

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

QIN & ORS v HE (Residential Tenancies) [2020] ACAT 116

RT 233/2020

RT 310/2020

Catchwords:

RESIDENTIAL TENANCIES – two separate tenancies in one two bedroom unit – the use of ‘house rules’ in tenancies – the extent of lessor control consistent with a tenancy and quiet enjoyment – the use of additional terms to impose ‘house rules’ – the regulation of common areas – regulation of utilities in tenancies akin to boarding houses – holding deposits not allowed – key deposit not allowed – loss of facilities in loss of parking bay, mailbox and air conditioner – eviction for breach of house rules – repayment of unlawfully charged utilities – lessor making threats to the tenants – lessor failure to prepare condition reports – excessive rent in advance

Legislation cited:

Residential Tenancies Act 1997 ss 6B, 6C, 6D, 6E, 6F, 9, 10, 15, 18, 23, 36, 44, 71
Standard Terms 3, 15, 21, 22, 23, 23A, 28, 42, 43, 44, 48, 51, 52, 53, 75, 76, 77, 78, 79,

Cases cited:

Faulder v Tran [2018] ACAT 80

List of

Texts/Papers cited:

Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017)

Tribunal:

Senior Member A Anforth

Date of Orders:

21 September 2020 and 21 December 2020

Date of Reasons for Decision:

21 December 2020

**AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL**

RT 233/2020

BETWEEN:

XINZHU QIN
First Applicant/Tenant

DAWEI GUO
Second Applicant/Tenant

YILIN FANG
Third Applicant/Tenant

YANG YANG
Fourth Applicant/Tenant

AND:

HONGGUANG HE
Respondent/Lessor

TRIBUNAL: Senior Member A Anforth

DATE: 21 September 2020

ORDER

The Tribunal orders that:

1. The respondent is to pay the applicants a sum of compensation to be determined by the Tribunal.
2. The matter is listed on 12 October 2020 at 10:00am for determination of the amount of compensation.
3. The applicants are to file and serve 29 September 2020 particulars of the amount they claim pursuant to the following entitlements:
 - (a) A return of their bond, the holding deposit, the bond for the keys.

- (b) The Tribunal lodgement fee.
 - (c) A return of the utility charges paid.
 - (d) Some rent reduction for the lack of parking access, mailbox access and withdrawal of the air conditioning service.
 - (e) Compensation for the breaches of quiet enjoyment suffered.
 - (f) Compensation for the inconvenience and costs imposed on them having to move prematurely from the premises.
4. A draft of the reasons for decision are provided to the parties and their representatives only. The draft reasons for decision are not be given to any other person unless for the purpose of seeking legal advice. When relisted the respondent may make any such application as he chooses concerning the suppression of his identity.

.....*Signed*.....
Senior Member A Anforth

**AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL**

RT 310/2020

BETWEEN:

HONGGUANG HE
Applicant/Lessor

AND:

XINZHU QIN
First Respondent/Tenant

YANG YANG
Second Respondent/Tenant

DAWEI GUO
Third Respondent/Tenant

YILIN FANG
Fourth Respondent/Tenant

TRIBUNAL: Senior Member A Anforth

DATE: 21 September 2020

ORDER

The Tribunal orders that:

1. The application is dismissed.

.....*Signed*.....
Senior Member A Anforth

**AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL**

RT 233/2020

BETWEEN:

XINZHU QIN
First Applicant/Tenant

DAWEI GUO
Second Applicant/Tenant

YILIN FANG
Third Applicant/Tenant

YANG YANG
Fourth Applicant/Tenant

AND:

HONGGUANG HE
Respondent/Lessor

TRIBUNAL: Senior Member A Anforth

DATE: 21 December 2020

ORDER

The Tribunal orders that:

