as a fair figure to compensation the landlord for the uncertainty of when they would find a new tenant. The Tribunal suggested $15.00 per week being the half way point between nil and $30pw.

28. The Tribunal explicitly told the tenants that they did not have to accept any such figure, that they could adjourn if they wish and put the landlord to the proof of the mitigation issue. The Tribunal further pointed out that the sum of $15pw over the balance of the fixed term amounted to less than one week of rent. Thus if the landlord took more than one week to find a new tenant after the hearing then, subject to the mitigation issue, the tenants would be better off accepting a deal at $15pw. The tenants again said "we will come at that" and the agreement was reached.

29. At no point was there any protest by the tenants. At no point did the tenants express any view other than that they wanted to resolve the matter at the hearing. At no point did the tenants indicate that their acceptance of liability to the date of the hearing was under protest or anything of the kind. At no point did the tenants indicate that their acceptance of the deal for $15pw for future rent loss was under protest or anything of the kind. In fact the sound recording indicates that the hearing was conducted in a courteous manner with no hint of anger, frustration or any like emotion. The only protest from the tenants was made after agreement had been reached and concerned the difference in advice they assert they had received from the Tenants Advice Service relative to the views put by the Tribunal on the mitigation issue.

30. By consent of the parties the Tribunal entered an order for rent to 4 September 2008 at $2948.57; advertising at $375.00 and compensation for loss of future rent of $780 calculated at $15pw. As indicated in the "Overview" above this last figure contained an error in so far as it was calculated over a 12 months period instead of being restricted to the balance of the fixed term and should have been $285. The formal orders made above correct this error.

31. On 15 September 2008 the tenants sought written reasons for the decision.

32. On 1 October 2008 the tenants wrote to the Registrar of the Tribunal making the following complaints:

> We are writing in order to lodge a formal complaint regarding the proceedings for the above case between Hookway and Boxsell.
>
> We have little expectation of an improvement in our situation, but hope this helps to ensure that the pending overhaul of the Tribunal results in a fairer system where parties seeking to take advantage of such a system are less likely to succeed. Please see attached Summary for an outline of our particular case.
>
> Our primary issue with the proceedings was that virtually all of the arguments we put forward in defence of our situation were either not addressed or dismissed out of hand by the Magistrate, Allan Anforce. In the transcript it appears that the member made all the points technically required of him, but the audio carries implications that reveal the hearing(?) to be less than satisfactory. If the Magistrate has an obligation to genuinely assist the respondents/tenants, then that obligation was not met in our case. Following is a list of unsatisfactory elements of our hearing.
>
> **Hearing Called Early**
> Although it was noted by the magistrate at the outset of the session that the hearing was called early, there was no legitimate reasons given by the applicant as to why it was called early nor were we the respondents/tenants given the opportunity to point out why. We had originally challenged the agent regarding their inability to rerent premises that we broke lease on due to extremely high advertised rent and threatened to take the matter to the Tribunal. We believe the agent applied for

the hearing early (and unbeknown to us) in order to ensure avoiding being the respondent during the hearing and therefore avoiding the onus of having to prove his actions reasonable - an assertion that, had it been investigated, would have revealed various shortcomings in the agent's and lessor's behaviour.

Concept of reasonable rent not investigated by the Magistrate
The concept of what constituted reasonable/unreasonable rent in our case was not explored. Instead of basing 'reasonable' on a variation from a market mean, the "mean" accepted and not questioned was the strike price our rental contract-which was not proven by evidence we put forward t the above the market value. THIS EVIDENCE WAS IGNORED AND THE ARGUMENT DISMISSED. Thus our argument that the property would not rerent at a further inflated price which was therefore unreasonable, was not attended to at all.

NB. It may be noted that the properly was rerented immediately following the hearing...

