AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: CARRON ELVIN V EFFIE MEISCHKE & STEPHANIE LEE [2008] ACTRTT (18)

RT 623 of 2008

Catchwords: Compensation for abandonment; the duty to mitigate losses;

Tribunal: A. Anforth, Member

Date: 8 October 2008

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 623 of 2008

CARRON ELVIN
(Applicant/Landlord)

AND:

EFFIE MEISCHKE and STEPHANIE LEE
(Respondent/Tenant)

DECISION

Tribunal :A. Anforth, Member

Date :8 October 2008

Decision :

1. The tenants are to pay the landlord the sum of $377.14 for rent to 25 August 2008, $33.13 for water and $280.40 for advertising and reletting fee being a total of $690.67.

2. The Office of Rental Bond is to pay the landlord the sum of $690.67 and is to remit the balance to the tenants.

3. The landlord is not entitled to the further rent loss stemming from the landlord's decision to re-advertise the premises at the same rent.

.....
Member

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 623 of 2008

CARRON ELVIN
(Applicant/Landlord)

AND

EFFIE MEISCHKE and STEPHANIE LEE
(Respondent/Tenant)

REASONS FOR DECISION

1. The parties entered a residential tenancy agreement 18 January 2008 in respect of premises at 82 Lewin Street, Lyneham in the ACT. The tenancy agreement provided for a fixed term commencing on 19 January 2008 for a period of 12 months at a rent of $880 per fortnight and a bond of $1760. The residential tenancy agreement was in standard form with no special clauses and no endorsed clauses.

2. On 22 July 2008 the respondent/tenants gave the landlord's agent 28 days notice by email of their intention to vacate the premises for reasons associated with their employment. The notice read as follows:

> I am writing as a follow up to our telephone conversation yesterday, regarding our unfortunate need to leave the 82 Lewin St Lyneham property, ahead of the lease termination. The reasons for leaving relate to one occupant moving to Melbourne for work and the rest of the household having changed working conditions which subsequently result in different location needs.
>
> Please accept this email as the 28 day-notice period required for the lease termination (therefore up until the 19 August 2008). In accordance with verbal recommendations and advice of the tenancy tribunal - we are willing to pay for reasonable advertising costs for the weeks of our notice.
>
> Furthermore, should new suitable tenants be found who wish to move in prior to the end of our notice, we are very happy to vacate the property earlier and terminate the lease at this time (the new tenants assuming the rental costs etc).
>
> We would be very grateful if you would forward this notice to the owner for their consideration at the earliest. If there should be any concerns regarding this matter and a decision is made to apply to the Tribunal for confirmation and/or compensation, we would be grateful for notification of intent to do so by COB Friday 25 July.
>
> Should the owner or a representative of Maloney's wish to speak to either Effie Meiscke or myself (Stephanie Lee) in person, please do not hesitate to call.
> Effie Meiscke: 6234 1132
> Stephanie Lee: 6206 4914 (or mobile: 0405 801 663).

3. By letter of 23 July 2008 the landlord's agent advised the respondent/tenants that until specific instructions were obtained from the landlord the tenants should proceed on the basis that their request for an early release from the tenancy agreement was denied. By letter of 25 July 2008 the landlord's agent confirmed his instructions to the effect that the request for early release from the tenancy

agreement was denied and that the landlord would make application to the Tribunal pursuant to prescribed term 84(b).

4. On 29 July 2008 the landlord made application to the Tribunal for an order requesting the confirmation of the fixed term of the agreement.

5. The Tribunal notified the respondent/tenants of the application and asked that they file their response to the landlord's application by 12 August 2008. The matter was listed before the Tribunal on 19 August 2008.

6. On 19 August 2008 Mr Taylor, real estate agent, appeared for the landlords and there was no appearance on behalf of the respondent/tenants and no response had been received from them. Mr Taylor advised the Tribunal that a new tenant had been found at the same rent and the new tenancy commenced from 25 August. The respondent/tenants had paid rent to 18 August 2008. Mr Taylor said his client sought compensation in two forms. The first was the advertising and reletting costs associated with finding the new tenant.

7. The second form of compensation sought requires some explanation. Mr Taylor informed the Tribunal that it was his understanding that the landlord's duty to mitigate her losses contained in section 38 *Residential Tenancies Act 1995* (the Act) precluded the landlord from re-advertising the premises at a rent greater than the rent that apply to the respondent/tenants i.e. $440 per week. For this reason the landlord advertised and secured a new tenant at the same rent.