1. The sum of \$1,775.25 jointly to Ms Qin and Ms Yang;
2. The sum of \$3,075.25 jointly to Ms Yang and Ms Gao.

.....
Senior Member A Anforth

REASONS FOR DECISION

1. The tenants were students from China studying in Canberra. The lessor was the owner of a two-bedroom residential flat in a strata complex designated as Unit 2. He was also the tenant of the adjacent two-bedroom designated Unit 3. On 1 February 2020 the lessor entered two separate residential sub-tenancy agreements, one for each of the bedrooms in Unit 3, albeit the signed residential tenancy agreements both referred to Unit 2 and not Unit 3. The tenants, Dawei Guo and Yilin Fang formed one set of sub-tenants and occupied one bedroom; the tenants Xinzhu Qin and Yang Yang formed the second set of sub-tenants and occupied the other bedroom in Unit 3. For ease of reference the two sets of sub-tenants are referred to below as the 'tenants'. The lessor lived in Unit 2.
2. The rent for Dawei Guo and Yilin Fang was \$450pw and the bond was \$1,800. The rent for Xinzhu Qin and Yang Yang was \$440pw and the bond \$1,760.
3. On the written agreement the fixed term of the tenancy for Dawei Guo and Yilin Fang was only nine days i.e. from 1 February 2020 to 10 February 2020. The fixed term for Xinzhu Qin and Yang Yang was one year and nine days i.e. 1 February 2020 to 10 February 2021. The parties informed the Tribunal that both the tenancies were thought to be for a year and so the Tribunal is prepared to accept that the reference to '10 February 2020' was a clerical error which should have read '10 February 2021'.
4. Both of the written residential tenancy agreements were in the prescribed form of Schedule 1 *Residential Tenancies Act 1997 (RTA)*. Each agreement also contained the same 26 additional terms, none of which were endorsed under section 10 of the RTA. Some of these additional terms are plainly void for inconsistency with section 9 of the RTA and others arguably so:

9(1) A term of a residential tenancy agreement is void if—

- (a) it is inconsistent with a standard residential tenancy term; and*
- (b) it has not been endorsed by the ACAT under section 10.*

(2) A term of a residential tenancy agreement is void if it is inconsistent with this Act (other than a standard residential tenancy term).

5. The additional terms are referred to as a set of 'house rules' and they purported to regulate many aspects of the tenants' right of occupancy of the premises and their quiet enjoyment. By way of example only:

Item 2: required daily cleaning of the kitchens, toilet, dishwasher and shower.

Item 3: prohibited pets and parties.

Item 6: required the tenant to personally reside in the premises.

Item 7: allowed the owner to sell and the tenant to vacate on one months' notice.

Item 8: prohibited "any slandering, or attacking online will be recorded and evidenced for the local police reference".

Item 11: "the tenants are responsible for their own safety".

Item 13: "the tenants have to ...respect the landlord or landlady".

Item 15: the tenants are responsible for the connection and payment of their utilities.

Item 17: "the tenants have to be WeChat or phone/email communicable".

Item 18: the owner can visit and inspect on 10 hours notice.

Item 19: "the owner should not enter the tenants' room without the tenants' consent unless the tenants violate these houses rules or laws".

Item 21: "The owner can have up to 8 weeks to repair if it is the owner's issue".

Item 23: "Violating these items, the owner has the right to evict the tenant by law...".¹

6. The same house rules apply to both separate tenancies. By way of example, this would mean that both sets of tenants would need to separately arrange for the connection of their own utilities, notwithstanding that the premises does not contain separate metering or separate utility inlets; both sets of tenants have to clean daily the kitchen, showers etc.

¹ Tenancy Agreement 1 February 2020, page 7

7. The tenancy agreement for Dawei Guo and Yilin Fang contained a handwritten notation that \$500 was paid as a holding deposit that would be refunded when the tenancy agreement was signed by the parties.
8. On 23 March 2020 the four tenants filed a joint application with the Tribunal seeking orders to terminate their tenancy agreements and a return of their bond of \$3,960.
9. In that application the tenants alleged:
 - (a) the lessor required them to pay fees and charges for the connection and supply of utilities and did not provide them with the utility accounts from the suppliers;
 - (b) the lessor failed to lodge their bonds with the Office of Rental Bonds;
 - (c) the lessor charged a second bond of \$200 as a security for the return of the keys;
 - (d) the lessor charged the tenants more than four weeks of advance rent;
 - (e) on 9 February 2020 the lessor conducted the first inspection. He entered Dawei Guo and Yilin Fang bedroom (two young females) uninvited and told them to vacate the room whilst he inspected it. The lessor moved the tenants' property around in the room and opened cupboards etc;
 - (f) the lessor took two unknown persons into the room during the inspection;
 - (g) the lessor turned off the air conditioning to the premises;
 - (h) the lessor used one of the parking spots that belonged to the tenants as the residents of Unit 3;
 - (i) the tenants had no access to their mailbox and the lessor opened and checked their mail.
10. On 23 April 2020 the tenants sought interim orders for the termination of the tenancies and refund of bonds. The tenants alleged:
 - (a) On 27 March 2020 the lessor sent text messages to each of the tenants threatening disconnection of utilities; to publish details of their passports and purported rent default to the Chinese community at large and to the

ACT Government; and threatening physical violence via the agency of a third party visit.