Offer to pay compensation not considered
Our argument that we had, upon vacating the rental premises, offered to pay any reasonable disparity between our rent fee and a new tenant's rent fee and been refused by the agent, was not addressed by the magistrate during the hearing. The magistrate did however deem it appropriate that we pay full rent for the still-vacant premises to the date of the hearing and *then* suggested an amount be paid to cover any disparity in the weekly rent until the end of the rental period. **This action of the Magistrate indicates that he must have accepted the notion that the said property was not going to be rerented at the advertised increased** fee...and that our offer (at the time of vacating the rental premises) to pay any reasonable disparity between old & new rents had been reasonable and potentially effective; surely he would not otherwise have used it as part of his solution to the dispute. WHY, THEN, DID THE MAGISTRATE NOT CONSIDER IT UNREASONABLE FOR THE AGENT TO HAVE REJECTED THIS SOLUTION PROFFERED BY US 7 WEEKS EARLIER? *Because he did not consider it.*

Errors in the Magistrate's calculations
The amount of $15 per week that the Magistrate suggested we pay to the lessor to the end of the 12 month lease should have been calculated over a 19 week period. Instead the Magistrate calculated the amount over a *52 week period, and sent out orders to that effect. (See attached facsimiles)*

In conclusion...
We as tenants had upheld all our contractual obligations to Wright Dunn Real Estate and the lessor. However, we disputed the new increased advertised rental price that the agent/lessor applied to the property we broke lease on and we threatened to take the case to the Tribunal. Unknown to us, the agent 'beat us to it'. When the Magistrate noted the premature timing of the agent's application to the tribunal, no valid reason was given by the agent and we the respondents/tenants were not given an opportunity to explain preceding events.

We had evidence that the agent/lessor was asking way above market rent on the unrerented property we broke lease on 7 weeks before. *The Magistrate was not interested.*

We quoted the property manager as having said she was taking the opportunity to "test the market" while we were expected to continue paying rent for the rerented property. *The Magistrate was not interested.*

The Magistrate thought a solution we had originally offered the lessor in our case was so reasonable, he employed it as part of the solution to our dispute. In regard to the fact that we had offered that solution to the agent/lessor 7 weeks earlier when the property was first vacated and had been unreasonably refused, *the Magistrate was not interested.*

Then the Magistrate got the calculations for our compensation payment to the lessor wildly wrong *in favour of the lessor.*
Unknown to us, the respondents, the Magistrate could have deliberated out of court on all the information we and the applicant had given him. Instead he chose to negotiate a solution during the session. For the uninitiated (we have never been in court before) this choice of procedure - that the magistrate had implied was in our best interests - was clearly not in our best interests. As we felt

not only hopeless and helpless regarding the lack of consideration given to and prompt dismissal of all our arguments, we believed - as indeed the Magistrate had indicated we should - that to adjourn and come back again if and when the premises finally rented would be taking too great a gamble.

My husband and I left the tribunal frustrated with the sense that as taxpayers we were funding an inherently unfair "justice" system in the form of the current Residential Tenancies Tribunal. Given this tribunal supposedly exists to help people - many of whom have vastly compromised literacy skills-were truly disgusted with the proceedings in general, the lack of genuine assistance from the Magistrate and the unjust outcome.

The issue of when the tenancy terminated, the keys and the tradesmen on the property:

33. One of the tenants complaints concerns the advice they received from the landlord's agent to the effect that the tenants should retain the keys until a new tenants was found and that the tenants were responsible for the maintenance of the premises until that time. In essence the landlord was indicating an intention to hold the tenants to the tenancy agreement and not to treat the tenancy agreement as having been terminated by reason of the tenants abandonment pursuant to section 36(e) of the Act, which reads:

> Despite anything to the contrary in any territory law, a residential tenancy agreement must not terminate or be terminated other than in the following circumstances:
> ….
> (e) if the tenant abandons the premises that are the subject of the agreement;

34. As indicated to the parties at the hearing, this does not accord with the Tribunal's understanding of the law. Once the tenants declare their intention to abandon the property within the fixed term for no lawful reason, such as in the present case, and actually vacate the premises and ceases paying rent, an abandonment has occurred within the meaning of section 36(e) of the Act and the tenancy is terminated. At this point the keys should have been returned and the right to possession of the property rests with the landlord again who is then responsible for maintenance. The landlord then has a duty to mitigate her losses by re-letting the premises at the best rent reasonably obtainable as soon as practicable.

35. At the point of termination of the tenancy the keys should have been returned by the tenant and the landlord's agent should not have refused to accept them. However because the right to possession of the premises has reverted to the landlord at the point of termination of the tenancy, the landlord has the right to admit whatever tradesmen she chooses to the premises without the tenants consent. This is why the Tribunal did not need to deal with the tenants assertions concerning the presence of the tradesmen on the property.