8. The problem arises for the landlord via the effect of prescribed term 35 of the Act. Prescribed term 35 provides that the landlord may not increase the rent in intervals of less than 12 months starting at the commencement of the tenancy. Thus under the original tenancy with the respondents, the landlord was entitled to increase the rent on 19 January 2009. But under the new tenancy the landlord is locked into the same rent until 25 August 2009. In a rising rent market this limitation on the landlord is likely to be productive of a financial loss.

9. If Mr Taylor's assumption that section 38 prohibit advertisement at a rent greater than the existing rent paid by the Respondent/tenants were true, then the consequence to the landlord set out above follows as a matter of logic and the potential loss of the increased rent in the period 19 January 2009-26 August 2009 would be a loss incurred by the landlord that arises directly from the tenants abandonment of the premises. The Tribunal notes in passing that one obvious obstacle to the landlord recovering that loss is the rather large element of speculation involved in divining the state of the rental market in mid January and mid August 2009, together with the other inherent uncertainties of life.

10. Following discussion with Mr Taylor concerning the scope of the landlord's duty to mitigate the Tribunal adjourned the matter and gave directions for the both parties to file and serve further particulars of the claim and any response to the claim by set dates. A copy of these directions was forwarded to the parties by the Tribunal.

11. On 21 August 2008 Mr Taylor filed and served the landlord's submissions with the Tribunal and served a copy on the tenants. Those submissions read:

> Further submission in relation to break lease awards of compensation.
> We are requesting that consideration in the amount of the compensation to be awarded be given to the following points:
>
> 1. The burden of the rules governing the duty to mitigate the losses for a tenant places the owner in the position of only requesting the existing rental amount for any replacement tenants. This has been the stance of some of the Tribunal members in previous hearings.
> 2. Accepting that the advertised rent should be at the current rent binds the Lessor to a 12 month rental cap as per prescribed terms 34 and 35 that reads
>
> > "Increase in rent
> > 34. The amount of rent shall not vary from period to period except as provided by this tenancy agreement and the Residential Tenancies ACT.
> >
> > 35. The rent may not be increased at intervals of less than 12 months from either the beginning of the tenancy agreement for the first increase, or after that, from the date of the last increase."
>
> and places the lessor at a financial loss for a potential rental increase for the period of abandonment as the agreement was abandoned 5 months prior to its rightful expiry date, this means that the rental increase period is further extended by 5 months.
>
> Example; The original fixed term tenancy commenced i 9/01/08 for 12 months and was due to expire on 18/01/09 allowing a rental increase to be made on that date. Using the current formula approved by the Tribunal of 7.51% with a variance of 20%, this would entitle the lessor to a new weekly rental amount of $479.65. The increased amount of $49.65 multiplied by the extended 22 weeks, represents a loss of rent of $1092.30 for the lessor.
>
> 3. The Act provides that the Lessor is entitled to compensation capped at one week's rent for, in part "reasonable costs of giving a right to occupy the premises to another person."
>
> 4. The unilateral act of the tenants in abandoning their tenancy agreement prior to the agreed fixed term date has created the loss stated in point 2 due to the enforced situation of giving the right to occupy to another person at the current rental.
>
> 5. That there is a GST component that forms part of the costs incurred to the Lessor.
>
> 6. That as of this date the cheapest 3 bedroom property in Lyneham is $460.00 per week representing an increase of $20.00 multiplied by 22 weeks equals $440.00.
>
> 7. We would also ask that the Tribunal accept that there has been advertising costs in the form of internet advertising in the amount of $40.70 (ledger provided to the Tribunal on 19 August 200S).
>
> We request that the tribunal awards the requested amount of $440.00 (being one weeks rent) as compensation under section 62 of the Act and rent until the new tenancy commences being $251.45 and water usage in the amount of $33.15.

12. The tenants did not comply with the orders of 19 August 2008 until 29 September 2008 when they forwarded an email to the Tribunal which read:

> I am writing on behalf of Effie Meiscke and myself, Stephanie Lee, in regard to the termination of the lease for the property 82 Lewin St Lyneham and the subsequent proceedings undertaken by Maloney's Real Estate agency to the Tenancy Tribunals.

Effie advised me this morning that the Tenancy Tribunal had kindly delayed handing down a decision (apologies if I misuse terms here- not being a lawyer myself:-) until they received our submission in our defence against Maloney's claim.

We are very grateful for the consideration shown to us by the Tenancy Tribunal and apologise for the delay in contact. We had understood that, having missed the official deadline, the matter would be resolved without our submission.

