ACT CIVIL & ADMINISTRATIVE TRIBUNAL

MIGHTYBOY PTY LTD v BARKER-SMITH (Residential Tenancies) [2020] ACAT 111

RT 267/2020

Catchwords: **RESIDENTIAL TENANCIES** – termination by tenant – termination under clauses 90 and 91 of the standard terms – whether there was a valid notice to vacate – tenant's rights to terminate the lease for failure to perform urgent repairs – what level of compensation the lessor is entitled to under the break lease clause – notice to vacate and subsequent termination invalid – tenant's right to compensation for lack of air-conditioning

Legislation cited: *Residential Tenancies Act 1997* ss 8, 59, 60, 76; standard terms 55, 56, 57, 58, 59, 60, 82, 90, 91
Unit Titles (Management) Act 2001

Tribunal: Senior Member D Mulligan

Date of Orders: 16 December 2020
Date of Reasons for Decision: 16 December 2020

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) RT 267/2020

BETWEEN:

MIGHTYBOY PTD LTD
Applicant/Lessor

AND:

CHLOE BARKER-SMITH
Respondent/Tenant

TRIBUNAL: Senior Member D Mulligan

DATE: 16 December 2020

ORDER

The Tribunal orders that:

1. The respondent is to pay the applicant the sum of $2,972.36.

2. To satisfy part of that debt I direct ACT Rental Bonds on behalf of the Territory to release the bond of $2,200 to the lessor, leaving a balance of $772.36 owing to the applicant.

3. The respondent is to pay the applicant the sum of $772.36 within one calendar month of the date of this decision.

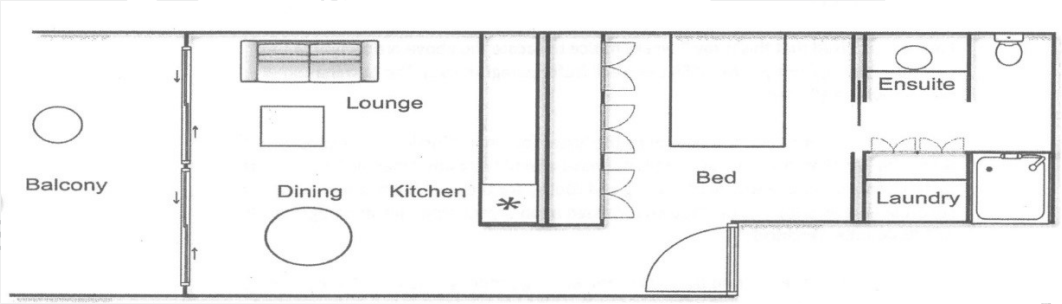
……..
Senior Member D Mulligan

REASONS FOR DECISION

1. The applicant, Mightyboy Pty Ltd, owns a property located at 7/19 Eastlake Parade, Kingston, ACT, 2604 (**the property**).

2. The properties that make up 19 Eastlake Parade, Kingston, are all members of a unit complex under the *Unit Titles (Management) Act 2001*.

3. The property is a studio apartment, the layout of which is as set out in this diagram:[1]



4. On 20 December 2019, the respondent in this matter, Ms Chloe Barker-Smith leased the property from the applicant. The parties signed a standard form tenancy agreement under which the respondent agreed to lease the property from the applicant from 20 December 2019.

5. The agreement was for a 12-month fixed term tenancy between 20 December 2019 and 19 December 2020, which could be followed, if both parties wanted to continue the arrangement, by a month-to-month tenancy.

6. Under the tenancy agreement, the respondent agreed to pay rent at the rate of $550 per week. She also paid a bond of $2,200 which was deposited with ACT Rental Bonds.

7. The respondent moved into the property in mid-January 2020.

8. On moving into the property, the respondent noted two problems. Firstly, the dishwasher was not working and secondly the air-conditioner was not working to an acceptable standard.

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[1] Exhibit R3 – Ref# 38

9. The air-conditioning unit provided the only mechanical means of heating and cooling the property.

10. The air-conditioner was a split system. The compressor was located on the roof of the units, from where ducting took the conditioned air to the property, where it entered by way of ceiling vents.

11. According to the respondent on 14 January 2020, the air-conditioner was "not functioning correctly only has a week [sic] airflow and shuts off after 5 minutes of operation."

12. The respondent emailed the applicant's agent, Ms Meg Moynihan of Luton Properties (**Luton**), at about 9:59am on 14 January 2020. The subject line was "7/19 Eastlake Parade faulty dishwasher" and the content of the email only referred to the problem she was having with the dishwasher which was not working.