- (b) On 28 March 2020 the lessor entered the premises against the express instructions of the tenants to the contrary. The tenants called the police who attended and detained the lessor.
 - (c) The lessor was neither the owner nor a person with the right to lease Unit 3.
11. Copies of what purported to be English translation of the text messages in Chinese referred to above were attached to the interim application as was a USB containing video of the lessor in the premises on 28 March 2020.
12. The matter was listed for hearing of the interim application on 30 April 2020. The tenants appeared by telephone and there was no appearance of the lessor.
13. The tenants advised that they had vacated the premises on 31 March 2020. They had sought personal protection orders from the ACT Magistrates Court against the lessor.
14. Given the absence of the lessor and the fact that the tenants had in fact vacated, there was no utility in determining the interim application at that time. The matter was adjourned to 8 July 2020 with orders that the tenants file and serve copies of the protection orders, police report of 28 March 2020 and a title search for Unit 3. They were advised to seek assistance from the Tenants Advice Service.
15. On 15 May 2020 the lessor filed his own counter claim. He claimed:²
- (a) from the tenants Xinzhu Qin and Yang Yang, the sum of \$385 for cleaning and \$2,640 for early termination of the fixed term lease (six weeks of rent);
 - (b) from the tenants Dawei Guo and Yilin Fang, the sum of \$760 for cleaning and utilities and \$2,700 for early termination of the fixed term lease.

² Application for Resolution of a Dispute 13 April 2020, page 4

16. The lessor admitted that he had not lodged the rental bonds with the Office of Rental Bonds but said that he returned it to the tenants on 27 March 2020.
17. On 29 June 2020 the tenants filed:
 - (a) the interim personal protection orders against the lessor; and
 - (b) the police report of the incident of 28 March 2020.
18. On 8 July 2020 three of the tenants appeared by phone (not Ms Fang) and the lessor appeared by phone. The lessor advised that he did not own Unit 3 but was subletting it to the tenants. The lessor confirmed that the rent had been paid by the tenants to the date of them vacating on 31 March 2020. By way of counter claim the lessor claimed:
 - (a) \$400 for outstanding utility charges;
 - (b) \$280 for cleaning charges which he undertook himself;
 - (c) loss of rent for early termination of the tenancies within the fixed term; and
 - (d) \$350 for the cost of removing an oil stain caused by the tenants in one of the parking bays.
19. The tenants denied the claims. Dawei Guo said that he had not been allowed to use the parking bay with the oil stains and that it was used by the lessor.
20. The parties outlined their cases to the Tribunal as best could be done by phone and asked each other questions. At the end of the hearing the Tribunal reserved the decision but gave leave to the parties to file and serve any final submissions (but not evidence) they wished by 22 July 2020.
21. On 15 July 2020 the tenants filed and served their final submissions together with a further copy of the video from the camera in Unit 3 and 134 pages of exhibits. The tenants' submissions replicated their oral submissions and argued:
 - (a) there was no ingoing condition report provided to them. They cleaned the premises with a vacuum cleaner and wet carpet cleaning. The results were

recorded on video supplied to the Tribunal. The premises were left in no less a state of cleanliness than at the start of the tenancies.

- (b) the lessor did not prepare an ingoing or outgoing condition report;
- (c) Xinzhu Qin and Yang Yang paid all outstanding utility charges;
- (d) Dawei Guo and Yilin Fang did not pay outstanding utility charges because the lessor did not provide them with a copy of the account and because they believed that the lessor was overcharging them to make a profit off the utilities;
- (e) the tenants were misled by the lessor's assertion that he owned Unit 3;
- (f) the lessor committed various breaches of quiet enjoyment which led to police intervention.

22. The Tribunal has watched the video. Most of the speaking is in Chinese which the Tribunal did not understand. The video of the state of the premises at the time of vacation on 31 March 2020 looks of average standard. There appeared to be some stains on some of the floor and benches, but there is no way of knowing whether those stains were present at the start of the tenancy on 1 February 2020.

