



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Haines v Chen; Chen v Haines [2016] NSWCATCD 44</b>
<b>Hearing dates:</b>	4 April 2016
<b>Decision date:</b>	17 May 2016
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	D Robertson, Senior Member
<b>Decision:</b>	<p>1 Order pursuant to s44 of the Residential Tenancies Act 2010 (NSW) that the rent payable under the residential tenancy agreement was excessive from 8 December 2015 to 15 February 2016, having regard to the reduction of the amenity of the premises arising by reason of the roof leaking during that period and that from 8 December 2015 to 15 February 2016 the rent for the premises should not exceed \$1,000 per week.</p> <p>2 Order that Simon Haines pay Tianyue Chen the sum of \$6,678.00 immediately.</p> <p>3 Order that the Rental Bond Services is directed to pay the landlord Tianyue Chen the whole bond plus interest of rental bond number K901233-1 and that any amount recovered is to be credited against the money order.</p> <p>4 Each of the applications is otherwise dismissed.</p>
<b>Catchwords:</b>	Residential tenancies – whether landlord in breach of covenant to repair – whether tenant entitled to terminate for breach – adequacy of notice of termination
<b>Legislation Cited:</b>	Civil and Administrative Tribunal Act 2013 (NSW) Residential Tenancies Act 2010 (NSW)
<b>Cases Cited:</b>	Kenny v Killalea [2015] NSWCATAP 66
<b>Category:</b>	Principal judgment
<b>Parties:</b>	RT16/05679 – Simon Haines – Applicant Tianyue Chen – Respondent  RT16/10897 – Tianyue Chen – Applicant Simon Haines - Respondent

**Representation:** Both parties in person  
**File Number(s):** RT 16/05679RT 16/10897  
**Publication restriction:** Nil

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## REASONS FOR DECISION

- 1 These two matters arise in relation to a residential tenancy agreement in respect of premises in St Ives. The premises were a detached house with a self-contained flat attached to the garage. The tenancy agreement was dated 3 December 2015, and was for a term of 12 months commencing on 4 December 2015. The rent payable was \$1,250 per week. Mr Haines was the tenant and Ms Chen was the landlord.
- 2 Mr Haines commenced proceedings RT16/05679 on 4 February 2016 seeking urgent relief relating to a leaking roof and a tree limb requiring removal.
- 3 By consent orders made on 11 February 2016 the Tribunal recorded that the parties agreed that the landlord would arrange for roofing repairs to be carried out by a suitably qualified roofer on or before 18 February 2016 at a time that was mutually convenient to both parties and that the landlord would arrange for the removal of the tree branch in the back garden of the premises on or before 18 February 2016 at a mutually convenient time.
- 4 Mr Haines asserted that the landlord had not complied with that agreement and on 25 February 2016 served notice of termination of the lease. Mr Haines and his family vacated the premises on 29 February 2016 and returned the keys on 1 March 2016.
- 5 On 2 March 2016 Ms Chen commenced proceedings RT 16/10897 seeking unpaid rent, payment of the bond and ongoing rent by way of damages for breach of lease until the premises were re-let. Ms Chen additionally sought compensation for damage alleged to have been caused to the premises including damage alleged to have been caused to the deck by the installation of a spa and an electrical circuit to service the spa, some lost screws from a fence, a lock for the garage door and the replacement of the mail box which had been allegedly moved and broken.
- 6 At the hearing Mr Haines sought and was given leave to amend his claim to include a claim for costs relating to his termination of the lease including his removal costs of \$2,995, a swimming pool cover which was made to fit the pool at the premises at a cost of \$955.00 and was of no use to the Applicant elsewhere, cleaning service in the amount of \$295.00 and the cost of installation of the electrical circuit for the spa in the amount of \$526.24. Mr Haines also claimed the cost of installing a network to access the internet in the amount of \$440.00 and the cost of removing the spa which he assessed at \$900 (albeit that no evidence of that cost was produced).
- 7 Mr Haines also recorded that he had sustained property damage by reason of the garage flooding. He identified the damaged property as including irreplaceable family photographs on which he was not able to put a value.

- 8 Mr Haines also sought an order pursuant to s44 of the Residential Tenancies Act 2010 (NSW (RTA) reducing the rent from the time that he alleged the premises became uninhabitable after it had rained on 8 December 2015. This application was brought by amendment of Mr Haines' application which was recorded in the orders made at a directions hearing on 26 February 2016. As the tenancy terminated on 1 March 2016, the application was brought before the end of the tenancy, as sub-section 44(3) requires.
- 9 After some initial confusion it became common ground between the parties that the rent had been paid by the tenant only up to 8 February 2016, that was 8 weeks prior to the date of the hearing and three weeks and one day prior to the tenant vacating the property and returning the keys. The amount claimed by the landlord to the date of the hearing in respect of unpaid rent was \$10,000. Ms Chen had not by the date of the hearing been able to re-let the premises.
- 10 I admitted in evidence a copy of the residential tenancy agreement which became Exhibit 1 and the outgoing condition report which became Exhibit 2. Mr Haines tendered a bundle of documents which became Exhibit 3 and a bundle of invoices relating to the expenses in respect of which he claimed compensation which became Exhibit 4. Ms Chen produced two bundles of documents which became Exhibits A and B. I note that both parties lodged further material with the Tribunal after the hearing. That material was lodged without the leave of the Tribunal and I have not taken it into account in reaching my decision.
- 11 Mr Haines brought to the hearing on his laptop a large number of photographs. He did not provide print outs of those photographs. He showed a number of photographs to the Tribunal on his laptop:
- (a) A photograph of mould on the base of his sofa taken on 29 February 2016;
  - (b) A photograph of the flooding of the garage taken on 8 December 2015;
  - (c) A photograph of a mark on the ceiling of an upstairs bedroom taken on 8 February 2016;
  - (d) A photograph said to have been of mould on a lounge taken on 8 February 2016;
  - (e) A photograph of the underside of a sofa in the room adjacent to the garage also taken on 29 February 2016; and
  - (f) A photograph of mould around a gas fitting taken on 8 February 2016.

Mr Haines also showed the Tribunal a video of a down light flickering on and off which Mr Haines asserted was an event that occurred whenever it rained.