36. An alterative construction of events relies upon section 36(j) "repudiation" of the tenancy contract. An abandonment is a paradigm case of the repudiation of a tenancy contract. Section 36(i) reads:

> Despite anything to the contrary in any territory law, a residential tenancy agreement must not terminate or be terminated other than in the following circumstances:
>
> (i) if—
> (i) a party to the agreement repudiates the agreement; and

(ii) the other party accepts the repudiation; and
(iii) the tenant vacates the premises;

37. On its face section 36(i)(ii) provides that the tenancy agreement is only terminated if the landlord then "accepts" the repudiation. However the landlords duty to mitigate her losses in section 38 of the Act has the effect that any decision by the landlord not to accept the repudiation and put the premises back on the market as soon as possible, could amount to a failure by the landlord of her duty to mitigate. For this reason, in practical terms, once the tenants had vacated the property and ceased paying rent the landlord had no choice but to "accept" the repudiation and take action to mitigate her losses. The full reasoning on the above issue was set out by the present Tribunal member at Chapter 12 Residential Tenancies-Law and Practice in NSW 2001 ed and adopted for present purposes. The conclusion that the landlord has little practical choice but to "accept" the repudiation was made by present Chief Justice Higgins in *J & S Chan P/L v McKenzie* (unreported ACTSC 12/1/94).

38. For the above reasons the Tribunal approached the matter on the basis that the present tenancy had terminated on 18 July 2008.

What does section 107 of the Act require:

39. As indicated to the parties at the hearing, the presently constituted Tribunal had already considered the issue of the construction of section 107 in prior cases and had come to a view on the matter. Nothing the tenants said in the hearing persuaded the Tribunal otherwise. The presently constituted Tribunal has further considered the matter in a written decision since the hearing in the present case and come to the same conclusion as it had in the previous cases. Specifically, in the recent decision in *Carron Elvin v Effie Meischke and Stephanie Lee* [2008[ACTRTT [..] the following conclusions were reached:

The first issue-the role of sections 62 and 107:

1. Section 62 and 107 of the Act read as follows:

> 62(1) If a tenant abandons premises before the end of a fixed term agreement, the former lessor may apply to the tribunal for the following compensation:
> (a) compensation for the loss of the rent that the former lessor would have received had the agreement continued to the end of its term;
> (b) compensation for the reasonable costs of advertising the premises for lease and of giving a right to occupy the premises to another person.
>
> (2) On application, the tribunal may award compensation of the kind mentioned in subsection (1) (a) and (b).
>
> (3) The amount of compensation the tribunal may award—
> (a) under subsection (1) (a) must not exceed an amount equal to 25 weeks rent; and
> (b) under subsection (1) (b) must not exceed an amount equal to 1 week's rent.
>
> (4) In deciding the amount of compensation that may be awarded under subsection (2) in relation to costs, the tribunal must have regard to when, apart from the abandonment of the premises—
> (a) the agreement would have ended; and

(b) the lessor would have incurred the costs mentioned in subsection (1) (b).

107(1) If a lessor received a notice of intention to vacate before the expiration of a fixed term agreement, and the date nominated in the notice as the date when the tenant intends to vacate is a date before the expiration of the agreement, the lessor may—
(a) accept the notice; or
(b) apply to the tribunal for compensation for—
(i) the loss of the rent that the lessor would have received had the agreement continued to the end of its term; and
(ii) the reasonable costs of advertising the premises for lease and of giving a right to occupy the premises to another person.

(2) On application, the tribunal may award compensation of the kind mentioned in subsection (1) (b).

(3) The amount of compensation the tribunal may award—
(a) under subsection (1) (b) (i) must not exceed an amount equal to—
(i) 25 weeks rent; or
(ii) rent in relation to the unexpired part of the agreement;
whichever is the lesser; and
(b) under subsection (1) (b) (ii) must not exceed an amount equal to 1 week's rent.

(4) In deciding the amount of compensation that may be awarded in relation to the reasonable costs of advertising, the tribunal must have regard to when, apart from the vacation of the premises—
(a) the agreement would have expired; and
(b) the lessor would have incurred the costs.

2. Sections 62 and 107 both deal with the case of an abandonment in the fixed term, albeit in different ways, and both fix the amount of compensation payable. The key difference between these two sections is that section 107 explicitly deals with the case where tenants serve a notice of intention to vacate during the fixed term, whereas section 62 deals with an abandonment generally i.e. where no such notice is served (*Mies v Phillips* [2006] ACTRTT 1). Prescribed term 84 is simply a replication of section 107.

