



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Lam v Somchanmavong [2016] NSWCATCD 46</b>
<b>Hearing dates:</b>	29 April 2016
<b>Date of orders:</b>	29 April 2016
<b>Decision date:</b>	20 May 2016
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	P French, General Membe
<b>Decision:</b>	<ol style="list-style-type: none"><li>1. The Residential Tenancy Agreement is terminated in accordance with section 87 of the Residential Tenancies Act 2010 as the tenant has breached the agreement by failing to pay rent in accordance with the Agreement.</li><li>2. The Tribunal is satisfied in accordance with section 89(5) of the Residential Tenancies Act 2010 that the tenant has frequently failed to pay rent in accordance with the Agreement.</li><li>3. The Residential Tenancy Agreement is terminated immediately and possession is to be given to the landlords on the date of termination.</li><li>4. The order for possession is suspended until 27 May 2016.</li><li>5. The tenant shall pay the landlords a daily occupation fee at the rate of \$42.85 per day from the day after the date of termination, namely 30 April 2016 until the date vacant possession is given to the landlord.</li><li>6. Within 60 days of the date for possession of the premises specified in these orders the landlord may request the relisting of the application to determine the amount of the occupation fee owing.</li><li>7. The landlords' agent is to advise the tenant in writing by the delivery of a letter to the premises by 6:00pm today of the orders made today.</li></ol>
<b>Catchwords:</b>	RESIDENTIAL TENANCY – termination of tenancy – failure to pay rent in accordance with the RTA – frequent

	failure to pay rent in accordance with the RTA
<b>Legislation Cited:</b>	Residential Tenancies Act 2010 Residential Tenancies Regulation 2010 Civil and Administrative Tribunal Act 2013
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Phung Lam, Kimson Lam, Loi Lam and Sue Lam (applicants) Sourivanh Somchanmavong (respondent)
<b>Representation:</b>	Phung Lam, Kimson Lam, Loi Lam and Sue Lam represented by Ms Sarah Thoeung, Managing Agent Mr Sourivanh Somchanmavong in person.
<b>File Number(s):</b>	RT 16/08765
<b>Publication restriction:</b>	Nil

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## REASONS FOR DECISION

- 1 These are written reasons for a decision of the Tribunal made on 29 April 2016 which have been prepared following a request to the Registrar made by the Respondent tenant pursuant to section 62 of *Civil and Administrative Tribunal Act 2013* (NCAT Act).
- 2 This is an Application pursuant to section 87 of the *Residential Tenancies Act 2010* (RT Act) by a Managing Agent on behalf of landlords to terminate a tenancy on the ground that the tenant has not paid rent in accordance with the terms of the Residential Tenancy Agreement (RTA) that subsists between them. This Application was made to the Tribunal on 17 February 2016.
- 3 The tenancy that gives rise to this dispute was made and commenced on 9 October 2010. It was for an initial fixed period of 26 weeks, but has continued as a period agreement since the end of the fixed term. It is in standard form. It is a tenancy to which the RT Act applies. The rent payable under the RTA was initially \$230.00 per week. At all material times for this Application it was \$300.00 per week. At the commencement of the tenancy the tenant provided the landlords with a rental bond of \$920.00 which was lodged with Rental Bond Services.
- 4 By Notice dated Monday 4 January 2016 the landlords' Managing Agent served a Notice of Termination of the tenancy on the tenant by posting it to the tenant's address. Pursuant to section 123 of the RT Act that Notice is deemed to have been served on the tenant four working days later on Friday 8 January 2016. The reason given for the termination of the tenancy was non-payment of rent. At the date of service of the Notice on 8 January 2016 the tenant had not paid rent due for 28 days. The tenant was required to give up vacant possession of the rented premises to the landlords on 23 January 2016, 15 days after the date of service of the Notice.
- 5 I am satisfied that Notice of Termination complies with the requirements of sections 82