23. The video showing the entry and presence of the lessor was enlightening. There were two videos, one dealing with the lessor's interaction with Xinzhu Qin and Yang Yang and the other dealing with Dawei Guo. In both cases the lessor entered without consent and directly confronted the tenants in an aggressive manner albeit speaking Chinese. It was sufficiently clear from the body language and the tone of the voices that he had engendered a level of fear in Xinzhu Qin and Yang Yang (two young female tenants). In relation to Dawei Guo (young male) there ensued an aggressive discourse with gesturing and pointing. The lessor then physically assaulted Dawei Guo by snatching his phone and then continued to 'shirt front' him.

The issues

24. This case raises a number of issues, including:

- (a) the effect of the setting up two separate residential tenancy agreements in the one small unit;
 - (b) the tenants' exclusive right of possession to the leased premises;
 - (c) how such an agreement can regulate charges for utilities;
 - (d) which of the additional terms of the residential tenancy agreement are lawful and which are not;
 - (e) the use of holding deposits;
 - (f) the failure to provide the tenants with access to a mailbox and parking bays;
 - (g) the restrictions on the lessor's right of entry;
 - (h) the tenants right to quiet enjoyment of the premises.
25. The Tribunal adopts and applies the *Faulder v Tran* [2018] ACAT 80 in so far as it is relevant to the above issues.
26. There is no question that it can be lawful to set up separate tenancies of individual bedrooms in the one small unit.³ The question is whether it is sensible and the issues it raises for traditional tenant's rights.
27. If each set of tenants are only given the exclusive right of occupancy to one bedroom, then the issue arises as to the status of the remainder of the house including the kitchen, toilets, lounge rooms, laundry etc (**the common areas**). It may be that the lessor intended that the two sets of tenants each have a non-exclusive license to use the common areas, in which case the common areas do not form part of either the individual tenancies.
28. If the lessor intended that each set of tenants has only a non-exclusive right to the common areas, then the issue arises concerning the broader right to possession of those common areas, and whether the lessor as the lessor retains any right of access to the common areas. There are two possibilities:

³ Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.3.8]

- (a) The tenancy agreements have the effect of conveying to the two sets of tenants collectively the exclusive right of access and use of the common areas, to the exclusion of all others, including the lessor; or
 - (b) The tenancy agreements do not have the above effect, and the lessor retains his right at law to enter and use the common areas.
29. These two alternatives must be distinguished from the circumstances of a joint tenancy of multiple tenants of the whole of the premises, including the common property, in which case the issue of common property is entirely an intra tenant issue.⁴
30. Obviously, the two alternatives of paragraph [28] make a huge difference to the level of use and quiet enjoyment the tenants can expect. The difference would be expected to be reflected in the rent and utilities charged, the lessor's right of access and in the responsibilities for maintenance of the common areas.
31. In the first alternative, the lessor may not enter the common areas without the consent of all the tenants and to do so would be a trespass. In the second alternative, the lessor may enter and use the common areas without consent. In the present case the lessor entered the common areas without consent where some of confrontations occurred. Under the second alternative of paragraph [28] this is not a trespass or a breach of the access provisions in the residential tenancy agreement. The lessor did, however, also enter a bedroom without consent which is he is not entitled to do under either alternative.
32. The residential tenancy agreements for the two sets of tenants only speak collectively of the duty of the two tenants within each lease to maintain the common areas. When there are two sets of tenants each having access and use of the common area, how is the responsibility between the two sets of tenants to be allocated? Whose bond is able to be retained for any failure to maintain the common areas? If the lessor also has the right to use the common areas then the lessor may inherit some of the responsibility for maintaining them and the charges for the utilities consumed in the common areas.

⁴ Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.3.7]

33. The common areas have utilities attached. There is no separate metering in the premises for each bedroom and for the common areas. It is not possible to determine, as between the two sets of tenants, who has consumed what electricity, water and gas. How then, does the lessor determine the apportionment for these charges and whose bond is at risk for non-payment?
34. The lessor could have opted for:
- (a) there to be one joint tenancy to the four tenants of the whole of the premises. In this case the utilities would be in their joint names; the lessor's right of entry would be curtailed; the extent of exclusive use and quiet enjoyment would be clear; and the maintenance issue would be an intra-tenant matter;
 - (b) the lessor to retain possession of the premise and create 'occupancy agreements' for the two sets of occupants, with non-exclusive rights to use the common areas. In this case the extent of the occupants use and quiet enjoyment would be defined at the lesser level of an occupant but with a commensurate reduction in rent and bond; utilities would remain a lessor cost, maintenance of the common area would be a lessor responsibility; and the lessor would retain his right of entry.
35. Given the level of the rent charged and the collective references to the tenants in the agreements, the Tribunal infers that the parties intended that the two sets of tenants collectively had exclusive use of the common areas per alternative [28(a)] above. In this event the lessor had no right of entry without consent.