3. The interpretation and application of section 107 was addressed by the presently constituted Tribunal in *Mies v Phillips* [2006] ACTRTT 1 and *David Hutcheson and Helen Hutcheson v Baden Cameron McMaster and Sonia Mary McMaster* [2008] ACTRTT 14. In those decisions the Tribunal rejected the construction of section 107 which requires the landlord to make application to the Tribunal immediately upon being served with a notice of intention to vacate by the tenants. In stead the Tribunal took the view that the landlord had a reasonable time to make this application and that a reasonable time was shortly after a new tenant had been found by the landlord. Part of the Tribunal's reasoning for this conclusion given in *Hutcheson* was as follows:

In determining what is a reasonable time it is necessary to have regard to the following issues:
(a) If section 107(1) is read literally then a landlord must make application to the Tribunal solely on the basis of a tenant's expressed intention to vacate the premises. But until such time as the tenant does in fact vacate the premises the fixed term tenancy still subsists. A fixed term tenancy is not terminated pursuant to section 36(j) unless and until the tenant vacates the premises. If the tenant does not in fact vacate the premises then no abandonment has occurred and there is no breach on the tenant's part that gives rise to any claim for compensation under section 107. The tenant may change his/her mind at any time after giving notice of intention to vacate and before actually vacating the premises.
(b) Assuming the tenant does in fact vacate the premises in accordance with their notice- if section 107(1) is read literally then the landlord may be required to

> apply to the Tribunal for compensation before a new tenant has been found. The extent of the landlord's right to compensation depends upon how long it takes to find a new tenant. If the landlord makes application as soon as the existing tenant serves notice of intention to vacate, then the landlord's losses will not crystallise until the existing tenant has in fact vacated the premise and a new tenant is found. Thus even if the landlord does make application to the Tribunal immediately following an notice of intention to vacate, the Tribunal cannot do anything with the application which will need to be adjourned until the landlord's losses have crystallised i.e. until the existing tenant does in fact vacate and until a new tenant is found.
>
> For these reasons it seems to the presently constituted Tribunal that a reasonable time in which the landlords should make application under section 107 is at a point of time shortly after a new tenant has been found. In the present case the landlords made their application within such a reasonable time after allowing for the time consumed in the negotiation between the parties.

4. The Tribunal is satisfied that the landlord in the present case has made his application under section 107 or prescribed term 84 in a reasonable time and that the application is therefore valid.

The prima facie level of compensation the landlord is entitled to:

5. Section 107(3) provides that the landlord is entitled to:
   (a) rent loss to the time that a new tenant is found or for 25 weeks which ever is the lesser:
   (b) advertising and reletting costs to a maximum of 1 weeks rent which is subject to the discounting factors in section 107(4).

40. In the present matter the tenants complain that their case was "called on early" in the sense that it was listed for hearing prior to the landlord having secured a new tenant. Unfortunately for the tenant, section 107 literally read, permits the landlord to make an application prior to a new tenant being bound and the Tribunal has no power to prevent this. It is apparent from the Tribunal's comments in *Elvin* above that the presently constituted Tribunal is of the view that section 107 is badly drafted and in need of reform and that a landlord's application to the Tribunal should await a crystallisation of the landlord's losses at the time that a new tenant is found. To do otherwise leads to precise the problem the tenants now complain of.

41. Be that as it may, the landlord's application was validly lodged and the landlord was entitled to have the Tribunal deal with it. On two occasions the Tribunal offered the parties an adjournment to wait until a new tenant was found and on both occasions the tenants declined the offer. It was pointed out to the tenants that such an adjournment would introduce a large element of uncertainty into the matter in that the landlord may find a new tenant quickly, or may not find a new tenant for a longer period. In the former event the tenants' liability for lost rent would not extend passed the point that a new tenant was found, but in later event the landlords losses at that later time would have crystallised into a larger sum and hence, subject to the mitigation issue on the landlord's part , the tenants' liability would also then be beyond dispute and hence beyond negotiation. The tenants own letter of complaint of 1 October 2008 admits that they considered this risk and choose to decline the adjournment for this reason.