13. The email did not refer to any issues with the air-conditioner.

14. Following that email it appears that the respondent and Ms Moynihan spoke on the phone and the issue of the air-conditioner was discussed.

15. At about 11:11am, Ms Moynihan emailed the respondent and in part said, "The air-conditioning also needs to be set to a certain setting which we can show you."

16. Later that day Ms Moynihan and a colleague, Ms Zoe Wheelhouse, went to the property where they inspected the dishwasher and the air-conditioner.

17. On 15 January 2020, Ms Moynihan emailed the respondent. The email in part addressed the air-conditioner and how it should be used to best effect. The email stated:

> *In regards to the air-conditioning, please see the installers instructions:*
> *To keep it basic,*
> *1. Fan speed needs to be set to high (not auto as this will lower fan speed)*
> *2. Both indoor units to be used at the same time. These units shared a common return air cavity and if one is used it will draw unconditioned air*

> *from the other room. Using both at the same time will aid in air movement through the apartment as a whole as this is the greatest flow with the current air-conditioning system*

18. It should also be noted that instructions for use were also taped to the air-conditioner's remote control, which instructed the user as follows: 'DO NOT PUT TEMP UNDER 22 DEGREES AC WILL SHUTDOWN!' [emphasis in original]

19. It appears to be the case that the applicant did not intend to do anything in relation to the air-conditioning after they inspected the system on 14 January and provided their advice as to how best to use the air-conditioner on 15 January 2020.

20. The respondent did not raise the issue in relation to the air-conditioner again between 15 January and 31 January 2020. During this period, it seems to me that the respondent was sufficiently satisfied with the functioning of the air-conditioner during the height of summer that there was no need to complain about it.

21. On Friday 31 January, the air-conditioner broke down and no longer functioned. The respondent emailed the applicant's agent on 1 February 2020 and told her of the issue. She said:

> *Just letting you know the air-conditioner stopped working yesterday evening. When I turn it on the unit doesn't blow any air and then will turn it's self off after about 5 mins. If you could please send someone to come and have a look that would be amazing.*

22. Ms Moynihan responded by email on Monday 3 February 2020, and said, in part:

> *I am contacting the body corporate to see if this is a building issue as we've had a few reports of air-conditioning systems not working in the outrageous heat over the weekend… Thanks Chloe, I'll be in contact with more updates shortly.*

23. On 7 February 2020, Ms Barker-Smith again wrote to Luton and asked:

> *I was wondering if you had an update for me about the faulty air conditioner, I still haven't heard anything from body corporate and it's still not working.*

24. On 11 February 2020, the respondent called Luton, with the result that Ms Moynihan agreed to discuss the matter of the air-conditioning with the owner.

25. On 16 February 2020, Ms Barker-Smith again emailed Ms Moynihan and advised her in the following terms:

> *Meg,*
>
> *I first emailed you about this on 1st of February, you replied on the 3rd of February stating that* [you] *would follow this up with* [the] *body corporate. Following this I was not contacted nor was I given an update of any action taken to repair the air conditioner.*
>
> *I then emailed you on the 7th of February requesting an update, which you ignored. I then call the office and left a message to you requesting an update on the 11th of February, where I had to call on 3 separate occasions to get you to call me back. During this time you said you would immediately call the owner to get permission to repair the air-conditioner and yet I still haven't been contacted on when it will be repaired.*
>
> *I am about to have major surgery on Monday as I have told you in my phone calls and will be extremely sick and in pain. As there are no windows in this apartment air conditioning is essential. As a female living in an apartment alone it is a security risk to solely rely on open door for airflow, especially since there is no security screens. I am now requesting that you send someone immediately to rectify this issue as it has now been 16 days since I have brought it to your attention and still nothing has been done.*
>
> *Chloe Barker-Smith*

26. On 17 February 2020, the respondent had the scheduled surgery. She was admitted to hospital overnight and then returned the property to convalesce the following day.

27. From 17 February 2020, the respondent's mother, Ms Sue Barker-Smith, liaised with Luton in an effort to have the air-conditioning repaired.

28. As a consequence of those discussions, it was arranged that Canberra Mechanical would visit the property on 19 February 2020, with a view to repairing the air-conditioner.