- 12 Mr Haines' bundle of documents (Exhibit 3) contained a timeline summarising what Mr Haines asserts were the relevant events. The bundle also included some further statements by Mr Haines in relation to the details of particular items of which Mr Haines complained. The significant events in the timeline were as follows (I have not recorded every item that is recorded in the timeline, only those that have relevance to the issues in the proceedings but I have considered the document in its entirety):

- (a) The lease commenced on 5 December 2015.
- (b) On 8 December 2015 it rained heavily and Mr Haines complained that the garage flooded 50cm deep within minutes. Mr Haines included in his bundle a photograph of the flooded garage. Mr Haines attributed the flooding to a drain across the driveway being full of soil with the result that water running down the driveway was diverted into the garage. The photograph provided by Mr Haines demonstrates that there was flooding in the garage. As far as it is possible to tell from the photograph it does not support the proposition that the flooding was 50cm deep. The flooding appears to be restricted to the front of the garage. Nevertheless it is clear that there was flooding. Mr Haines complains that he lost a number of items damaged in the flooding including photographs which had sentimental value and cannot be replaced.
- (c) Mr Haines also asserts that the rear of the property was flooding on 8 December 2015 and the downlights were flickering. Mr Haines' timeline asserts that he notified Mr Wiseman, the landlord's managing agent, of the flooding on 8, 9, 10 and 11 December 2015.
- (d) Mr Haines' timeline asserts that on 11 December 2015 Mr Haines also raised with Mr Wiseman that the pool timer was not working and that he was concerned about exposed electrical wiring in the pool shed.
- (e) Mr Haines' timeline states that on 12 December 2015 he himself dug out the drains to alleviate the drainage problem. The timeline asserts that also on 12 December 2015 Mr Haines cleared the garden and established that the pool was not compliant, and that the landlord did not agree, but agreed to fit a pool chlorinator.
- (f) Mr Haines' timeline asserts that on 12 December 2015 he discussed with Mr Wiseman and the landlord the idea that he might install a 20 amp dedicated circuit for the spa and that he received approval to do so.
- (g) On 14 December 2015 the timeline records that Mr Haines reported an unsafe oven door, the hinge of which had broken.
- (h) I note that the oven was apparently replaced although the timeline does not record when that occurred.
- (i) The timeline records that on 15 December 2015 Mr Haines "reported concerns regarding bad smell in the house after rainfall" and that Mr Wiseman agreed to investigate.
- (j) The timeline records that the house flooded again on 21 December 2015 and that Mr Haines informed Mr Wiseman "regarding continuous flooding at garage and rear of house and bedroom upstairs" on 23 December 2015.
- (k) The timeline records that the landlord offered to send a tradesman to attend on 25 and 26 December 2015 to clear the drains to see if that would help with the roof leakage. That offer was not accepted. Mr Haines, reasonably, considered it inappropriate that workmen attend on Christmas Day and Boxing Day.
- (l) The timeline records that on 24 December 2015 overseas visitors complained about the smell in the downstairs bedroom and that the mould smell was increasing and stains were appearing in the garage roof. That was reported to Mr Wiseman.
- (m) The timeline records that on 5 January 2016 Mr Haines demanded that Mr Wiseman attend the property immediately and that Mr Wiseman did

attend. The timeline further records that Mr Wiseman inspected the roof area during light rain and “got very wet whilst inside the roof”.

- (n) On 8 January 2016 a roofer, Steve, attended to provide a quote.
- (o) On 11 January Mr Haines was informed that the first roofer was too expensive and the owner was getting another quote.
- (p) On 12 January 2016 there was further rain and the timeline records that the smell was “now overpowering” and that the property was “flooded in multiple areas”.
- (q) As noted above Mr Haines commenced proceedings in the Tribunal on 4 February 2016 and consent orders were made by the Tribunal on 11 February 2016.
- (r) The timeline records that on 12 February 2016 the landlord advised that the roofer would attend on Saturday, 13 February or Sunday, 14 February. Mr Haines advised that that was not appropriate and the owner advised the roofer would attend on Monday, 15 February 2016 “before 8 am”.
- (s) The timeline states in respect of this entry “No Show” and “Owner advised roof had been fixed. I was away from the home for 1 hour dropping kids at school - absolutely not possible to fix roof and remove tree within an hour”.
- (t) I will address Mr Haines’ credit later in these reasons, but I note that these comments are an example of Mr Haines’ propensity to exaggerate and distort the facts to suit his case.
- (u) Other documentation establishes that the only time suggested for the commencement of work on Monday, 15 February 2016, was 9 am. Mr Haines acknowledged in the course of oral evidence that he was away from home for longer than an hour on that morning.
- (v) The timeline finally records that on 21 February 2016 the light was again flickering “aggressively due to rain”.

- 13 Mr Haines included in his evidence a statement from Matthew Martin, a director of Top Notch Roofing who was one of the contractors who had quoted for repair of the roof on 5 February 2016. Mr Martin stated:

“Following roof inspection of the following property \*\*\* St Ives NSW several leaks were uncovered. There is a multitude of problems with the roof resulting in a lot of water entering the house from a number of areas. The smell upon entering the house of water is overpowering to say the least and if not attended to asap will result in mould etc as well as potential health risks for the tenants living in the house. I was contacted by the owner to quote on these issues and gave him a very reasonable price to resurrect the issues. After many phone calls and a million questions as to what I was going to do he still has not made a decision to go ahead. After speaking with the tenant Simon Haynes who is at a total loose end with the situation as the owner has had several quotes and failed to make a decision on what I would regard as URGENT particularly when it is a rental property. I suggested to Simon of my own back I was happy to write him a report to take to his upcoming tribunal hearing to help his case. I am happy to be contacted at any time to answer any questions regarding this matter.