Due to time restraints in our current positions, we haven't been able to put together a formal submission but hoped to reiterate what we have already communicated to Maloney's Real Estate. That is- we apologise sincerely for our request for early termination of the lease, it was due entirely to unforeseen events and we have subsequently followed all Maloney's directions.

We:
1. provided more than adequate notice to Maloney's (as per conditions of the lease) until the new tenants were able to move in;
2. paid all advertising costs;
3. had the carpets professionally cleaned and spent several days cleaning the property to a better condition than on arrival (as reflected in the original condition report)
3. agreed to pay an additional week's rent to compensate the owner/Maloney's for the loss of a possible rent increase (ie deferring the possibility of a rent increase for a further 6 months)

On satisfying all these conditions, we expected the matter was resolved and happily awaited the notification from Maloney's of the lease termination etc. It was with some surprise we received notice that they would continue with proceedings.
While fully appreciate the extra challenges posed by an early termination of lease- given that the house was so quickly and satisfactorily re-occupied and that we had not only maintained the house in excellent condition throughout but also left it in pristine condition- we do feel that we have been more than flexible with the matter and are looking forward to a resolution.

Having fully recompensated the owner/Maloney's for possible lost revenue and additionally followed their instructions without delay, we appeal to the Tenancy Tribunal that they might resolve this matter in accordance with the actions we have already undertaken.

Many thanks for your time with this, please don't hesitate to contact me for further information (I haven't been involved in this before so please let me know if you need anything else! :)

The issues for consideration:

13. The first issue for consideration is the role of sections 62 and 107 of the Act in determining what is expected of a landlord in circumstances where a tenant abandons the premises or serves notice of intention to abandon in a fixed term tenancy.

14. The second issue concerns the prima facie level of compensation a landlord is entitled to in the above circumstances.

15. The third issue concerns the nature and extent of the landlord's duty to mitigate their losses under section 38 of the Act and in particular whether the landlord is restricted to advertising for a new tenant at the existing rent.

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

16. 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.

17. 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.

18. 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.

19. 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:

20. 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).

21. Dealing with the advertising and reletting costs first. The advertisement costs are self evident. The reletting fee is the fee paid by the landlord to the landlord's agent under the managing agency contract between the landlord and her agent for the agents work in finding and securing a new tenant. Under most managing agency agreement in the ACT and NSW this fee is also the first weeks rent which is the case in the present instance.

22. However, when a fixed term tenancy comes to an end the tenant is entitled to serve notice and vacate at which time the landlord will be put to the cost of finding a new tenant and will thus incur both the advertising and reletting costs. In this sense when these costs are incurred following an abandonment part way through the fixed term of a tenancy, they are costs brought forward as opposed to new costs. This is the issue to which section 107(4) is directed. Traditionally this tribunal and its NSW counterpart has taken the approach of allowing the landlord a pro-rata of the advertising and reletting fees calculated on the basis of the percentage of the fixed term that had expired at the point of abandonment. In the present case the abandonment occurred when the tenants ceased paying rent from 18 August 2008 which was 7 months into a 12 month tenancy. Accordingly the landlord is entitled to $7/12^{th}$ of the advertising and reletting fee to a maximum of 1 weeks rent.

23. The landlord is entitled to $7/12^{th}$ of the sum of $40.70 (advertising) and $440 (reletting fee) which is $280.40. In addition the landlord is entitled to the water consumed by the tenants and not paid, being $33.13.

24. The landlord's prima facie right to lost rent is calculated by reference to the rent payable under the Respondent/tenants tenancy until a new tenant is found or to the end of the fixed term, which ever occurs first and is capped at the monetary value of 25 weeks rent. In the present case the new tenancy commenced on 25 August 2008 and the Respondent/tenants rent was paid to 19 August 2008. This leaves an amount of 6 days rent payable by the tenants to the landlord of $377.14.

25. This sum will be payable by the tenants to the landlord unless the tenants are able to convince the Tribunal that:

    (a) the landlord has in some way failed to mitigate her losses relating to the manner in which the new tenant was sought; and
    (b) had the landlord not failed to mitigate her losses in the manner alleged by the tenants then the 6 days of rent loss would not have occurred.

The third issue- the landlord's duty to mitigate her losses:

26. 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.

27. 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."

28. 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.

29. 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."

30. 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."

31. 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)."

32. 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.

33. 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).

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

Conclusion:

39. The landlord is entitled to the $377.14 for rent to 25 August 2008, $33.13 for water and $280.40 for advertising and reletting fee.

40. The landlord is not entitled to the further rent loss stemming from the landlord's decision to re-advertise the premises at the same rent.

A. Anforth
8th October 2008