29. By email of 20 February 2020, Canberra Mechanical provided the results of their investigations. The email stated:

> *Hi Zoe,*
>
> *Unfortunately, I don't have good news for this unit.*
>
> *We found the compressor (main component of the outdoor system) visibly burnt and requiring replacement. The system is an older model approx 10yo and I am waiting on part availability from our supplier. Due to age of system, we do not recommend repairs even if parts are available.*
>
> *The second option would be to replace the system, however this is going to be a difficult installation. To remove the existing indoor units (mounted in the ceiling space), we will need to cut the ceiling. We will then put the new indoor system in before the roof will need to be patched and painted.*
>
> *Third option being the wall mounted system in the lounge room: I would highly recommend getting onto the strata/body corporate ASAP to see if they will approve an outdoor unit to be mounted on the balcony. If we can get approval here, we can get a wall mounted system installed ASAP.*
>
> *NOTE: we will not be able to install a wall mounted system if we cannot get approval for outdoor on balcony.*
>
> *I will have a quotation through to you this afternoon with options.*

30. On 20 February 2020, the respondent and her mother went to Luton Properties and met with Ms Wheelhouse. According to the respondent she advised Ms Wheelhouse that she intended to give two weeks' notice to vacate due to the non-functioning air-conditioner.

31. The respondent and her mother allege Ms Wheelhouse supported the action outlined by the respondent and said words to the effect "that is exactly what I would do."

32. Ms Wheelhouse denies making the statement.

33. No contemporaneous correspondence has been made available to me that supports the assertion that Ms Wheelhouse made the statement.

34. Later that day, at about 3:32pm on 20 February 2020, Ms Wheelhouse emailed the respondent, and her mother confirming that she had spoken about the three replacement options outlined by Canberra Mechanical and that he was inclined to having the existing unit replaced but that "he will do what is more efficient for the unit and what can be done in the fastest time frame." The email stated:

Hi Sue and Chloe,

Thank you so much for coming past the office today.

I just want to confirm that I have spoken with the owner about the 3 options for the AC unit that have been supplied by Canberra Mechanical Services and he appears to be leaning more towards having the system that is there replaced rather than a wall mounted unit, however he will do what is more efficient for the unit and what can be done in the fastest timeframe. I have now asked CMS to supply the full specs and costs for each unit and we will get that submitted to the body corporate asap.

I didn' mention to him that you intend to break the lease in a 2 week period if the system isn't fixed and he obviously doesn't want that and has providers with your current situation and would like to have a new a unit installed for you asap to ensure your comfort.

I do just want to confirm that I have offered a temporary cooler or fan for you to use in the meantime but you have to turn that down and have borrowed a friend's cooler.

I am just waiting for the costs and specs to come through, the owner will confirm which ones he wants and then it will get submitted to the strata for approval.

As I understand you are wanting an answer now I will try my best to get all information across to you as soon as I have it.

I do sincerely apologise that this situation has caused discomfort but I can assure you that we at Luton's by doing everything we can to have a positive outcome.

I sincerely appreciate your patience and cooperation in this time.

Zoe Wheelhouse

35. At about 4:42pm, Ms Barker-Smith replied to Ms Wheelhouse's email of 3:32pm. The email stated:

Hi Zoe,

Thank you so much for getting back to us so soon.

In regard to the temporary cooler I just wanted to clarify, our friend has currently leant us the best air cooler money can buy, that does not require ducted air and it is still not sufficient to cool the apartment. It is not that we are rejecting the offer, it's that a temporary cooler is not a sufficient nor viable replacement to air conditioning when I am paying top dollar for rent.

I look forward to discussing this further in our meeting tomorrow.

Kind regards

Chloe

36. It can be seen from the content of Ms Wheelhouse's email of 3:32pm that she had told her client that Ms Barker-Smith intended to break the lease:

> *...in a two-week period if the system isn't fixed and he obviously doesn't want that*.

37. This comment brings into question what in fact was said by the three ladies during the course of that meeting at Luton's offices. Did the respondent and her mother say that Ms Barker-Smith "intended to give two weeks" notice to vacate due to the non-functioning air-conditioner? Or did they say that she intended to break the lease "in a two-week period if the system isn't fixed" as alleged in Ms Wheelhouse's email, which was sent shortly after the discussion between the three women on 20 January 2020.

38. I prefer the later statement for three reasons:

(a) First, because Ms Wheelhouse's email of 3:32pm was contemporaneous to the discussions she has with the respondent and her mother. That email was drafted shortly after the events in question took place and at a time when they would be fresh in Ms Wheelhouse's memory.