- and 88 of the RT Act and that its service complies with the requirements of 123 of the RT Act and section 76 of the *Interpretation Act 1987*.
- 6 The tenant failed to give the landlords vacant possession of the rented premises on 23 January 2016, and when he failed to do so this Application was made to the Tribunal. The hearing of the Application occurred after the date of vacant possession specified in the Notice of Termination and within the time period allowed by section 83(2)(a) of the RT Act and regulation 22(2) Act of the *Residential Tenancies Regulation 2010*.
- 7 The Application was first listed before the Tribunal on 7 March 2016 for conciliation and hearing. A Managing Agent attended that listing on behalf of the landlords. The tenant attended in person. The tenant does not speak English. He participated in the hearing and in the conciliation with the assistance of a Laotian Interpreter.
- 8 In conciliation assisted by a Tribunal conciliator the parties reached an agreement which was in the following terms:
- (a) The tenant owed rent arrears for the period 16 January 2016 to 7 March 2016 in the amount of \$2,228.57 (rent arrears);
  - (b) The tenant would repay these rent arrears on the basis of an initial instalment plan that would involve payments of at least \$600.00 on or before 11 and 18 March 2016 and a payment of \$300.00 on or before 29 March 2016. No agreement was apparently reached as to when or how the remainder of the arrears was to be paid.
  - (c) The tenant would pay rent in future in accordance with the RTA (prospective rent).
  - (d) The landlords' Application for termination of the tenancy could be relisted before the Tribunal at any time before 7 June 2016 if the tenant failed to comply with the agreements regarding the payment of rent arrears and prospective rent.
- 9 The terms of this agreement were set out in writing on the Tribunal's "Rent Arrears/Termination Application Conciliation Agreement Form." That form was signed by the Managing Agent on behalf of the landlord and by the tenant.
- 10 When the matter returned to the Hearing Room, the Tribunal gave effect to this agreement by making three Orders by consent, relying on its power to do so provided in section 59 of the NCAT Act when proceedings are settled. Order 1 of these Orders compelled the tenant to repay the rent arrears owed according to the agreed instalment plan. Order 2 of these Orders compelled the tenant to pay rent of \$300.00 a week in accordance with the RTA in future, the next payment being due on 11 March 2016. Order 3 of those Orders granted the landlords the option of requesting that the Application for termination of the tenancy be relisted before the Tribunal at any time before 7 June 2016 if the tenant failed to comply with the Tribunal's orders concerning the payment of rent.
- 11 By letter dated 12 April 2016, emailed to the Tribunal's Registry on that date, the landlords' Managing Agent requested that the Application for termination of the tenancy be relisted before the Tribunal because the tenant had failed to comply with Order 1 of the Tribunal's Orders of 7 March 2016 by repaying rent arrears in accordance with the

- agreed instalment plan.
- 12 The Application was again listed for conciliation and hearing in a Group List on 29 April 2016. The Managing Agent attended the hearing on behalf of the landlords. The tenant attended in person with the assistance of a Laotian interpreter.
- 13 In accordance with the Tribunal's usual practice where counterparts are present in a Group List, the parties were directed to participate in conciliation to determine if the issues in dispute could be resolved cooperatively without the need for a formal hearing of the Application.
- 14 When the parties returned to the Hearing Room, they handed up a further agreement between them recorded on a "Rent Arrears/Termination Application Conciliation Agreement Form." That agreement recorded that the tenant had now paid all rent arrears owed up to the date of the hearing. However, it asked the Tribunal to note that the RTA required the tenant to pay rent one week in advance, and that he would do this by paying instalments of at least \$50.00 per week commencing from 6 May 2016 until rent was paid one week in advance. The tenant again agreed that he would pay prospective rent in accordance with the RTA. In addition, it was agreed that the landlords' option to relist the Application for termination of the tenancy would be extended by a further three-month period.
- 15 The Tribunal explored in discussion with the parties if it was really necessary for it to make a further specific performance order by consent in relation to the payment of prospective rent in circumstances where the tenant had now paid all rent arrears owed. The Tribunal also indicated to the parties that it would not extend the period in which the Application for termination of the tenancy could be relisted on the basis that the Application had already been relisted to determine that question at this hearing, and on the further basis that the Tribunal did not have the role or function of, in effect, supervising the tenancy on a continuing basis to ensure that the tenant paid rent as required.
- 16 The Managing Agent told the Tribunal that the landlords required a three-month extension of the period in which the Application for termination of the tenancy could be relisted and if this was not available, the landlords pressed the Application for termination of the tenancy.
- 17 The Tribunal's power to permit a landlord to relist an Application for Termination in circumstances where specific performance orders regarding the payment of rent arrears and prospective rent entered into by consent in order to avert termination are not complied with by a tenant is found in section 188(c) of the RT Act. In this respect it is an appropriate ancillary order that has the effect of encouraging the cooperative resolution of rent payment disputes without resort to termination of the tenancy. The landlord has the comfort that if agreements concerning the payment of rent arrears and prospective rent are not complied with they may quickly and easily relist their Application before the Tribunal to determine if the tenancy ought to be terminated without it being necessary to serve the tenant with a new Notice to terminate the