- 14 Mr Haines included in his bundle a copy of the quote provided by Mr Martin on 5 February 2016. The quote identifies the work which Mr Martin considered was required as:

- extensive damage to ridge capping, requires full re-bed, ridge capping, & re-pointing of caps top roof

- re-laying of tiles front garage section
  - re-seal lead flashing cover by waterproof membrane
  - re-direction of down pipe from top roof
  - underseal colorbond roof
  - replace all broken tiles
- 15 On separate pages in Exhibit 3 Mr Haines set out:
- details of the amount of compensation claimed
  - details relating to the broken oven door and its replacement
  - a complaint that the landlord took 6 weeks to supply a pane of glass to the rear of the house
  - a photograph of staining on a ceiling and wall which does appear to be mould annotated “Main source of smell, ceiling”
  - a photograph of a drain with broken cover grilles
  - photographs of blinds captioned “Mould in lounge area – appeared this week” (the date of the photographs is not identified)
  - a schedule of “Improvements I have made to property” and
  - a letter from Pedro Silva of Auspark Electrical Solutions describing the work performed to install a dedicated electrical current for the spa and noting that the bricks along the side wall were quite damp and the ground under the floor was “quite moist” at the time he installed the wiring.
- 16 In Ms Chen’s bundle of documents, Exhibits A and B, Ms Chen included chronologies relating to the roof problem, including compliance with the Tribunal orders of 11 February 2016, and the painting and electrical issues. These chronologies were supported in many respects by contemporaneous documentation. The communications between the landlord, the landlord’s agent and the tenant were largely conducted by SMS and email. For convenience I set out below the content of those chronologies in full save for the omission of certain entries of no relevance.

Thu 10/12/2015	Property Manager emailed "All gutter are blocked and need to be cleaned". The roof repairing request was initially raised as a request for gutter cleaning. No mentioning about roof leaking or mould.
Tue 22/12/2015	Contacted Roof A clean gutter and install gutter guard. Contacted Roofer B clean gutter and install gutter guard.
Sat 16/12/2015	Roofer A inspected
Wed 20/1/2016	Roofer B inspected, reported no need to clean gutter and install gutter guard; solar pipeline leaking could be reason; ask for repairing solar pipeline leaking first
Thu 21/1/2016	Landlord sent email to Property Manager informing Roofer B's report; not received report from Roofer A yet  Landlord immediately arranged Pool Service to repair solar pipelines leaking on the roof
Tue 26/1/2016	Received quote from Roofer A; whose report has big difference from the Roofer B; Landlord decides to arrange another Roofer to inspect
Fri 29/1/2016	Pool Service repaired leaking solar pipeline
Thu 4/2/2016	Tenant called Landlord at 5.30AM, send text message and email Tenant came to Landlord's child's school and threatened  Landlord informed Tenant that Landlord is working on it; roofer inspection and quoting is already undergoing; because there are big difference with the first two roofer's report and quote, we may need to find another inspection and quote. All these information has been delivered to the Property Manager face to face on Friday, 29/1/2016 when they meet  Landlord sent Property Manager email to confirm their talking on Friday, 29/1/2016, and inform arrangement of two roofer inspection on weekend

<p>Fri 5/2/2016</p>	<p>3.30PM Landlord went to the property, see the situation and move the broken tree branch down</p> <p>5.00PM Contractor arrive</p> <p>6.00PM Landlord went to property by Tenant's request to discuss repair work and quote with Contractor</p>
<p>Sat 6/2/2016</p>	<p>Tenant urged Landlord must use Friday's Roofer, not wait for another Roofer who had been arranged, threatening words again</p> <p>Landlord contacted the 1st Roofer about working availability, but no reply</p>
<p>Mon 8/2/2016</p>	<p>Email sent to Property Manager for notice on Monday 8/2/2016</p>
<p>Tue 9/2/2016</p>	<p>Contractor was arranged to arrive at about 10am to inspect</p> <p>11AM Contractor arrived for inspection</p> <p>1.30PM Landlord agreed Contractor to start working on Wednesday, 10/2/2016; Email was sent to Property Manager for notice; Contractor's mobile number was provided for Property Manager and Tenant to contact the Contractor to confirm time</p> <p>Later: Landlord was told the Contractor received rude and personal insulting call from Tenant; Tenant refused to have the Contractor come to repair, threatening if Contractor come, he will call police.</p> <p>Meanwhile Landlord received tenant's email with insult and threaten</p> <p>Landlord still do the duty to send email to Property Manager to ask available time of tenant for repair.</p>
<p>Wed 10/2/2016</p>	<p>Landlord waiting for Property Manager's reply; no reply</p> <p>7PM Landlord called Property Manager; Property Manager replied Tenant cannot make it on Thursday</p>
<p>Thu 11/2/2016</p>	<p>Attend Tribunal Hearing regarding Tenant's complaint on roof repairs, rental reduction and compensation</p>

<p>Thu 11/2/2016</p>	<p>Immediately after hearing, Owner contacted roofer to confirm time for repairing</p> <p>At 18.48PM I sent email to Property Manager asking him to confirm Tenant will give access to Roofer when he repairs</p> <p>Another email was sent out later informing that the Roofer is scheduling the earliest time he may come</p>
<p>Fri 12/2/2016</p>	<p>Received confirmation from Roofer and so informed Property Manager that Roofer can arrive at about 7.30-8.00am the next morning, Saturday, to start working.</p> <p>Property Manager responded in text message that Tenant “advised weekend is not convenient” and “has agreed that work can commence Monday morning”.</p> <p>I responded in email that according to weather forecasts there could be rain next Monday and Wednesday. We have concern this will cause work delay. I also send out the weather forecast image for reference.</p> <p>Property Manager responded in text message that if Monday is wet, the work can also be deferred. Still insist of booking on Monday.</p> <p>I rescheduled with Roofer again and responded Property Manager that if weather condition allowed the Contractor will come to repair on Monday morning. But I do not agree with the Tenant’s multiple rescheduling, despite the possibility of raining on Monday and delaying the work.</p>
<p>Sun 14/2/2016</p>	<p>Property Manager text me asking how does 9AM work.</p> <p>I responded that “if no rain, contractor will come in the morning”.</p>