Which of the additional terms of the residential tenancy agreement are lawful and which are not?

36. It is not open to the parties to include just any term they choose into a residential tenancy agreement. For good policy reasons the RTA has curtailed the freedom to contract (standard term 3 of the RTA).⁵ It is doubtful that any of the additional terms set out in paragraph [6] above are lawful, for various reasons. In the present case there is no purpose served in reviewing the reason

⁵ Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.219.1]

why each of these additional terms is probably unlawful. It is sufficient to indicate why items 15, 18, 19 and 23 are unlawful.

Utilities

37. In relation to item 15, the responsibilities for utilities is determined by standard terms 42, 43, 44 and 48 of the RTA:

42 The lessor is responsible for the cost of the following:

(c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;

43(1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

(2) The tenant is responsible for the connection of all services that will be supplied in the tenant's name.

44 The lessor must pay the annual supply charge associated with the supply of water or sewerage.

48(1) The lessor is responsible for undertaking or arranging all readings or measurement of services, other than those that are connected in the name of the tenant.

(2) The lessor must provide the tenant with an opportunity to verify readings and measurements.

38. In the present case there was no separate metering of utilities which would permit any charges to the tenants under standard term 42 of the RTA. The lessor is responsible for the supply charge, not the tenants (standard term 44 of the RTA). The lessor did not give the tenants a copy of the readings or accounts from the supplier (standard term 48). The utility charges paid by the tenants are repayable to them.⁶

Lessor's right of access

39. In relation to item 18, the relevant notice period for the lessor to enter is governed by standard terms 75-79:

75(1) The lessor must not require access to the premises during the tenancy except as provided by the law, this tenancy agreement, the Residential Tenancies Act, or an order of the tribunal.

(2) The tenant may permit access to the premises by the lessor at any time.

⁶ Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.38.2]-[2.39.2]

76 The lessor must not have access to the premises—

- (a) on Sundays; or*
- (b) on public holidays; or*
- (c) before 8 am and after 6 pm;*

other than—

- (d) for the purpose of carrying out urgent repairs or for health or safety reasons in relation to the premises; or*
- (e) with the consent of the tenant.*

77 The lessor may inspect the premises twice in each period of 12 months following the commencement of the tenancy.

78 In addition to the inspections provided for in the previous clause, the lessor may make an inspection of the premises—

- (a) within 1 month of the commencement of the tenancy; and*
- (b) in the last month of the tenancy.*

79(1) The lessor must give the tenant 1 week written notice of an inspection.

(2) The inspection must take place at a time agreed between the parties with reasonable regard to the work and other commitments both of the tenant and of the lessor (or their agents).

(3) If the parties are unable to agree on an appropriate time, the lessor or the tenant may apply to the tribunal for an order permitting access at a specified time.

40. The right contained in the house rules to enter at any time on 10 hours' notice is inconsistent with each of the above restrictions.

The tenants' quiet enjoyment

41. In relation to item 19, in addition to the restrictions on the lessor's right of entry above, standard terms 51-53 provide for the tenants' exclusive right of possession and quiet enjoyment:

51 The lessor guarantees that there is no legal impediment to the use of the premises for residential purposes by the tenant.

52 The lessor must not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises.

53 Unless otherwise agreed in writing, the tenant has exclusive possession of the premises, as described in the agreement, from the date of commencement of the tenancy agreement provided for in the agreement.

42. The tenants' quiet enjoyment is predicated on the expectation that the premises are the tenants' home and the tenants expected the lessor to behave as such. It is not a hotel or boarding house or any of the other category of contractual licenses that are excluded from the definition of a residential tenancy in sections 6B-6F of the RTA. Tenants are expected to be able to use the premises in much the same way as the lessor is entitled to use his home, although in the present kind of arrangements conflicts may arise between the two sets of tenants both seeking to exercise these rights. The tenants do not have to tolerate uninvited intrusions from the lessor, threats of various kinds including unlawful threats of eviction and unpleasant discourse in their home with the lessor (or any third party).⁷
43. Breaches of the tenants' right to quiet enjoyment attract compensation.⁸