(b) Second, because shortly after receiving Ms Wheelhouse's email, the respondent sent Ms Wheelhouse an email to correct an error in the email Ms Wheelhouse had sent, relating to why the respondent had not taken up the offer of a cooler or fan. In that email she did not correct the assertion made by Ms Wheelhouse that she intended to break the lease "in a two-week period if the system isn't fixed".

(c) Third, Ms Barker-Smith had with her at the time she met with Ms Wheelhouse a letter that she had composed, and which was dated 20 February 2020. This letter gave notice of her intention to vacate the property on two weeks' notice.

It seems inherently unlikely that if on 20 February 2020, Ms Barker-Smith was unambiguously giving two weeks' notice to vacate that she wouldn't have given the letter drafted for that purpose to Ms Wheelhouse.

It seems to me, especially given the content of the email of 4:42pm that Ms Barker-Smith had not unequivocally committed to vacating the property on 20 February 2020, and that she was holding out some hope that the air-conditioning system could be revived or replaced, and she would not have to leave the apartment for good.

It should be noted that the respondent returned to Luton's office on 21 February 2020 and gave the letter to Ms Wheelhouse.

39. As a consequence I prefer the position adopted by Ms Wheelhouse that on 20 February 2020, she was not told by Ms Barker-Smith that she 'intended to give two weeks notice to vacate due to the non-functioning air-conditioner'. I accept that what was said was that Ms Barker-Smith intended to break the lease 'in a two-week period if the system isn't fixed'.

40. I also accept Ms Wheelhouse's contention that she did not make the statement "that is exactly what I would do".

41. On 21 February 2020, the respondent and her mother again returned to Luton properties at which time the respondent gave Luton the letter dated 20 February 2020, in which she stated that she was giving "2 weeks [sic] notice to vacate the above property' and that the 'termination of [the] tenancy will be [on] 5th March." The letter reads as follows:

> *Dear Zoe and Meg,*
>
> *Please be advised that this is my 2 weeks notice to vacate the above property that I am currently leasing from you for $550 per week (refer paragraph 91). The termination of tenancy will be 5th March.*
>
> *I am giving this notice due to a breach by the lessor for a non-functioning air conditioner. Given the fact that this apartment does not have a window or any other airflow, also the fact that this is the sole source of heating and cooling for the apartment, a functioning air conditioner is essential. Its breakdown is classed as an urgent repair (refer paragraph 60 (J) ACT Residential Tenancy)*
>
> *I advised you that the air-conditioner was not working properly when you came to look at the broken dishwasher on 14th of January. In fact, the air conditioner has never worked properly since I have been here. The air conditioner suffered catastrophic failure on 1st February (currently 20 days ago). Despite repeated attempts by me to get in contact with your*

> *office, you did not organise for repairs until 19th February. The repair was not able to be carried out and I still have a non-functioning air-conditioner.*
>
> *I was more than patient and reasonable waiting without an air conditioner in order to allow the landlord the opportunity to fix the problem. I waited 19 days without an operating air-conditioner which is part of my lease agreement. Now that it has been identified as a major repair, I expect that the landlord* [will] *be reasonable, fair and understanding as well. Furthermore, given the fact that I have had major surgery and will face further, far more involved surgery in the near future, this upheaval is detrimental to my recovery.*
>
> *Regards,*
>
> *Chloe Barker-Smith*

42. The respondent vacated the property on 5 March 2020.

43. By email of 12 March 2020, Ms Wheelhouse notified that the owner had:

> *...instructed me to make a full claim on the bond (4 x weeks rent $2200.00) for a break lease charge. The break lease charge at this point in the tenancy would usually be 6 weeks rent but he is only wanting to claim the bond at 4 weeks rent.*

44. The respondent did not agree that a break lease fee was appropriate in the circumstances and declined to agree that the rental bond, held by ACT Rental Bonds, should be released to the applicant.

45. As a consequence, the matter was referred by ACT Rental Bonds to ACAT for resolution.

The applicant's claim

46. The applicant filed an application on 5 June 2020, in which it sought a total of $3,940, made up of a six-week break lease fee ($3,300) and $640 to "reimburse for owners costs re-letting, advertising and gap rent between new tenancy."

47. The applicant elected to seek a six-week break lease fee as opposed to the four-week break lease fee it had earlier offered the respondent to settle the dispute.

48. The respondent did not file a response or counter claim in relation to the application.

The hearing

49. The matter was heard on 29 July 2020.

50. At the conclusion of the hearing, I gave the parties until 14 August 2020 to file and serve written submissions.

The law

51. The fundamental issues for me to determine are:

    (a) whether or not the respondent validly terminated the lease agreement and is therefore not responsible for any of the subsequent losses the applicant suffered as a consequence of the termination of the lease.