- tenancy and wait the necessary period until the date of vacant possession has passed before the Tribunal has power to deal with the matter. A relist option also means that a landlord is not required to pay any further application fee to the Tribunal such as would be required in any new Application for termination of the tenancy.
- 18 However, the Tribunal has a judicial role and function. It must determine Applications brought before it according to law. As noted above, the Tribunal does not have the role or function, in effect, of providing ongoing oversight or supervision of a tenancy to ensure that the tenant pays rent in accordance with the terms of the RTA.
- 19 Additionally, an Application to the Tribunal for termination of a tenancy on the basis of non-payment of rent proceeds from a Termination Notice issued by the landlord on the tenant at a particular point in time. Pursuant to sub-section 83(2)(a) of the RT Act and regulation 22(2) Act of the *Residential Tenancies Regulation 2010* such an Application must be made to the Tribunal within 30 days of the date of vacant possession specified in the Notice.
- 20 There is no question that the landlords have complied with that requirement in this case, however, the policy underlying that requirement is that a Termination Notice does not have perpetual effect. It must be acted upon by the landlord within the prescribed period (or such further period as the Tribunal may permit pursuant to its power to extend time pursuant to section 41 of the NCAT Act).
- 21 In my view the Tribunal's power to make ancillary orders under section 188(c) of the RT Act should not be used to unreasonably extend the period in which a Termination Notice for non-payment of rent takes effect. This would have the potential to result in the Tribunal determining if a tenancy should be terminated in circumstances that are remote in time from the breach of the RTA that originally brought the Application before the Tribunal.
- 22 Despite the Tribunal's explanation of its refusal to grant the landlords a three-month extension of the period in which the Application for termination of the tenancy could be relisted, the Managing Agent declined to proceed to settle the dispute on the basis of the other matters agreed in conciliation and pressed termination of the tenancy. This was a disappointing outcome, but it was a course the Managing Agent was fully entitled to follow in the circumstances. That being so, it was the Tribunal's responsibility to determine the Application on the evidence before it according to law.
- 23 Section 87 of the Act sets out the Tribunal's powers and discretion in relation to termination of a tenancy based upon breach of a RTA. It relevantly provides:

...

(4) The Tribunal may, on application by a landlord, make a termination order if it is satisfied

that:

(a) the tenant has breached the residential tenancy agreement, and

(b) the breach is, in the circumstances of the case, sufficient to justify termination of the agreement, and

(c) the termination notice was given in accordance with this section and the tenant has not vacated the premises as required by the notice.

(5) In considering the circumstances of the case, the Tribunal may consider (but is not limited to considering) the following:

- (a) the nature of the breach,
- (b) any previous breaches,
- (c) any steps taken by the tenant to remedy the breach,
- (d) any steps taken by the landlord about the breach,
- (e) the previous history of the tenancy.

(6) The Tribunal may refuse to make a termination order if it is satisfied that the tenant has remedied the breach.

24 With respect to applications for termination based upon non-payment of rent, the Tribunal's powers and discretion are also structured by section 89 of the Act, which provides as follows:

(1) This section applies if a landlord gives a tenant a non-payment termination notice.

(2) The Tribunal must not make a termination order on the ground set out in the notice if the tenant pays all rent owing or enters into, and fully complies with, a repayment plan agreed with the landlord.

(3) A termination of the residential tenancy agreement solely on the ground of non-payment of rent, and any warrant for possession issued as a result of any order for possession, cease to have effect if the tenant pays all of the rent owing or enters into, and fully complies with, a repayment plan agreed with the landlord and the tenant has not vacated the residential premises.

(4) If a tenant repays all the rent owing or enters into, and fully complies with, a repayment plan agreed with the landlord, the landlord must notify:

- (a) the Tribunal, if the landlord has applied to the Tribunal for a termination order on the ground of non-payment of rent and the application has not been finally dealt with, or
- (b) the Sherriff, if a termination order has been made and a warrant for possession of the residential premises has been issued but has not been enforced by the Sheriff

(5) The Tribunal may, on application by a landlord, make a termination order despite sub-section (2) or (3) if it is satisfied that the tenant has frequently failed to pay rent owing for the residential premises on or before the day set out in the residential tenancy agreement.