Evictions

44. In relation to item 23 there are many restrictions in the RTA and standard terms on the lessor's right to evict a tenant. The general rule is set out in section 36 of the RTA:

36(1) 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:

- a) if a fixed term agreement ends and the tenant vacates the premises on or after the end of the agreement;*
- b) if a tenant notifies the lessor in the form approved under section 133 (Approved forms—Minister) for a termination notice, and vacates the premises in accordance with the notice;*
- c) if a tenant terminates an agreement under section 46A because the tenant has accepted aged care or social housing accommodation;*
- d) if the ACAT terminates an agreement under division 4.3, division 4.4 or division 6.5A;*

⁷ Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.50.1]

⁸ Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.187.2]-[2.187.6]

e) if the ACAT makes a termination and possession order in relation to the premises that are the subject of the agreement under division 4.4 , division 4.5, division 6.5 or division 6.5A;

f) if the tenant abandons the premises that are the subject of the agreement;

g) if a person takes action in accordance with section 64;

h) if the tenant and lessor agree in writing to terminate the agreement and the tenant vacates the premises in accordance with the agreement to terminate;

(i) if the tenant and the lessor are the same person;

(j) 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;

...

45. Item 23 permits eviction by the lessor for breach of any of the additional terms, including for example, failing to show respect to the lessor. Nothing in section 36 permits eviction based only on a breach of 'house rules'. Section 36 and the standard terms regulate the kinds of breaches and the severity of breaches that justify service of a notice of termination, which mostly are be preceded by a notice to remedy. Even then the Tribunal retains various discretions and is called upon to make various evaluative judgements about whether a tenancy will be terminated.

The use of holding deposits

46. Section 18 of the RTA bans holding deposits:

18(1) A lessor must not require or accept a holding deposit.

(2) An agreement to pay a holding deposit is void, and any amount paid under an agreement to pay a holding deposit is recoverable as a debt owing by the person to whom the amount was paid to the person who paid the amount.

(3) In this section:

***holding deposit** means an amount paid or payable by a tenant to a lessor in consideration for the lessor not entering into a residential tenancy agreement with a third party in relation to premises pending the tenant entering into a residential tenancy agreement with the lessor in relation to the premises.*

47. The lessor had no right to require and take a holding deposit.

Rent in advance

48. Standard Term 28 of the RTA limits rent in advance to two weeks:

The lessor must not require an amount of rent paid in advance greater than 2 weeks or a longer period nominated by the tenant.

49. The lessor was not entitled to require more than this.

Key bond

50. Section 15(2)(e) of the RTA and standard term 24 of the RTA precludes a second bond for the keys:

...15.A lessor must not require or accept any consideration for:

...

(e) giving a tenant a key to the premises; or

51. The lessor was not entitled to charge the deposit for the keys.

Rental Bond lodgement

52. Section 23(3) and Standard Term 17 require the lessor to lodge the rental bond with the Office of Rental Bonds:

23(3) If the tenant pays the bond to the lessor and not to the lessor's agent, the lessor must, before the prescribed period ends, deposit with the Territory—

(a) the amount of the bond; and

(b) a notice in accordance with section 25.

Maximum penalty: 20 penalty units.

17 If the lessor requires a bond, the bond must be lodged with the Office of Rental Bonds.

53. The lessor did not deposit the bond and only returned it to the tenants after the tenants had commenced proceedings in the Tribunal. It is unknown what the lessor would have done with the bond had the tenants not commenced these

proceedings. It is also unknown how many other bonds the lessor has taken and not lodged with the Office of Rental Bonds.

The failure to provide the tenants with access to a mailbox and parking bays

54. The tenants are entitled to exclusive use of the 'premises'. The premises are defined in Dictionary to the RTA:

"premises" includes—

(a) any habitable structure, whether it is fixed to the land or not; and

(b) part of any premises; and

(c) any land, buildings or structures belonging to the premises.