<p>Mon 15/2/2016</p>	<p>Early morning shows no rain. My husband called Roofer to double check. After confirming no rain, Roofer purchased repairing materials and then went to property with my husband at about 10AM, but nobody at home. They do not have access to the Property. Roofer started working then while waiting for Tenant. He was not allowed to enter property when he tried to inspect on 2/2/2016. He has expressed that he needs to view the leaking spots and entering cavity wall through manhole to inspect. Without access, he did all he could from outside to repair leaking. At about 12pm at noon, Tenant still not returned. Roofer and my husband left. I separately sent two text messages to Property Manager advising him Tenant was not in and was not returned.</p> <p>In the evening I talked with Property Manager over phone about the situation again. Informing him Roofer has done the work from outside but without access to property, I informed that if there are any more problems, I will make necessary arrangements accordingly.</p>
<p>Tue 16/2/2016</p>	<p>At about 4.30PM Owner found a missed call from Tenant and a voice message full of offensive words and asked Roofer to turn up the next morning between 7-8am; otherwise Tenant blamed Owner breaching the order. Then continuous message bothering.</p> <p>At about 17.29pm Owner sent a brief email to Property Manager about this.</p> <p>At about 17.55pm Owner received email from Tenant about urging roofer attend the next morning at 7-8am.</p> <p>At about 23.43pm Owner sent another email to Property Manager summarising <b>Roofer has arrived on Monday on schedule and done his work</b>. There will be no roofer as required by Tenant to show up again at 7-8am next morning. "If there is any further problem the Tenant may contact you and I may make necessary arrangement accordingly". Inform Property Manager that I have arranged painter to paint the affected area.</p>
<p>Wed 17/2/2016</p>	<p>Tenant sent Owner email blaming "the roofer did not turn up on schedule" and no done his work. Foul words of threatening and insulting.</p> <p>Owner received email from Tribunal about "Correspondence has been received from the Applicant on 16/2/2016 concerning non compliance with order 8 made on the 11/2/2016."</p> <p>...</p>

Fri 19/2/2016	Owner received "Direct Hearing" notice from Tribunal about hearing on Fri 26/2/2016.
Wed 24/2/2016	Tenant emailed roof is still leaking. Owner sent email to Property Manager asking for details such as where and how. Agree to arrange Roofer to check and fix again if leaking happens, but require Teant make sure to give access to Roofer.
Thu 25/2/2016	Tenant sent out notice of exit, without discussing with Owner

**About painting arrangement**

Tue 16/2/2016	Inform Property Manager that Owner had arranged painter to paint the affected area
Thu 18/2/2016	Ask Property Manager the follow up about painting arrangement
Fri 19/2/2016	Property Manager replied that he is waiting for painter to contact him
Sun 21/2/2016	Inform Property Manager that Painter may inspect anytime the next day; ask for confirming a time.
Mon 22/2/2016	Learned from Painter neither Property Manager nor Tenant ever contacted him and set up schedule
Tue 23/2/2016	<p>Found no response and progress from Property Manager and Tenant; so Owner confirmed schedule with Painter, and informed Property Manager that Painter may arrive tomorrow between 10-11am to clean and paint the affected ceiling.</p> <p>Received Property Manager's forwards of Tenant's response, turn down schedule for tomorrow; ask for rescheduling next week.</p> <p>Sent email to Property Manager about painting arrangement; asked Property Manager to arrange painting done by this week; or let Owner know if Tenant insist to reschedule to next week.</p>
Wed 24/2/2016	<p>Confirmed with Painter and reschedule two optional time: this Thursday, or next Thursday. Asked Property Manager for confirmation.</p> <p>Tenant responded "this week not convenient".</p>
Thu 25/2/2016	Owner received Tenant's email of final exit on 1/3/2016
Fri 26/2/2016	Owner sent email to Property Manager about follow up painting arrangement

#### **"About urgent electrician request**

On Sunday 21/2/2016, Tenant requires an electrician to inspect flickering light for urgency (no mention he required to arrange electrician himself). Owner urgently arranged licensed electrician to inspect and check on Monday morning between 10.00-11.00 am. But on Monday 22/2/2016 early morning, Owner received Property Manager's email saying Tenant does not wish for my electrician to attend, but asking for he arrange electrician himself. Owner replied that Owner had arranged qualified electrician timely, there was no reason for Tenant to do so. As the electrician had been booked, Owner had to cancel before 9.30am. Then the schedule was turned down and

Owner had to cancel the electrician. But Owner still informed Property Manager that "please let me know if any follow up arrangement needs to be made."

17 Ms Chen also stated that after Mr Haines and his family had left the property she had attended the property on different days and detected no leaks. She included in her bundles three documents produced by various contractors.

(a) Sam Lee, the general manager of Cosmos Art painting made the following statement:

"To whom it may concern. Inspection of the property, \*\*\* St Ives NSW, shows no evidence of damages on the ceilings of the upstairs bedroom & garage due to rain leakage. The inspection was carried out immediately after some period of rain and the ceiling appeared completely dried and there was no dampness. In my opinion, the stain on the bedroom ceiling may have been caused by an animal such as a possum or even a bird. There would be no problem if you wish to proceed with the painting."

(b) A handwritten note from "John" of Hornsby and North Shore Pest Management was in the following terms:

"18/3/16 Inspection at Number \*\*\* St Ives NSW 2075 stain on roof ceiling is from windmaster fixed to roof could not notice any water leaks from inside roof re broken tiles (bedroom, no mould) rodents/mice activity noticed in roof area this has been treated as normal. Thanks John Hornsby and Nth Shore Pest Management"

(c) The third document from Yang Huang of ACDC Electrical and Security Service was headed "Electrical report" and stated:

"Hi Diane On 25 January I (electrician) inspected the property to check the condition of electrical circuit. I checked the electrical cable in the ceiling, the guard for the downlight, and the cable in the switchboard. I found the cables in the ceiling and in the switchboard are all in dry and fine condition, I found the Downlight guard is approved fire resistant guard for downlight I did not see any light flicking when I was there. Light flicking may be caused by many reasons, e.g. outside power station, lighting, cable condition, fuse, light switch or transformer as well.

If you have any question please do not hesitate to contact me on [number]"

18 Ms Chen also produced a photograph which demonstrates that the area of mould in the photograph of staining on a ceiling and wall produced by Mr Haines (referred to in paragraph 15 above) and identified as "main source of smell" was in the corner of the garage and is not evidence of serious mould within the house.