(6) If the Tribunal makes a termination order as referred to in subsection (5), a warrant for possession may be issued as a result of that order, even if the tenant has paid all rent owing or complied with a repayment plan.

25 At the first listing of this Application on 7 March 2016, the tenant was 52 days in arrears of rent in the amount of \$2,228.57. In the course of conciliation on the day of the hearing, the Managing Agent and tenant agreed on a partial repayment plan for the payment of rent arrears that required at least \$600.00 to be paid towards those arrears on 11 and 18 March 2016 and \$300.00 to be paid towards those arrears on 29 March 2016. The Tribunal gave effect to this agreed repayment plan as an Order of the Tribunal by consent. The Tribunal also made an order, by consent, that the tenant pay prospective rent on time.

26 On 9 March 2016 the tenant paid \$900.00 into his rent trust account. This satisfied his obligation to pay \$600.00 towards the arrears on or before 11 March 2016 and to pay prospective rent then due.

- 27 However the tenant did not pay rent again until 4 April 2016 when he paid \$1,200.00 into his rent trust account. The tenant's failure to make a payment of at least \$600.00 on or before 18 March 2016 and his failure to pay prospective rent due from 14 March to 4 April 2016 constitutes a failure comply with an agreed repayment plan for the payment of rent arrears.
- 28 The \$1,200.00 payment made by the tenant on 4 April 2016 is the equivalent of 4 weeks rent. It did not make good the tenants default on the agreed repayment plan. A payment of at least \$1,800.00 would have been required to achieve this.
- 29 It follows from this analysis that the Tribunal is not prevented by section 89(2) of the RT Act from considering if this tenancy ought to be terminated in all the circumstances of the case.
- 30 As noted above, the tenant had not paid all rent due when this Application was first listed before the Tribunal on 7 March 2016. As at the date of the hearing of the relisted application on 29 April 2016, the tenant had paid all arrears owed up to that date, but had not paid rent one week in advance as required by the RTA.
- 31 Nevertheless, the Tribunal may only consider termination the tenancy pursuant to section 87 of the RT Act in these circumstances if it is satisfied pursuant to section 89(5) of the RT Act that the tenant has frequently failed to pay rent in accordance with the RTA. In the original Application to the Tribunal the Managing Agent sought such a finding from the Tribunal on behalf of the landlord.
- 32 In evidence before the Tribunal was a print-out of the Tenant Trust Ledger Report for the whole of the tenancy. This rent payment record was not disputed by the tenant.
- 33 In early March 2015 the rented premises passed into new ownership. It is convenient to consider the tenant's rent record from then on up to the present. That record reveals that the tenant has not paid all rent due on the date upon which it fell due for the whole of the period. Rent has always been paid late and not kept one week in advance. The extent of the arrears fluctuates from just a few days to 52 days, but for most of the period rent has been owed for more than 14 days. On the basis of this evidence the Tribunal is comfortably satisfied pursuant to section 89(5) of the RT Act that the tenant has frequently failed to pay rent in accordance with the RTA.
- 34 The Tribunal therefore has the power to terminate the tenancy pursuant to section 87(4) of the Act notwithstanding that all rent due had been paid as at the date of the hearing, provided it is otherwise satisfied that the breach is, in all the circumstances, sufficient to justify termination of the RTA.
- 35 Sub-section 87(5) sets out some of the factors the Tribunal may consider in the exercise of its discretion to order or refuse to order termination of the tenancy, without limiting the factors that may be considered.
- 36 Having regard to sub-sections 87(5)(a), (b) and (e) of the Act, the Tribunal was comfortably satisfied that the nature of the tenants' failure to pay rent in accordance with the RTA at the time the Notice of Termination was issued was serious (the tenant being 28 days in arrears) and that over the course of the tenancy the tenant was

continuously in arrears. For most of the periods rent was in arrears the breach was serious, being more than 14 days and extending up to 52 days.