    And if not;

    (b) what level of compensation the applicant is entitled to under the break lease clause; and

    (c) whether the respondent is entitled to a reduction in rent payable as a consequence of the absence of air-conditioning for a period at the height of a very hot and hazy summer.

The respondent's power to terminate the lease for failure to perform urgent repairs

52. The starting point for a consideration of the issue is the standard terms which apply to all ACT tenancies which are found in the first schedule of the *Residential Tenancies Act 1997* (**the Act**).

53. In this case the tenant says that the lessor is not entitled to any compensation pursuant to section 8 of the Act, as she was entitled to cancel the contract because urgent repairs had not been carried out to fix the air-conditioner.

54. The first issue to consider is the nature of the lessor's obligation to undertake repairs and when those repairs must be completed.

55. Clauses 55, 57, 58, 59 & 60 of the standard terms apply to the current situation and in part provide:

Lessor to make repairs

55 (1) The lessor must maintain the premises in a reasonable state of repair having regard to their condition at the commencement of the tenancy agreement.

(2) The tenant must notify the lessor of any need for repairs.

57 Subject to clause 55, the lessor must make repairs, other than urgent repairs, within 4 weeks of being notified of the need for the repairs (unless otherwise agreed).

Repairs in unit title premises

58 If the premises are a unit under the Unit Titles Act 2001, and the tenant's use and enjoyment of the premises reasonably requires repairs to the common property, the lessor must take all steps necessary to require the owners corporation to make the repairs as quickly as possible.

Urgent repairs

59 The tenant must notify the lessor (or the lessor's nominee) of the need for urgent repairs as soon as practicable, and the lessor must, subject to clause 82, carry out those repairs as soon as necessary, having regard to the nature of the problem.

60 The following are urgent repairs in relation to the premises, or services or fixtures supplied by the lessor:

...

(j) a failure or breakdown of any service on the premises essential for hot water, cooking, heating or laundering;

56. Clause 55 of the standard terms of the Act provides that the respondent must maintain the property in a reasonable state of repair having regard to its condition at the commencement of the tenancy agreement.

57. Clause 57 of the standard terms requires him to make repairs to the property within four weeks of being notified of the need for a repair, by the tenant, unless, pursuant to sections 59 and 60 of the Act, the repair is classified as an urgent repair, in which case the respondent must carry out the repairs as soon as necessary, having regard to the nature of the problem.

58. Clause 60 (j) of the standard terms makes a failure or breakdown of any service on the premises essential for hot water, cooking, heating or laundering an urgent repair that the respondent is required to have fixed "as soon as necessary, having regard to the nature of the problem".

59. It should be noted the breakdown of a cooling service was not, in February 2020, characterised as an urgent repair.

60. The Act has subsequently been amended and the breakdown of a cooling service is now considered to be an urgent repair that must be undertaken as soon as practicable.

61. Finally, it should be noted that as the premises were a unit under the *Unit Titles (Management) Act 2011*, clause 58 of the standard terms requires the respondent to take all steps necessary to require the owners corporation to make the repairs as quickly as possible.

62. In February 2020, the repair of a cooling service was required to be undertaken within four weeks of the tenant making the lessor aware that the air-conditioner had broken and required repair.

63. In this case the four weeks began to run from 1 February 2020, when the respondent emailed Luton and told them that the air-conditioner had broken down.

64. The respondent did not follow the regime set out in clauses 55, 57, 58, 59 and 60 of the standard terms.

65. The applicant was entitled to a period of four weeks, from 1 February 2020, to either fix the issue as a standard repair, if it was something it could fix, or to take all steps necessary.

66. During that four-week period the respondent did not have the power to use the failure of the service as a basis for terminating the lease.

67. The tenant did not allow that four-week period to run and she terminated the contract before she was entitled to do so on 21 February 2020.