19 Mr Haines and Ms Chen each gave evidence under oath and were questioned both by the Tribunal and by the other party. Mr Haines also called Mr Keith Wiseman, a licensed real estate agent and valuer, who had been until recently the property manager of the property. He had ceased to occupy that role on 4 March 2016. Mr Wiseman had conducted the incoming and outgoing property inspections and had been the general point of contact between the landlord and Mr Haines.

20 Mr Wiseman gave evidence that he had received a call from Mr Haines on the evening of 8 December 2015 in which Mr Haines complained of flooding on the premises. Mr Wiseman also stated that he observed water marks on the side of the garage wall on 9 December 2015 (that is the following day). Mr Wiseman gave evidence that he arranged for plumbers to look at the drainage problems. Mr Wiseman stated that on an

occasion in late January 2016 which he said was in the last two weeks of January he had been called to the property and used a ladder belonging to Mr Haines to investigate a manhole in the flat attached to the premises where he observed rain water entering the roof above the flat and the garage.

21 In response to questions from Mr Haines, Mr Wiseman gave evidence of the process of obtaining a replacement oven which was said to be a matter of putting the relevant circumstances in context. Mr Haines sought to suggest the landlord was always reluctant to undertake repairs. This was disputed by the landlord. I do not find it necessary to determine this issue.

22 In relation to the critical issue of the rectification of the leaking roof after the making of consent orders on 11 February 2016, Mr Wiseman said that the landlord had offered to send a roofer to fix the roof on the Saturday or Sunday following the making of the orders, that is 13 or 14 February and that the tenant had indicated that was not convenient and he would prefer the work commenced on the Monday. Mr Wiseman gave evidence of driving past the premises himself sometime during the morning of the Monday, 15 February 2016, and having seen a car in the driveway which was not the tenant's or the landlord's.

23 Mr Wiseman gave evidence that on behalf of the landlord he had given approval to the installation of the spa and to the tenant moving the letterbox from the one side of the driveway to the other. Mr Wiseman expressed the view that the damage to the deck of which the landlord complained was no more than fair wear and tear. Mr Wiseman expressed the view that the rent of \$1,250 per week was a reasonable market rent for the property. When asked what he considered would be a fair rent given the state of the property in December 2015 and January 2016, he stated that he believed that a current market rent of \$1,000 to \$1,100 a week would be appropriate.

24 In his oral evidence, Mr Haines asserted that he had sought an urgent hearing in the Tribunal and ultimately terminated the lease because he was concerned about his son's health. He referred to a medical report which he had provided to the Tribunal in support of his application for an urgent hearing. That medical report stated:

"Master Daniel Haines was admitted to hospital in 2015 for treatment of pneumonia. He has also been seeing a respiratory specialist to manage his recurrent cough. Mouldy conditions may exacerbate childrens' coughs."

The report is dated 5 February 2016 and was provided by Dr Betty Chen of the Davidson Family Medical Practice.

25 Mr Haines asserted that on Sunday, 21 February 2016, it had rained and the lights began flickering. That was after the landlord's roofer had attended on 15 February. Mr Haines asserted that on that date he had looked into the roof above the garage and saw water running down the beams.

26 Mr Haines asserted that emails included in the landlord's bundle were not genuine. He sought to establish that proposition by reference to the absence of subject lines in the emails and some variation in the manner in which the addressee (usually Mr Wiseman) was identified. Mr Haines asserted that he had expertise in IT (ie information

technology) which enabled him to opine that the emails could not be genuine.

- 27 The proposition that the emails were not genuine was simply refuted by reference to the fact that one email Mr Haines identified as manifestly forged was the subject of a response from Mr Wiseman, which Mr Haines did not suggest was not genuine. I also note that, notwithstanding that Mr Haines called Mr Wiseman to give evidence, he did not ask Mr Wiseman whether Mr Wiseman had received the emails he claimed were forged.
- 28 I find that Mr Haines' preparedness to rely upon some unspecified knowledge of IT and the way emails worked to assert that the emails were forged reflects very poorly on his credit. I have noted in sub-paragraph 12(q) above another example where Mr Haines exaggerated and distorted the facts to improve his case. I am not prepared to accept Mr Haines' evidence except where it is not in dispute or where it is corroborated by contemporaneous documents.
- 29 In her oral evidence, Ms Chen denied forging the emails and said she was not aware how the way in which Mr Wiseman's email address appeared on the emails occurred. She said she was just replying to emails she had received. I accept this evidence.
- 30 Ms Chen gave evidence of arranging a number of roofing tradesmen to quote for the repairs for the roof. The first quote was that of TopNotch Roofing dated 5 February 2016 in the amount of \$2,600.00. The substance of that quote is set out in paragraph 14 above.
- 31 Ms Chen's evidence was that in discussions with Mr Haines, in her presence, the roofer from TopNotch Roofing, whom she identified as Matt, had reduced his quote by some several hundred dollars and that she felt uncomfortable using him because he was so quick to reduce his quote. Ms Chen gave evidence that she asked three other roofers to inspect the roof. Ultimately a roofer she identified as David or Han was retained to perform the work. Although Mr Haines had been rude and abusive to him, and he had at one stage said he would not do the work, he had been prevailed upon to do so.
- 32 Ms Chen produced a text from Mr Wiseman suggesting 9 am as a start time on Monday, 15 February 2016. Ms Chen did not suggest that her husband and the workman had arrived before 10 am. Mr Haines was not present at that time and such work as the roofer had performed had been done from the outside of the building between the hours of 10 am and 12 noon that day.
- 33 Although Ms Chen acknowledged telling the Tribunal on 11 February 2016 that it would take 2 to 3 days to complete the roofing work, she explained that she hadn't consulted David, her roofer, about that and was relying upon what Steve, another roofer, had said.
- 34 Ms Chen gave evidence that she had scheduled a painter to attend but Mr Haines had not co-operated in providing access and that she had sought to arrange an electrician to look at the downlights after 21 February 2016 but again that had not been able to be arranged.

35

Ms Chen gave evidence that she had been unable to re-let the premises since Mr Haines and his family had vacated.

36 Ms Chen called Ms Iris Chan, a property manager with Loyal Property in Chatswood, who had been her property manager since 4 March 2016.

