Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Huang v Sinclair [2017] NSWCATCD 9**
Hearing dates:	20 January 2017
Decision date:	09 February 2017
Jurisdiction:	Consumer and Commercial Division
Before:	P French, General Member
Decision:	1 The Tribunal is satisfied that the Application and Notice of hearing have been served on the tenant in accordance with section 223 of the Residential Tenancies Act 2010, and that justice requires that the Application be heard and determined in the absence of the tenant. 2 The tenant's application for an adjournment of the hearing is refused. 3 The Residential Tenancy Agreement is terminated in accordance with section 92 of the Residential Tenancies Act 2010 on the basis that the tenant has seriously threatened the landlord and abused the landlord and the landlord's agent and intentionally engaged in conduct in relation to the landlord that would reasonably cause the landlord to be intimidated and harassed. 4 The Residential Tenancy Agreement is terminated on 13 February 2017 and possession is given to the landlord on this date. 5 The order for possession is suspended to 20 February 2017. 6 Within 60 days of the date for possession of the residential premises specified in these orders the landlord may request relisting of the application to determine the amount of occupation fee owing. 7 The landlord's agent is to advise the tenant in writing of these orders by delivery of a letter to the tenant at the residential premises not later than 5pm on 13 February 2017.
Catchwords:	RESIDENTIAL TENANCIES – section 92 of the Residential Tenancies Act 2010 - termination of tenancy – where the tenant has seriously threatened the landlord – where the tenant has seriously abused the landlord and the landlord's

agent – where the tenant has intimidated the landlord – where the tenant has harassed the landlord – where the facts suggest the tenant has a mental illness – where there is no evidence that the tenant's conduct has been non-intentional due to mental illness

PRACTICE & PROCEDURE – subsection 38(5(c) of the Civil and Administrative Tribunal Act 2013 – the Tribunal's duty to take such measures as are reasonably practicable to ensure that parties have a reasonable opportunity to be heard and have their submissions considered - where tenant has requested an adjournment of the hearing to obtain legal representation – where there has been no application for, or grant of leave for legal representation – where the reason given in justification for an adjournment is time to prepare a case which is not relevant to an issue for determination - where a tenant advocate is available at the Registry on the day of the hearing – where justice requires the Tribunal to consider the tenant's case on the best evidence available.

- section 51 of the Civil and Administrative Tribunal Act 2013 – Tribunal's power to adjourn proceedings – where a hearing is brought forward on the basis of urgency - where the landlord and landlord's agent claim to be in immediate risk of serious harm - where the tenant objects to the hearing being brought forward – requirements for service of Notice of the hearing on the tenant – where registrar directs steps be taken to bring the Notice to the attention of the tenant – where Tribunal directs that the tenant has been served on a specified date - where the tenant seeks an adjournment of the hearing in order to obtain legal representation – where there has been no application for or grant of leave for legal representation - where Tribunal does not accept that a reasonable effort has been made to obtain legal advice – where a tenant advocate is available at the Registry on the day of the hearing – where the Notice of Hearing warns the parties that if they fail to attend the hearing the Tribunal may proceed and determine the application in their absence – where there is a Procedural Direction issued by the President under section 26 of the Act that establishes the Consumer and Commercial Division's procedure in relation to adjournment of proceedings - where the facts suggest that the tenant has a mental illness – where the tenant submits a medical certificate just prior to the hearing which states he is unable

	to attend due to anxiety – where that medical certificate does not address the critical question - where the tenant cannot avoid the compulsory process of the Tribunal by not attending the hearing
Legislation Cited:	Electronic Transactions Act 2000 Civil and Administrative Tribunal Act 2013 Civil and Administrative Tribunal Rules 2014 Interpretation Act 1987 Residential Tenancies Act 2010 Residential Tenancies Regulation 2010
Cases Cited:	Bobolas v Waverley Council [2016] NSWCA 139 Cameron v Ozzy Tyres Pty Ltd [2016] NSWCATAP 70 Cure v Bridge Housing Ltd [2014] NSWCATAP 80 Lindsay v NSW Land and Housing Corporation [2016] NSWCATAP 128 McCormack v Commonwealth [2007] FMCA 1245 NAKX v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 1559 Penhall-Jones v State of NSW [2008] FMCA 832 Queensland v J L Holdings Pty Ltd (CLR) 189 CLR 146 Wilson v Chan & Naylor Parramatta Pty Ltd as trustee for Chan & Naylor Parramatta Trust [2016] NSWCATAP 236
Category:	Principal judgment
Parties:	Wayne Huang (applicant landlord) Paul Sinclair (respondent tenant)
Representation:	Valerie Naidoo, Managing Agent for the landlord No appearance by tenant
File Number(s):	RT 17/01445
Publication restriction:	Nil

REASONS FOR DECISION

Introduction

1 This is an application by Mr Wayne Huang (**the landlord**) for an Order from the Tribunal pursuant to section 92 of the RT Act that would terminate the Residential Tenancy Agreement (**RTA**) that subsists between him and Mr Paul Sinclair (**the tenant**), and for related orders. This application was made to the Tribunal on 11 January 2017 (**the application**).