42. The tenants indicated that they did not wish to seek an adjournment but rather wanted to resolve the matter at the hearing. In the face of this decision by the tenants the Tribunal rejects the tenants criticism that the hearing was brought on prematurely and sees the criticism to be disingenuous.

The landlords duty to mitigate losses and the rent at which the premises can be re-let following an abandonment:

43. The tenants' principle complaint appears to be that the Tribunal did not take into account the landlords duty to mitigate her losses. The landlords failure to mitigate was said to arise from two of the landlord's actions:

    (a) the landlord's delay in advertising at all until 5 July 2008, being two weeks after the tenants had given written notice of intention to vacate and two weeks before the tenants did in fact vacate:
    (b) the landlord's decision to advertise the property on 5 and 12 July 2008 at $450pw being $20pw above the tenants' existing rent, then to advertise at $440 pw on 19 July 2008; and finally to advertised at $430pw from 26 July 2008.

44. The audio take of the hearing discloses that the issue of the landlord's duty to mitigate and the relevance of the rent at which the premises were re-advertised occupied the majority of the hearing time. The explanation given to the tenants at the hearing concerning the landlords duty to mitigate her losses following the tenants abandonment and the rent at which a premises can be re-advertised is in the same terms in which the Tribunal expressed itself in *Elvin* (supra):

> 6. The onus of proof is on the Respondent/tenants to show that the landlord acted unreasonably in failing to mitigate her loss: *TC Industrial Plant Pty Ltd v. Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 138; *Wenkart v. Pittman* (1999) 46 NSWLR 502 at 520–523. A contrary conclusion appears to have been reached by the Supreme Court of South Australia (Full Court) in *Murray-Oates v. Jjadd Pty Ltd* (1999) 76 SASR 38 at 48, relying upon *Roper v. Johnson* (1873) LR 8 CP 167. It is respectfully suggested that *Roper v. Johnson* is not authority for the proposition suggested. The approach of the High Court in *TC Industrial Plant* is binding.
>
> 7. Not only is the onus on the Respondent/tenants to show that the landlord acted unreasonably, but the onus is on the Respondent/tenants to prove the value of what would have occurred had the landlord acted reasonably: *Karacominakis v. Big Country Development Pty Ltd* [2000] NSWCA 313 at [187]. As was said by Lord Denning MR in *The World Beauty* [1970] P 144 at 154:
>
> > "It must be remembered too, that it is for the defendant to prove the value of the advancement. It is he who prays it in aid in mitigation of damage. He must prove, therefore, the value of it."
>
> 8. The landlord must take all reasonable steps to mitigate the loss caused by the Respondent/tenants abandonment and cannot recover compensation for any loss which she could have avoided but failed, through unreasonable action, to avoid. Where the landlord does take reasonable steps to mitigate the original loss stemming from the abandonment she can recover the costs or losses incurred in engaging in mitigation. It does not matter that the resulting loss incurred in attempting to mitigate the original losses is greater than would have been the case had no mitigating stops been taken—see: *Simonius Vischer & Co v. Holt* [1979] 2 NSWLR 322 at 355–6 (obiter); *Lloyds and Scottish Finance v. Modern Cars and Caravans* [1966] 1 QB 764.

9. It is the facts of any given case which determine whether the innocent tenant or innocent landlord acted reasonably in attempting to mitigate loss. The question is often phrased as it was in *Payzu Ltd v. Saunders* [1919] 2 KB 581 by McCardie J:

> "The question, therefore, is what a prudent person ought reasonably to do in order to mitigate his loss arising from a breach of contract."

10. It should not be forgotten, however, that it is the innocent party who is required to take steps to mitigate the loss because of the breach of the guilty party and that the steps required of the innocent party will not generally be set too high. Thus, in *Banco de Portugal v. Waterlow & Sons Ltd* [1932] AC 452 at 506 Lord McMillan said:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricated himself ought not to be weighed in nice scales at the instance of party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held in breach cans suggest that other measures less burdensome to him might have been taken."