37 Ms Chan gave evidence that she had met Mr Wiseman on Friday, 4 March 2016 and had inspected the property on that date. She said that she had conducted open inspections at the property for prospective tenants on 12 and 19 March and 2 April 2016. Ms Chan gave evidence that she had advertised on domain.com.au and realestate.com.au, on her company's website and in her company's office window. She thought there may also have been some print advertising in a Chinese language newspaper.

38 Ms Chan stated that she had had a few enquiries concerning the property, but only 2 or 3 groups had attended the first open inspection. She said that Mr Haines had also attended the first open inspection and had spoken to the prospective tenants. Ms Chan was unable to say what Mr Haines had said to them. No prospective tenants had attended the second and third open inspections.

39 Mr Haines sought to suggest to Ms Chan that she had no experience in renting houses in St Ives. Ms Chan stated she knew the suburb reasonably well and that 20% of her property management portfolio was currently houses, rather than apartments. Ms Chan gave evidence that, so far as she could see, when she inspected the property it was dry although there were some black patches mainly in the garage and a red patch on the main bedroom ceiling which she did not think was mould.

### **Determination**

40 I have considered the evidence filed by the parties, including the "statements" of various trade contractors produced by both parties. Each of those statements purported to proffer an expert opinion concerning the condition of the house. None of the statements complied with the Tribunal's Procedural Direction 3 which sets out the code of conduct for expert witnesses. None of the authors of the statements were called to give evidence. Moreover the form in which the statements were expressed diminished their evidentiary value. The statement by Mr Lee, the painter, is undated and does not indicate when Mr Lee inspected the premises.

41 However, having regard to the guiding principles set out in Section 36 of the Civil and Administrative Tribunal Act 2013, to facilitate the just, quick and cheap resolution of the real issues in the proceedings I have received the statements into evidence and will accord them some, albeit not overriding, weight.

42 I find on the evidence that by reason of the state of the roof which allowed water to penetrate the flat, the landlord was in breach of the obligation set out in Section 63 of the RTA which provides:

63 Landlord's general obligation

(1) A landlord must provide and maintain the residential premises in a reasonable

state of repair, having regard to the age of, rent payable for and prospective life of the premises.

(2) A landlord's obligation to provide and maintain the residential premises in a reasonable state of repair applies even though the tenant had notice of the state of disrepair before entering into occupation of the residential premises.

(3) A landlord is not in breach of the obligation to provide and maintain the residential premises in a reasonable state of repair if the state of disrepair is caused by the tenant's breach of this Part.

(4) This section is a term of every residential tenancy agreement.

43 I am satisfied, in particular by reason of the evidence of Mr Wiseman that he had observed water penetrating the roof when he looked through the manhole in the flat, that the roof above the garage and flat was prone to leak. I find that the roof was prone to leaking, from the commencement of the tenancy, although it does not appear that any consequences followed until it rained heavily on 8 December 2015.

44 I am satisfied on the basis of the photographs shown to me on Mr Haines' laptop that a consequence of the leaking roof was the formation of mould in the garage and also in the flat.

45 I consider in the light of Mr Wiseman's evidence concerning rental values that a rent reduction of \$250.00 per week from 8 December 2015 until the roof was repaired should be ordered pursuant to s44 of the RTA having regard to the diminution in amenity of the premises flowing from the consequences of the leaking roof. Section 44 provides relevantly:

44 Tenant's remedies for excessive rent

(1) Excessive rent orders

The Tribunal may, on the application of a tenant, make any of the following orders:

...

(b) an order that rent payable under an existing or proposed residential tenancy agreement is excessive, having regard to the reduction or withdrawal by the landlord of any goods, services or facilities provided with the residential premises and that, from a specified day, the rent for residential premises must not exceed a specified amount.

...

(3) Applications on withdrawal of goods or services

A tenant may, before the end of a tenancy, make an application that the rent is excessive, having regard to the reduction or withdrawal of any goods, services or facilities provided with the residential premises, even if those goods, services or facilities were provided under a separate or a previous contract, agreement or arrangement.

...

(5) The Tribunal may have regard to the following in determining whether a rent increase or rent is excessive:

(a) the general market level of rents for comparable premises in the locality or a similar locality,

(b) the landlord's outgoings under the residential tenancy agreement or proposed agreement,

(c) any fittings, appliances or other goods, services or facilities provided with the residential premises,

(d) the state of repair of the residential premises,

- (e) the accommodation and amenities provided in the residential premises,
- (f) any work done to the residential premises by or on behalf of the tenant,
- (g) when the last increase occurred,
- (h) any other matter it considers relevant (other than the income of the tenant or the tenant's ability to afford the rent increase or rent).

46 I find that the roof was repaired on 15 February 2016. A roofer attended on that day and rendered an account for the replacement of tiles and "complement cement roof". It is not clear what that phrase comprehends but I infer it involved some form of sealing of areas of the roof.

47 I note that Mr Martin quoted for a much more substantial repair. However I am not able on the evidence before me to conclude that the repair that was actually carried out was inadequate. I am not satisfied on the balance of probabilities that the roof leaked after 15 February 2016.

48 I do not accept Mr Haines' evidence that he looked through the manhole in the flat and observed water penetrating the roof on 21 February 2016. Mr Haines did not include any such assertion in any communication at about that time or in his timeline. I consider that if Mr Haines had observed water penetrating the roof on 21 February 2016 he would have communicated that fact to Mr Wiseman immediately and would have included reference to it in his timeline.

49 In his documentation Mr Haines only relied upon the fact that the lights were flickering on 21 February 2016 to establish that the roof was leaking on that date.

50 On the evidence before me I am unable to conclude that the flickering of the lights was a consequence of water penetration. I accept that the lights were flickering but I do not find that that is evidence that the roof was leaking. Moreover, the evidence of the painter, electrician, pest controller and Ms Chan, the new property manager, that the premises were dry and did not show signs of moisture penetration after the roof had been repaired reinforces my conclusion. I note that, for the reasons outlined above, I am able to place only limited weight on that evidence. However, I consider that it provides some evidence that the roof repairs had been effective.

51 The onus of establishing breach of the tenancy agreement falls upon Mr Haines and I find that he has not satisfied that onus in relation to the period after 15 February 2016.