The tenant's power to terminate under Clause 91

68. In the termination letter the respondent directly referenced clause 91 of the tenancy agreement as the source of her power to terminate the lease on the basis

of the faulty air-conditioner. Clauses 90 and 91 of the tenancy agreement provide:

> *90 If the lessor breaches the tenancy agreement, and the tenant wishes to terminate the tenancy agreement, the tenant may either –*
>
> *(a) apply to the tribunal for an order terminating the tenancy; or*
>
> *(b) give the lessor you written notice of intention to terminate the tenancy, in accordance with clause 91.*
>
> *91 If the tenant decides to proceed by way of notice to the lessor, the following procedures apply:*
>
> *(a) the tenant must give the lessor a written notice that the lessor has 2 weeks to remedy the breach if the breach is capable of remedy;*
>
> *(b) If the lessor remedies the breach within that 14-day period – the tenancy continues;*
>
> *(c) If the lessor does not remedy the breach within the time specified in the notice, or if the breach is not capable of remedy –the tenant must give 2 weeks notice of intention to vacate;*
>
> *(d) the tenancy agreement terminates on the date specified by the tenant;*
>
> *(e) rent is payable to the date specified in the notice or to the date that the tenant vacates the premises, whichever is the later;*
>
> *(f) if the less or remedies the British during the period of the notice of intention to vacate –the tenant, at the tenant's option, may withdraw the notice or may terminate the tenancy agreement on the date specified in the notice by vacating the premises on that date.*

69. Clause 90 makes it clear that the respondent had two alternative mechanisms to terminate the lease agreement. She could pursue the matter at ACAT or by way of written notice to the lessor.

70. She chose to proceed by way of notice.

71. The regime for termination by notice is as follows:

    (a) The tenant must give the lessor a written notice that the lessor has two weeks to remedy the breach if the breach is capable of remedy,

    (b) if the breach is repaired during that time then the lease continues. If not then;

(c) the tenant must give two weeks' written notice of his/her intention to vacate the property on a stated date.

(d) If the breach is remedied during that period, the tenant can elect to continue with the lease or he/she can move out as outlined in the preceding notice.

72. The tenant did not follow the regime set out in clauses 90 and 91.

73. On 21 February 2020 she simply gave the respondent a notice advising that she would be leaving the property and terminating the lease two weeks later, on 5 March 2020. She did not, in that notice, tell the owner it had two weeks to remedy the breach and she did not subsequently send the second notice envisioned by clause 91, indicating that she was giving two weeks' notice.

74. The respondent did not terminate the lease in accordance with Clauses 90 and 91 and is therefore not entitled to protection from liability for early termination of the lease those clauses could have provided her.

The tenant's power to terminate under clause 86

75. Mr Christensen, who acts for the respondent, also argued that the property was uninhabitable during the period that the air-conditioner was not working and that pursuant to clause 86 of the lease agreement the respondent could have terminated the lease on two days' notice. Clauses 86 and 87 in part provide:

> *86 The lessor or the tenant may, by written notice, terminate the tenancy on the date specified in the notice on the following grounds:*
>
> *(a) The premises are not fit for habitation.*
>
> *87 (2) the tenant may give two days notice of termination of the tenancy.*

76. The short answer to Mr Christensen's submission is that the respondent never in fact sought to terminate the contract on the basis that was uninhabitable, rather in the termination letter she gave to Luton on 21 February 2020, she gave notice pursuant to clause 91 of the lease agreement.

77. The respondent is not now entitled to retrospectively claim that she sought to terminate the lease agreement under clauses 86 & 87 of the lease agreement.

78. I am also not persuaded that the property was uninhabitable. Many people throughout the ACT live without air-conditioning. Whilst the absence of air-conditioning during the hottest period of summer, during a period of extensive bushfires and haze, is very unpleasant, in my view it does not render an otherwise habitable structure uninhabitable.

79. It appears to me that the discomfort and inconvenience of not having air-conditioning can be adequately dealt with by compensating the tenant with lower rent during the period when the air-conditioning was unavailable.

The Agent's encouragement to the tenant to move out

80. Mr Christensen submits that the statement in Ms Wheelhouse's email of 20 February to the effect "I did mention to the owner that you intend to break the lease in a two week period if the system isn't fixed and he obviously doesn't want that" taken in conjunction with the fact that Ms Wheelhouse had not mentioned a break lease fee in her discussions with the respondent "was a clear encouragement for her to move out, without paying a break lease fee".

81. With respect, I do not agree with Mr Christensen's submission. Ms Wheelhouse's reported comment simply reflected what she had told her client.

82. At that time Ms Barker-Smith had not given notice of an actual intention to vacate the property and end the tenancy. That took place the following day, 21 February 2020, when the respondent and her mother returned to Luton and gave Ms Wheelhouse the letter dated 20 February 2020.

83. I do not see how Ms Wheelhouse's report to her client and failure to speak to the issue of the break lease fee encouraged Ms Barker-Smith to move out, or to move out in circumstances where she would not have to pay a break lease fee.

How much can the lessor claim?