11. In *Karacominakis v. Big Country Developments Pty Ltd* [2000] NSWCA 313, at paragraph 187, the Court of Appeal of New South Wales said:

> "A plaintiff who acts unreasonably in failing to minimise his loss from the defendant's breach of contract will have his damages reduced to the extent to which, had he acted reasonably, his loss would have been less. This is often misleadingly referred to as a duty to mitigate, although the plaintiff is not under a positive duty. The plaintiff does not have to show that he has fulfilled his so-called duty, and the onus is on the defendant to show that he has not and the extent to which (*TCN Channel 9 Pty Ltd v. Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130). Since the defendant is a wrongdoer, in determining whether the plaintiff has acted unreasonably a high standard of conduct will not be required, and the plaintiff will not be held to have acted unreasonably simply because the defendant can suggest other and more beneficial conduct if it was reasonable for the plaintiff to do what he did (*Banco de Portugal v. Waterlow and Sons Ltd* [1932] AC452; *Pilkington v. Wood* [1953] Ch 770; *Sacher Investments Pty Ltd v. Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5)."

12. In the present case, and consistent with the above principles, the landlord was under no duty to secure a new tenant and sign the new tenant to a new tenancy agreement based only on the tenants notice of intention to vacate. As indicated in *Hutcheson* the Respondent/tenants were under no duty at law to honour their notice of intention to vacate and so could have rescinded it at any time prior to giving the landlord vacate possession. If the Respondent/tenants had rescinded their notice of intention to vacate and if at that time the landlord had in fact secured a new tenant and signed a new tenancy agreement with that new tenant, then the landlord would have been caught in the embarrassing position of being unable to deliver vacant possession to the new tenant. The landlord would have been in breach with respect to the new tenant from day one of the new tenancy.

13. The landlord's duty to mitigate arising from the respondent/tenants breach does not go so far as to require the landlord to put themself at risk of suit by a new tenant in the manner described above. Accordingly the landlord's duty to mitigate does not require the landlord to have undertaken a search for a new tenant until such time as the existing tenants in fact deliver vacant possession (cf *Davtron P/L v Lum and McGregor* (2005) NSWCTTT 107).

14. In the present instance the landlord undertook the search for a new tenant prior to receiving vacant possession which they were not required to do. The tenants vacated on or around 19 August 2008 and the landlord had secured a new tenant with 6 days. A period of 6 days is not excessive, in fact it is very efficient on the landlord's part. There is nothing in the tenants submissions or the evidence generally that would satisfy the Tribunal that the landlord had done anything but act reasonably in the circumstances. Accordingly the rent for the period of 6 days is payable.

15. The landlord maintains the further claim set out at paragraphs 7-9 above, namely that by virtue of her mitigation action in the form of advertising the premises at the same rent, she has suffered a further loss in the extended prohibition on her right to increase the rent.

16. In a rising rent market it is clear that the landlord has suffered a loss albeit difficult to quantify. However the loss arises from the landlord's agent own misapprehension that the property must be re-advertised at the same rent (cf *Loncar v Barkovic* 1999 ACTRTT 9). Reasonable mitigation is a matter of degree. Clearly if the landlord took the opportunity to re-advertise the premises at a rent increase that was unlikely to appeal to new tenants in the same market segment as the Respondent/tenants then a failure to mitigate may have occurred. But an increase in rent to a level consistent with market movements for similar property is unlikely to constitute unreasonable conduct on the landlord's part.

17. Because the landlord chose to re-advertise at the same rent it is now unknown whether the landlord could have secured a tenant at a higher rent. The landlord's agent contends that it is likely that a tenant had a higher rent could have been found. The Tribunal does not doubt this proposition given the state of the market with which the Tribunal is familiar. But this admission by the landlord's agent only operates to defeat the landlord's further claim for compensation. If it is accepted the a higher rent could readily have been obtained from the market if sought then the landlord's decision to settle for the lower rent does not satisfy the landlord's duty to mitigate its losses.

18. Conversely, in a falling rental market reasonable mitigation may require the landlord to re-advertise at a lesser rent and the outgoing defaulting tenants may then be responsible to top up the rent to its former level to the extent of the 25 weeks cap in section 107.

45. The Tribunal adopts the whole of the above for present purposes. The Tribunal was fully cognisant of the above at the time of hearing the present matter and was motivated by the above understanding of the law. In fact most of the above is drawn directly from the present Tribunal member's writing in Residential Tenancies Law and Practice- NSW 4th ed Fed Press and preceding editions.