52 Mr Haines did not establish any monetary loss flowing from the water penetration which occurred prior to 15 February 2016. Although I accept he was concerned for his son's health, I am not persuaded on the evidence before me that there was any risk posed by the condition of the premises to the health of the occupants. The doctor's certificate in respect of Mr Haines' son does not suggest that mouldy conditions experienced after 8 December 2015 at the premises in St Ives had played any part in causing or exacerbating his condition.

53 Although Mr Haines complained that a mouldy smell persisted after the roof had been repaired, I find that Ms Chen did seek to rectify that issue by arranging to have the premises painted, but that owing to the lack of co-operation from Mr Haines she was

not able to do so. I do not find that Ms Chen breached the tenancy agreement or s63 of the RTA after 15 February 2016.

54 It follows that Mr Haines' purported notice of termination of the tenancy agreement sent on 25 February 2016 was not given in accordance with the RTA. The RTA provides for the termination of a fixed term residential tenancy agreement before the expiry of the fixed term only in limited circumstances. The only such circumstance potentially relevant to the termination notice issued by Mr Haines was that the landlord was in breach of the tenancy agreement.

55 Section 98 of the RTA provides:

98 Breach of agreement—termination notice by tenant

- (1) A tenant may give a termination notice on the ground that the landlord has breached the residential tenancy agreement.
- (2) The termination notice must specify a termination date that is not earlier than 14 days after the day on which the notice is given.
- (3) The termination notice may specify a termination date that is before the end of the fixed term of the residential tenancy agreement if it is a fixed term agreement.
- (4) The Tribunal may, on application by a landlord made before the termination date and within the period prescribed by the regulations, revoke a termination notice by a tenant if satisfied that the landlord has remedied the breach and that it is appropriate, in the circumstances of the case, to continue the tenancy.

56 As I have found that the landlord was not in breach of the tenancy agreement at the date the notice was given, the notice was not authorised by s98 of the RTA.

57 The notice, which Mr Haines sent by email to Mr Wiseman, was in the following terms:

"Hi Keith,

Formal Notice: \*\*\* St Ives Exit Date: 1 March 2016

As we have just discussed, can you please book a final inspection of [the premises], on 1/03/16 Tues please or ASAP

The place is being professionally cleaned on Tuesday – As you have basically live here or you may as well you are well aware of the vast improvements we have made to the condition on the house inside and out apart from the obvious water damage. However we will have the place cleaned ready for the next poor victims.

I should add you may wish to advise the owners that the house has subsidence due to the water problem. Explains the grave like whole under the deck to alleviate the water issue. This explains the 8" difference on the floor, and the spring in the floor, it looks like the pillars have failed, as the floor has no support. Obviously very dangerous the floor may collapse at any time, who knows! Anyway see you Tuesday. Have a great weekend."

58 The notice purportedly given by Mr Haines did not comply with the requirements of s82 of the RTA which provides:

82 Termination notices

- (1) A termination notice must set out the following matters:
  - (a) the residential premises concerned,
  - (b) the day on which the residential tenancy agreement is terminated and by which vacant possession of the premises is to be given,
  - (c) if the notice is not given under section 84, 85, 96 or 97, the ground for the notice,
  - (d) any other matters prescribed by the regulations.

(2) A termination notice must be in writing and be signed by the party giving the notice or the party's agent.

(3) A termination notice for a periodic agreement may specify a day other than the last day of a period for the payment of rent as the termination date.

59 The notice does not identify the grounds for the notice.

60 The notice was not signed by Mr Haines.

61 The evidence does not establish that the notice was served in accordance with s223 of the RTA. Section 223 of the RTA provides a number of mechanisms by which service may be accomplished. However email is not included. The tenancy agreement provided an address for service of notices upon the landlord at a post office box.

62 Finally, the notice did not specify a termination date not earlier than 14 days after the day on which the notice was given, as required by s98(2) of the RTA.

63 I note that s113 of the RTA provides:

113 Defects in termination notices

The Tribunal may make a termination order for a residential tenancy agreement or any other order even though there is a defect in the relevant termination notice or the manner of service of the notice if:

(a) it thinks it appropriate to do so in the circumstances of the case, and

(b) it is satisfied that the person to whom the notice was given has not suffered any disadvantage because of the defect in the notice or service or that any disadvantage has been overcome by the order and any associated order.

64 I note that the defects in the termination notice and the potential application of s113 of the RTA were not addressed at the hearing.

65 In circumstances where I have determined that the notice was ineffective because the landlord was not in breach at the relevant date, I do not make any finding whether or not the notice was ineffective by reason of the defects in the notice, including the failure to give 14 days notice. I merely note that, even if the tenant had established there was a defect in the roof on 25 February 2016 when the notice was served, he would nevertheless have had the onus of persuading the Tribunal that the defects in the notice, including the failure to give 14 days notice, could be overcome pursuant to s113 and that the landlord did not suffer disadvantage by reason of those defects, including the short notice.

66 Although I would likely have been satisfied that the landlord has suffered no disadvantage by reason of the absence of signature or the manner of service, and that the landlord would have understood that the ground of termination was breach of the landlord's obligation to repair in respect of the roof, I consider it unlikely that I would have been satisfied that the landlord suffered no prejudice by reason of the short notice.

67 Only five days notice was given and that notice included the weekend of 27 and 28 February. If proper notice had been given, the landlord would have had time to remedy any breach specified and obtain orders from the Tribunal pursuant to s98(4) of the RTA revoking the termination notice.

68

It is not clear in any event that the failure to provide 14 days notice would constitute a defect in the termination notice capable of being overcome pursuant to s113 (although the Appeal Panel in *Kenny v Killalea* [2015] NSWCATAP 66 appears to have assumed that it would constitute such a defect).

69 In circumstances where the notice of termination was not effective, Mr Haines' vacation of the property on 1 March 2016 constitutes an abandonment of the property and a breach of the residential tenancy agreement. It follows that Mr Haines' claim for compensation for moving out early, including moving and cleaning costs, the cost of the pool cover and the cost of installing the electrical circuit for the spa and internet access must fail.

70 Section 81 of the RTA provides:

81 Circumstances of termination of residential tenancies

(1) Termination only as set out in Act

A residential tenancy agreement terminates only in the circumstances set out in this Act.