84. For the reasons given above I not satisfied the tenant was entitled to terminate the lease agreement on 21 February 2020 (with effect on 5 March 2020) and the notice was consequently defective.

85. Notwithstanding that defective notice, the tenancy agreement terminated, pursuant to section 60 (1) (a) of the Act, on 5 March 2020, the date mentioned in the defective termination letter.

86. Section 60 (1) (a) of the Act provides:

> ***60 Tenant's defective termination notice***
>
> *(1) If a tenant purports to serve a termination notice on a lessor and vacates the premises in accordance with the notice, even though the notice is not in the form approved under section 133 (Approved forms—Minister) for a termination notice—*
>
> *(a) the residential tenancy agreement terminates on the vacation of the premises in accordance with the notice; and*
>
> *(b) the former lessor may apply to the ACAT for compensation for the tenant's abandonment of the premises.*
>
> *(2) The ACAT must award compensation to a person who makes an application mentioned in subsection (1) (b) unless satisfied that the person was not in a significantly worse position because of the defect in the notice than the person would have been had the notice been in the approved form.*

87. A person in the lessor's position is normally entitled to six weeks' rent in the event the lease is for a period of three years or less and that under half of the fixed term has expired at the time the tenant terminates the lease.[2] Section 8(2)(3)(a)(i) of the Act, provides:

> ***Termination before end of fixed term—fee for breaking lease***
>
> *(1) If the tenant ends a fixed term agreement before the end of the fixed term (other than for a reason provided for by the Residential Tenancies Act or the agreement), the tenant must pay a fee (a **break fee**) of the following amount:*
>
> *(2) The lessor agrees that the compensation payable by the tenant for ending a fixed term agreement before the end of the fixed term is limited to the amount of the break fee specified in subclause (1).*
>
> *(3) However, the lessor and tenant agree that if, within the defined period after the tenant vacates the premises, the lessor enters into a residential tenancy agreement with a new tenant, the amount payable by the tenant is limited to—*
>
> *(a) if the fixed term is 3 years or less—*
>
> *(i) if less than half of the fixed term has expired— 6 weeks rent; or*

[2] *Residential Tenancies Act 1997* section 8 (2)(1)(a)(i)

(ii) in any other case—4 weeks rent;

88. Additionally, a person in the lessor's shoes can seek up to one weeks rent to cover costs related to the advertising of the premises for lease and for giving the right to occupy the premises to another person.[3]

89. In this case the applicant is claiming the following costs:

(a) $295 Advertising on Allhomes.com.au.

(b) $220 Advertising on Realestate.com.au and other sites.

(c) $605 Luton letting fee.

$1120 (in total).

These costs are properly claimable by the applicant but are capped at one weeks rent, that is $550.

90. In this case I am prepared to award the applicant the six weeks rent it is entitled to under Section 8(2)(3)(a)(i) of the Act and the one week's rent for re-letting the property. I am not inclined to increase that figure pursuant to section 60(2) of the Act. The amount awarded to the applicant is seven weeks rent, which equates to $3,850.

91. Additionally, the applicant is entitled to the ACAT application fee it paid, in the sum of $159.50.

92. In total the respondent owes the applicant $4,009.50

The counter claim

93. On 14 August 2020, Mr Christensen, filed submissions (**the tenant's submissions**) which included a claim for damages in the sum of $3,007. This is a counter claim.

[3] *Residential Tenancies Act 1997* section 8 (2)(3)(b) & 8(4)(b)

94. It should be noted the respondent did not file a counter claim, pay the relevant ACAT counter claim fee, or raise the issue of a counter claim with either ACAT or the applicant prior to the hearing, which was held on 29 July 2020.

95. Normally, I would simply dismiss the counter claim for these reasons.

96. However, from the start of the hearing on 29 July 2020, it was apparent the respondent was seeking damages and the factual basis that would support that claim was sufficiently ventilated for me to conclude that it would be desirable to deal with the issue now, rather than have the respondent file fresh proceedings and substantially re-litigating the matters raised in the current proceeding.

97. In the tenant's submissions, Mr Christensen claimed that his client should receive $3,007 in compensation. This sum is made up of:

    (a) $42–compensation for substandard air-conditioning (13/1/20 – 1/2/20).

    (b) $1,583–compensation for no air-conditioning (1/2/20 – 5/3/20).

    (c) $1,000–compensation for stress, inconvenience and annoyance.

    $3,007 (in total)

98. The tenants submissions traversed areas not covered during the course of the hearing such as whether the property was uninhabitable whilst the air-conditioner was either not functioning adequately (from the respondent's perspective) or when it was not working at all.