The remainder of the tenants complaints:

46. In their letter of complaint the tenants state that their "primary issue" is that "virtually all of the argument that we put forward in defence of our situation were either not addressed or dismissed out of hand by the magistrate". A perusal of the tenants submissions to the Tribunal filed at the hearing, a study of audio recording and a perusal of the tenants letter of complaint fails to disclose a single issue raised by the tenants which was not dealt with at the hearing, and now in this document.

47. The tenants' grievance regarding the fact that the Tribunal did not accept the contentions of law they advanced is readily explained by the explanations given by the Tribunal at the hearing and repeated in this document, namely that the Tribunal did not accept that those propositions accurately stated the law. The Tribunal is only required to adjudicate on disputes according to its own understanding of the law. It is not required to accept each competing contention of

law advanced by each party. The propositions advanced by the tenants were just wrong at law.

48. In their letter of complaint the tenants even go on to say "we as tenants had upheld all our contractual obligations to …the lessor". Not by any stretch of the imagination can the tenants seriously and credibly propose that their abandonment of the fixed term tenancy, solely for their own benefit, constituted upholding their contractual obligations. In fact the tenants freely admitted their breach during the hearing.

49. In their letter of complaint the tenants say that the Tribunal "ignored" their argument that the rent at which the property was re-advertised was unreasonable. The audio tapes discloses that the issue of the re-advertised rent was explicitly discussed and the Tribunal spent some time explaining to the tenants that the landlord's duty to mitigate did not preclude the landlord putting the premises back on the market at a slightly increased rent, to "test the market" in the tenants' words. The Tribunal actually explained this to the tenants by reference to the earlier cases and gave examples. It is difficult for the Tribunal to accept that when the tenants wrote the letter of complaint that they had forgotten the discussion of this issue, or that they had simply missed it when they listed again to the audio tape as they claimed to have done.

50. In their letter of complaint the tenants asserted that the Tribunal did not consider the possibility of a settlement based on the tenants paying $15pw or some other similar figure as compensation from 19 July 2008. This is not true. The issue of the tenants' exposure to compensation for the period 19 July 2008 to the date of the hearing was explicitly discussed. The landlord made it a precondition to any negotiation that this accrued rent loss be paid. The Tribunal explained to the tenants that unless they succeeded on the mitigation issue, they would be liable for this sum as a crystallised loss resulting from their abandonment. The issue of paying $15pw week for a number of weeks following 19 July 2008 was simply not relevant because:
    (a) the losses to the landlord for that period were an historical fact and not a mere future possibility:
    (b) the tenant would either succeed in a challenge to those losses on the mitigation principle or would fail entirely and then owe the whole sum
    (c) the landlord was not interested in negotiation on any basis other than the full lost rent to the date of the hearing.

51. The issue of the tenants exposure to the full lost rent from 19 July 2008 to the date of the hearing was integrally tied up with the mitigation issue which is addressed above. The Tribunal had put the view that:
    (a) the advertisement of the premises prior to 19 July 2008 was of little relevant because the landlord was not require to advertise at all in this period i.e. the duty to spend the money on advertisements only arose after the landlord had vacant possession:
    (b) the landlord was not restricted to re-advertising at $430.00 and that an initial advertisement of $450 or $440 was not likely to be found an unreasonable step by the landlord in a rising rent market per;

52. After the landlord's duty to advertise arose on 19 July 2008 the property was advertised for one week only at $440pw after which it was advertised at current rent of $430pw. Thus the whole of the tenants case for a failure to mitigate came down to whether advertising at a $10pw increase for one week only, and thereafter having continuously advertised at the existing rental of $30pw, constitutes a failure to mitigate on the landlord's part. Whether the tenants recognised the magnitude of the case that confronted them in discharging their onus of proof to show this conduct amount to a failure to mitigate, is not known to the Tribunal but the fact that the tenants consciously choose not to seek an adjournment to attempt to make this case is not hard to understand.

53. The Tribunal does admit that the issue of the $35 dishonour fee seems to have been overlooked. Possibly the main reason for this is that it was not raised by the tenants at the hearing and hence was not the subject of argument and submission by the landlord. Nevertheless it had been in issue and the landlord should allow a set off to this amount. The Tribunal cannot however now make a formal order to that effect.

54. The tenants have the right to appeal the above decision to the Supreme Court for error of law or may apply to the President of the Tribunal to set aside the decision under section 102(2) of the Act for "extraordinary circumstances".

A. Anforth
10 October 2008