- 37 Having regard to sub-section 87(5)(d) of the Act, the Tribunal notes that the landlords have attempted to avert termination of the tenancy by entering into an agreement with the tenant on 7 March 2016 for the repayment of rent arrears and the payment of prospective rent, which became the subject of consent orders of the Tribunal. As outlined above, the tenant has not complied with the terms of that agreement.
- 38 Having regard to sub-section 87(5)(c) of the Act the Tribunal takes into account that as at the date of the hearing the tenant has paid all rent due up to that date (although not a week in advance as required by the RTA).
- 39 There are other circumstances that are also relevant to the exercise of the Tribunal's discretion in this case.
- 40 The Tribunal sought an explanation from the tenant for his failure to pay rent in accordance with the RTA. The tenant informed the Tribunal that his difficulties in paying rent have resulted from his loss of employment due to a workplace injury. His only income is workers compensation in the amount of \$480.00 per week. He is not currently able to return to work, and will not be able to do so for the foreseeable future.
- 41 The tenant told the Tribunal that over a period of at least two months he has been trying to reduce his rent burden by finding a co-tenant. This had been attempted with the landlord's consent. However, these efforts had been unsuccessful. He told the Tribunal that he intended to keep trying to find a co-tenant.
- 42 It appeared to the Tribunal that the tenant was genuine in his regret about being unable to pay rent when due, and that he was doing his best in very difficult circumstances to find a means of meeting his financial obligations. However, it was also clear that these efforts, over a protracted period, had not been successful. The obvious reality to be confronted by the tenant and the Tribunal is that the rent payable under the RTA is more than 60% of the tenant's weekly income. He simply cannot afford to pay rent due and meet his other subsistence needs. The tenancy is not sustainable. On the evidence before the Tribunal, the tenant has no current means of paying all rent due under the RTA in the future. He will continue to struggle to do so.
- 43 The tenant's circumstances are compelling. It may be that he is eligible for some form of social housing assistance in the circumstances. That is a matter for the appropriate authorities to determine.
- 44 The Managing Agent told the Tribunal that the landlords rely upon the rent payments to meet their own financial needs. The Managing Agent said that the irregularity in rent payments has caused the landlords financial inconvenience and difficulty.
- 45 In summary, this Application for termination of the tenancy is made to the Tribunal in circumstances where the breach of the RTA by failing to pay rent in accordance with that agreement is serious, where the failure to pay rent over the course of the tenancy has been continuous resulting in financial inconvenience and difficulty for the landlords,

where the tenant cannot satisfy the Tribunal that he has the financial capacity to meet his obligation to pay rent in accordance with the RTA in the future, and where the tenant has already had the benefit of specific performance orders made by consent for the repayment of rent arrears according to an agreed instalment plan and the payment of prospective rent which have not been complied with.

- 46 In all these circumstances the Tribunal is satisfied that the tenant's failure to pay rent in accordance with the RTA is sufficient to justify the termination of the RTA.
- 47 Having reached that conclusion, the Tribunal then considered if the date for possession ought to be suspended for a particular period.
- 48 The tenant sought to remain in the rented premises as an occupant as long as possible on the basis that he anticipated he would have significant difficulty in finding alternative accommodation.
- 49 On behalf of the landlords, the Managing Agent opposed the order for possession being suspended. She did so on the basis of the tenant's rent record and the potential financial exposure of the landlords due to the likelihood that the tenant would not be able to pay occupation fees owed until vacant possession was given.
- 50 The tenant is a single person living at the rented premises alone. He has no dependents. As noted, he is unable to work due to a workplace injury. He has a modest income which will make it difficult for him to find alternative accommodation without social assistance. If he is eligible for social assistance this may take some time to secure.
- 51 As at the date of the hearing all rent arrears have been paid. The landlord still retains the full benefit of the tenant's rental bond of \$920.00. This is now the equivalent of just over 3 weeks rent at the current rate. The tenant impressed the Tribunal as a person who understood and sought to fulfil his financial obligations. From an objective point of view he will struggle to do so. However, there are reasonable prospects that he will be able to make some payment towards occupation fees due from the date of vacant possession. If he is not able to pay all occupation fees due, the landlords may have resort to his rental bond to cover any shortfall.
- 52 Taking each of these matters into account, the Tribunal determined that the tenancy would be terminated with immediate effect and that possession would be given to the landlords. However, the date for possession was suspended until 27 May 2016. Until the date vacant possession is given to the landlord, the tenant must pay an occupation fee at the daily rate of \$42.85, which is one-seventh of the current weekly rent.

**P French**

**General Member**

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

**20 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