99. On 18 August 2020, following receipt of the tenant's submissions the applicant filed two documents:

    (a) A letter from the property manager, Ms Kim Paxton, setting out further matters of fact.

    (b) Six pages of emails between the parties.

100. The respondent objects to me receiving further evidence from the applicant, but not submissions.

101. Ms Paxton did not give evidence at the hearing of 29 July 2020 and she was not subject to cross examination. No reason has been advanced as to why she couldn't have been called to give evidence at the hearing. I do not propose to receive or rely on her material.

102. Until 27 November 2020, I was unaware the applicant had filed this further material and was not given a copy of it by the ACAT registry.

103. On 9 November 2020, in ignorance of the material provided by the applicant on 14 August, I asked, via the ACAT registry, whether the applicant wanted to make submissions in reply to paragraphs 51–55 of the tenant's submissions, which dealt with the issue of damages.

104. On 26 November the applicant filed its submissions addressing paragraphs 51–55 of the tenant's submissions. I do propose to receive and take account of those submissions.

The tenant's right to compensation for the lack of air-conditioning between 1 February and 5 March 2020

105. Pursuant to section 76 of the Act, ACAT has jurisdiction to hear and determine any matter relating to the *Residential Tenancies Act 1997* and the standard terms. It also has jurisdiction under section 83 to order the payment of monies by one party to another and that includes the payment of compensation when a service related to the property, such as air-conditioning, is not provided as the consequence of the service breaking down.

106. The respondent submits that she should be awarded $424 in compensation for the period in which she says the air-conditioning wasn't working very well (13/1/20 -1/2/20) and $1,583 in compensation for the period she had no air-conditioning (1/2/20 – 5/3/20).

107. The applicant in its submissions of 26 November 2020 essentially submits that for the period between 13 January 2020 and 1 February 2020, no compensation should be payable as the air-conditioning was working to an acceptable standard.

108. I accept that submission. Whilst the system had its idiosyncrasies, I am satisfied that when the air-conditioner was used in the manner explained to the respondent in Ms Moynihan's email of 15 January 2020, and in accordance with the directions on the remote control, it worked to an adequate standard.

109. The applicant submitted that it took timely steps to engage professionals and the body corporate, to try and resolve the complex issue of supplying a new air-conditioning service in a strata titled building.

110. The applicant also points to the fact that it offered the respondent a cooling solution whilst the air-conditioner was not working, but that the respondent declined to use it and in effect failed to mitigate her loss.

111. The applicant also submits that no compensation is payable to the respondent in relation to the period when the respondent had no air-conditioning (1/2/20 – 5/3/20), as the applicant had a four-week period to action the repair and that, in effect, the respondent is not entitled to compensation for a service that does not function during that period.

112. In my opinion the four-week period simply informs the party when non-urgent repairs must be finished. It does not affect a person's ability to claim for loss of amenity during the period when the service is not working.

113. I think the tenant is entitled to compensation for the period 1 February 2020 to 5 March 2020, when she did not have any form of air-conditioning in the property.

114. Mr Christensen submits the respondent is entitled to a 65 per cent reduction in rent for this period.

115. I think that figure is too high. In my view the tenant is entitled to a rent reduction of 40 per cent of her rent because of the absence of an air-conditioner during such a hot time of the year. This figure is $1,037.14 ($550 divided by 7, multiplied by 33 days, multiplied by 40%).

116. The respondent also seeks $1,000 for stress, inconvenience and annoyance in having to live in a property that for slightly more than a month had no

functioning air-conditioning. I make no award under this head of damage as the $1,037.14 I have awarded the respondent reflects, in part, the stress inconvenience and annoyance she suffered during the period she had no air-conditioning.

117. In total I award the respondent $1,037.14.

118. This figure should be deducted from the $4,009.50 awarded to the applicant. Meaning that in total the respondent owes the applicant the sum of $2,972.36.

119. To satisfy part of the debt I direct ACT Rental Bonds on behalf of the Territory to release the bond of $2,200 to the applicant (the lessor).

120. The result, following the deduction of the rental bond is that the respondent owes the applicant $772.36 ($2,972.36- $2,220).

121. I order the respondent pay the applicant the sum of $772.36 within one calendar month of the date of this decision.

……..
Senior Member D Mulligan

Date(s) of hearing	29 July 2020
Applicant:	Ms Z Wheelhouse, authorised representative
Solicitor for the Respondent:	Mr P Christensen