55. Section 71 of the RTA provides for a rent reduction where there is a withdrawal or loss of any 'facilities' that form part of the leased premises:

71(1) On application by a tenant, the ACAT must order a reduction in the rental rate payable under a residential tenancy agreement if it considers that the tenant's use or enjoyment of the premises has diminished significantly as a result of any of the following:

(a) the loss or diminished utility of an appliance, furniture, a facility or a service supplied by the lessor with the premises as a result of—

(i) the withdrawal of the appliance, furniture, facility or service by the lessor; or

(ii) the failure by the lessor to maintain the premises and any appliance, furniture or facility supplied with the premises in a reasonable state of repair, having regard to their condition at the commencement of the residential tenancy agreement; or

(iii) the failure by the lessor to provide and maintain the locks or other security devices necessary to ensure that the premises are reasonably secure;

56. The premises in question are part of a strata complex. The parking bay and mailbox form part of the unit title and go with the tenancy of the premises unless explicitly excluded in the residential tenancy agreement. This exclusion did not appear in the present residential tenancy agreements. The lessor's failure to provide keys to the mailbox and to withdraw the parking bay is a breach that

would have warranted a rent reduction; as would the withdrawal of the controllable air conditioner.⁹

Failure by the lessor to provide ingoing and outgoing condition reports

57. Standard Terms 21, 22, 23 and 23A require that the lessor prepare and give to the tenants copies of the ingoing and outgoing conditions reports:

21(1) Within 1 day of the tenant taking possession of the premises, the lessor must give 2 copies of a condition report completed by the lessor to the tenant.

(2) The condition report must be on, or to the effect of, the condition report form published by the Territory.

22(1) The tenant must examine the report and indicate on the report the tenant's agreement or disagreement with the items.

(2) Within 2 weeks after the day the tenant receives the report, the tenant must return 1 copy of the report to the lessor, signed by the tenant and indicating the tenant's agreement or disagreement with the report or parts of the report.

23 The lessor must keep the condition report for a period of not less than 1 year after the end of the tenancy.

23A(1) At the end of the tenancy, an inspection of the premises must be carried out in the presence of the lessor and tenant.

(2) A condition report based on the inspection must be completed in the presence of, and signed by, the lessor and tenant.

(3) A party may complete and sign a condition report in the absence of the other party if the party has given the other party a reasonable opportunity to be present when the report is completed and signed.

58. The lessor did none of these things.

Consideration of the issues

59. The tenants were living in close proximity to the lessor and the level of acrimony had reached the point of police involvement and personal protection orders. The lessor had not demonstrated any intention of respecting their quiet enjoyment.

⁹ Anforth, Christensen and Adkins, *Residential Tenancies Law and Practice in NSW* (The Federation Press, 7th ed, 2017) at [2.13.11]

60. The Tribunal finds that:

- (a) the lessor was in breach of residential tenancy agreements by reason of his conduct in entering the premises uninvited, his confrontational attitude to the tenants, his threats by text messages including threats of third-party violence, and his threats to disconnect the utilities;
- (b) the tenants were entitled to seek the immediate termination of their tenancies under section 44 of the RTA:

44(1) On application by a tenant, the ACAT may terminate a fixed term agreement in accordance with this section if satisfied that—

(a) the tenant would suffer significant hardship were the agreement to continue; and

(b) the level of hardship is such that it is appropriate and just to terminate the agreement during its fixed term.

- 61. The Tribunal orders the tenancies terminated on 31 March 2020 after which no rent is payable. The lessor's claim for lost rent beyond this date is dismissed.
- 62. The Tribunal is not satisfied that the tenants left the premises in any worse state of cleanliness than they received it. It was the lessor's responsibility to prepare an ingoing condition report which he did not do. The effect to this omission is that the Tribunal has no ready means of knowing the state of the premises at the commencement of the tenancy other than the evidence of the tenants themselves and their video. The lessor's claim for cleaning costs are dismissed.
- 63. The lessor did not comply with the law concerning the utility costs. He was not entitled to charge for the supply fee or to make a profit. He did not provide the tenants with the invoices from the suppliers. There was no separate metering for the two tenancies operating with the one premises that would permit utility charges.
- 64. The lessor has already received payments for utility charges to which he was not entitled. He could and should have factored the utility charges into the rent. The rent charged to each set of tenants for their one room and shared use of the common area appears excessive and could be taken to include the utilities. The rent could have been reduced for the lack of parking bay and mailbox access.

65. There are no claims from the lessor that are meritorious, and the claim is dismissed.
66. The tenants are entitled to:
 - (a) a return of their bond; the holding deposit, the bond for the keys;
 - (b) the Tribunal lodgement fee;
 - (c) a return of the utility charges paid;
 - (d) some rent reduction for the lack of parking access, mailbox access and withdrawal of the air conditioning service;
 - (e) compensation for the breaches of quiet enjoyment suffered;
 - (f) compensation for the inconvenience and costs imposed on them having to move prematurely from the premises.
67. The Tribunal does not have a clear understanding of the amounts that arise under paragraph [66] above. The matter will need to be relisted for that purpose alone.
68. To that end, the tenants are to file and serve an outline of the amounts they claim pursuant to paragraph [66] and the reasons for each claim.
69. Given the critical nature of the findings against the lessor, his name is suppressed to permit the lessor an opportunity to make any application he chooses on this issue when the matter is relisted.