(2) Termination by notice and vacant possession

A residential tenancy agreement terminates if a landlord or tenant gives a termination notice in accordance with this Act and the tenant gives vacant possession of the residential premises.

(3) Termination by order of Tribunal

A residential tenancy agreement terminates if the Tribunal makes an order terminating the agreement under this Act.

(4) Other legal reasons for termination

A residential tenancy agreement terminates if any of the following occurs:

(a) a person having superior title (such as a head landlord) to that of the landlord becomes entitled to possession of the residential premises,

(b) a mortgagee of the residential premises becomes entitled to possession of the premises to the exclusion of the tenant,

(c) a person who succeeds to the title of the landlord becomes entitled to possession of the residential premises to the exclusion of the tenant,

(d) the tenant abandons the residential premises,

(e) the tenant gives up possession of the residential premises with the landlord's consent, whether or not that consent is subsequently withdrawn,

(f) the interests of the landlord and tenant become vested in the one person (merger),

(g) disclaimer occurs (such as when the tenant's repudiation of the tenancy is accepted by the landlord).

71 Since the notice of termination was not given in accordance with the RTA, the tenancy did not terminate by the operation of s81(2) when Mr Haines gave vacant possession on 1 March 2016. However the tenancy agreement did terminate on that date pursuant to s81(4)(d).

72 In those circumstances the landlord is entitled to payment of the arrears of rent to the date of termination and compensation pursuant to s107 of the RTA which relevantly provides:

107 Landlord's remedies on abandonment

(1) The Tribunal may, on application by a landlord, order a tenant to pay compensation to the landlord for any loss (including loss of rent) caused by the abandonment of the residential premises by the tenant.

(2) The landlord must take all reasonable steps to mitigate the loss and is not entitled to compensation for any loss that could have been avoided by taking those steps. This subsection does not apply in the case of a fixed term agreement that provides for the payment of a break fee.

(3) The compensation payable by a tenant under this section in respect of a fixed term agreement is the amount of the applicable break fee for the tenancy, if the agreement provides for the payment of a break fee.

73 The residential tenancy agreement did not include provision for the payment of a break fee. Clause 41 of the standard form tenancy agreement which relates to break fees was struck out in the agreement executed by the parties. However the special conditions attached to the tenancy agreement included clause 2 which provided:

“2. Should the lessee wish to vacate the property prior to the expiration of the said lease he/she will create a penalty and agree to pay the following regulatory charges:

- (a) Owner’s lease preparation fee,
- (b) Paying a fee equivalent to one/two weeks rent plus gst,
- (c) Paying all advertising expenses.

(d) Continue to pay rent until the property has been re-let or the lease has expired, whichever occurs first.”

74 To the extent this clause requires payment of more than the losses recoverable pursuant to s107 I consider it would be invalid pursuant to s19(2)(d) of the RTA which provides:

19 Prohibited terms

(1) A residential tenancy agreement must not contain a term of a kind set out in this section or prescribed by the regulations for the purposes of this section.

(2) Terms having the following effects must not be included in a residential tenancy agreement:

...

(d) that, if the tenant breaches the agreement, the tenant is liable to pay all or any part of the remaining rent under the agreement, increased rent, a penalty or liquidated damages,

75 In particular, the “fee equivalent to one/two weeks rent plus gst” is clearly invalid.

76 Nevertheless the landlord is entitled to compensation for the losses she has proved. No evidence was put before me to establish either the cost of lease preparation or the cost of advertising. The only loss proved by the landlord is the lost rent for the period from 1 March 2016 to the date of hearing on 4 April 2016, a period of 5 weeks.

77 I am satisfied by the evidence of Ms Chan, the new managing agent, that the landlord has taken reasonable steps to mitigate that loss. The premises had been advertised and Ms Chan had at the date of hearing not been able to re-let the property. I note that Mr Haines interfered with the reletting of the property at the first open inspection and that the period since 1 March includes the Easter weekend.

78 It remains to deal with the landlord’s claims in respect of alleged damage to the property.

- 79 In light of Mr Wiseman's evidence that the installation of the spa and moving of the letterbox were authorised by him and that any damage to the deck was fair wear and tear, I find that the landlord has not established any damage in respect of those matters which is compensable pursuant to the agreement or the RTA. The landlord is bound by the approval given by her agent.
- 80 The landlord raised other minor items being a broken garage door, the loss of screws on the deck fence and marks on the walls where hooks had been removed and allegedly unpaid bills for water usage and pool chemicals, but provided no evidence to establish the cost of repairs or the amounts of the unpaid bills. I find that Mr Haines is not liable to the landlord for any repair or remediation costs.
- 81 Accordingly in respect of the tenant's application I will order pursuant to s44 of the RTA that the rent payable under the residential tenancy agreement was excessive from 8 December 2015 to 15 February 2016, having regard to the reduction of the amenity of the premises arising by reason of the roof leaking during that period and that from 8 December 2015 to 15 February 2016 the rent for the premises should not exceed \$1,000 per week.
- 82 In consequence I find that Ms Chen is liable to refund to Mr Haines the excess rent paid during the period from 8 December 2015 to 8 February 2016 being 9 weeks (noting that rent has not been paid in respect of any period after 8 February 2016) being \$2,250.00.
- 83 In respect of the landlord's application I find that Mr Haines is liable to pay to Ms Chen arrears of rent from 8 February 2016 to 1 March 2016 being 1 week at \$1,000 per week and 2 weeks and 1 day at \$1,250 per week being \$2,678.00 and that Mr Haines is liable to pay Ms Chen compensation pursuant to s107 of the RTA for the abandonment of the premises being loss of rent in the amount of \$6,250.00.
- 84 The net result of the above findings is that Mr Haines is liable to pay Ms Chen the sum of \$6,678.00 and I will order that that sum be paid immediately.
- 85 I will further order that the Rental Bond Services is directed to pay the landlord the whole bond plus interest of rental bond number K901233-1 and that any amount recovered is to be credited against the money order.
- 86 In each matter the application will be otherwise dismissed.

**D Robertson**

**Senior Member**

**Civil and Administrative Tribunal of New South Wales**

**17 May 2016**

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated: 20 July 2016