Quantum of compensation

70. The Tribunal gave an interim decision on 21 September 2020. Paragraphs [1]-[69] of this decision contain reasons for that interim decision, with the quantum of the claim to be determined at a later date. The interim decision found liability in the applicants/tenants favour for various breaches by the respondent of the residential tenancy agreement between the parties. The respondent/lessor cross claim was dismissed. On the evidence it was not possible to determine the amount of compensation to the tenants and the matter was relisted for that purposes.

71. On 6 November 2020 the Tribunal made the following orders:
 1. The Registrar is to send to the first tenant a copy of the draft decision dated 21 September 2020.
 2. The lessor has two weeks to provide written submissions as per the draft decision, and the tenant submissions 1 October 2020.
 3. The tenants have one week to provide a response.
72. When the matter was relisted on 12 October 2020 for hearing by telephone, the tenants were jointly represented by Ms Yang and the respondent appeared in person. Ms Yang informed the Tribunal that some of the tenants had now returned to China and that she had authority to represent them all, notwithstanding that there were two distinct tenancy agreements.
73. It transpired that the respondent/lessor had not received the interim decision from the Tribunal notwithstanding that the Tribunal records showed it to have been sent. The respondent repeated his position that he was in fact in the right, and the tenants were the party in the wrong. The Tribunal told the respondent that the liability issue had already been determined and that the purpose of the hearing was limited to assessment of compensation. The Tribunal explained the appeal rights to the respondent and pointed out that it was still open to him to appeal the interim decision once the final decision had been made. The respondent stated his intention to adopt this course of action.
74. The hearing was completed, and orders were made for a timetable for the parties to file and serve any final written submissions, limited to the issue of assessing compensation.
75. The tenants did not file final submissions on the quantification issues. On 5 November 2020 the respondent filed his final submissions. He again asserted that he was the wronged party. He did not address the quantum of compensation issue save to say that the whole of the bond had already been returned to the tenants.
76. The Tribunal orders that the respondent pay:

- (a) to tenants, Ms Quin and Yang, the \$200 for the unlawful bond for the key;
 - (b) to all four tenants in equal shares, the sum of \$150.50 for the Tribunal application fee,
77. The amount of compensation for the mailbox and parking spot was not the subject of any quantification by the tenants. The Tribunal allows nothing for this head of compensation.
78. The Tribunal is unable to quantify the utilities refund issues. The starting point would have been a full refund to both sets of tenants, with some offset for actual use by the tenants on a *quantum meruit* basis. The respondent asserts that the tenants left owing utility charges. That claim by the respondent was dismissed as part of his cross claim, but it is probably the case that there is not much owed either way for these charges.
79. The major claim by the tenants was for breach of quiet enjoyment leading to their decision to vacate the premises. The events are described in the interim decision above. The amount to be awarded depends on the nature and extent of the disruption caused by the respondent's actions. In the case of Ms Qin this was nothing as she was in China for the whole of the time and so suffered no disturbance. So, the compensation payable to Ms Fang and Mr Guo will be more than that paid to Ms Qin and Ms Yang.
80. The assessment of compensation for breach of quiet enjoyment involves a comparison of the amounts awarded to other persons for similar breaches.¹⁰ The total period of the tenancy was only about eight weeks but the disturbances in that time were intense and characterised by aggression. The Tribunal allows the sum of \$3,000 to Ms Fang and Mr Guo jointly; and the sum of \$1,500 to Ms Yang.
81. In total the Tribunal awards:
- (a) The sum of \$1,775.25 jointly to Ms Qin and Ms Yang;
 - (b) The sum of \$3,075.25 jointly to Ms Yang and Ms Gao.

¹⁰ Anforth, Christensen and Adkins 'Residential Tenancies Law and Practice in NSW' at [2.187.7]

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Senior Member A Anforth

Date(s) of hearing	30 April 2020, 8 July 2020, 12 October 2020, & 6 November 2020
Applicant:	In person
Respondent:	In person