2 For reasons that are set out following, the Tribunal has determined that the RTA ought to be terminated pursuant to section 92 of the RT Act with effect on 13 February 2017 and possession given to the landlord within seven days of that date on the basis that it

is comfortably satisfied that the tenant:

(a) seriously threatened the landlord on repeated occasions during December 2016 and January 2017, including on 16 and 23 December 2016, and on 2, 8, 15, and 19 January 2017;

(b) seriously abused the landlord on repeated occasions during December 2016 and January 2017, including on 16 and 23 December 2016, and on 2, 8, and 15, January 2017;

(c) seriously abused the landlord's Managing Agent on 2 and 11 January 2017;

(d) intentionally engaged in conduct during December 2016 and January 2017 that is reasonably likely to have caused the landlord to be intimidated, including on 16 and 23 December 2016, and on 2, 8, 15, and 19 January 2017; and

(e) intentionally engaged in conduct during December 2016 and January 2017, including on 16 and 23 December 2016, and on 2, 8, 15, and 19 January 2017 that is reasonably likely to have caused the landlord to be harassed.

Procedural history

3 The application was first listed before the Tribunal for Conciliation and Hearing in a Group List on 25 January 2017. The Divisional Registrar issued Notices of this hearing to the parties on 12 January 2017. However, after receiving this Notice, on 17 January 2017, the landlord's Managing Agent applied to the Divisional Registrar for an earlier hearing on the basis that the application was urgent. The Managing Agent claimed that the tenant was persistently engaging in conduct towards her and the landlord and members of the landlord's family that was aggressive and intimidating. The Managing Agent claimed that she and the landlord and members of the landlord's family were frightened for their safety. After considering the matter, the Divisional Registrar granted the landlord's request. On 18 January 2017 hearing notices were issued for a hearing on 20 January 2017. The Notices were sent to both parties by express post and email, and a Registry Officer telephoned both parties. However, it appears from the Tribunal's file record that the tenant contacted the Divisional Registrar on 19 January 2017 to advise that he could not open the email. It also appears that the Divisional Registrar's telephone call to the tenant on 18 January 2017 was not answered

4 Nevertheless it is clear that the tenant received the Notice of hearing on 19 January 2017. In the late afternoon of that day, the tenant emailed the Divisional Registrar the following request:

> I request adjournment of this matter to get representation and properly prepare as I am unable to submit my case without proper legal representation. I believe this was an unreasonable action to bring the hearing forward, its actually called moving the goal posts

5 In the early evening of 19 January 2017, the tenant emailed the Divisional Registrar again. It is convenient to extract that email at some length at this point as its contents are relevant both to the adjournment application and the substantive issues to be determined:

> I requested adjournment as I wasn't aware of the change of date till today and last conversation with Alex the property mgr was we weren't even going to the Tribunal, now they've moved the goal posts again to favour them, I need more time to get legal representation which is difficult as tenant advocates only work half days. This has been compromising my mental health more and more for weeks (and the landlord is a mental health nurse and should know not to push people to their limits) without adequate sleep, clean water, the frustration of a TV screen pixelating after trying to relax. I regret swearing and slamming doors and overall conduct, but they've shown me no respect and the agent has put words in my mouth and elaborated with fiction which infuriated me, advice from Judy at fair trading is I'm entitled to backdated rent reduction after politely requesting repairs to basic things like TV reception (the landlord told me to get Foxtel for tv, when viewing the property, I noticed two satellite dishes and an aerial on the roof so I made safe assumption I'd have reception but now only sometimes I get ch9 and clean drinking water, as it is I've also got a cyst and problems in my stomach from this stress and water quality and will require endoscopy and surgery to remove cyst, as well as mental pain and suffering I'm requesting an adjournment so I can present my case for backdated 50% rent reduction which will give me immediate monetary option for new accommodation. I was told when I viewed the property there was only one person upstairs who works night shift, there are now three people upstairs who snore like elephants, talk at the top of their voice, mow the lawn and whipper snipper at 8:30pm. I could go on n on, again, I regret my reaction, its all too common these days to push people to their limits and when they have a reaction, they've already got the police or the tribunal on speed dial which I find quite evil and despicable, creating more pain and suffering for people like me who have already suffered the initial mental torment, that's why anxiety and depression and even domestic violence will always be present because people are without regard and don't take responsibility, instead countering and shifting blame and responsibility, and then I feel worse and cross at myself for reacting, which isn't difficult after weeks of next to no sleep and being treated second rate, they're so transparent, they've gone to all this trouble instead of showing some respect for the tenant and doing the right thing to start with. Today's mail is a letter from century21 advising of a routine inspection on 7/2/17, which will be interesting, I wasn't even given a condition report.
>
> I shouldn't have to buy clean water from the supermarket or buy earplugs or rent video for uninterrupted TV viewing. I will need legal representation as I will not settle for anything less than the said rent reduction and 21 days or as quick as I can find new accommodation to vacate. It shouldn't have had to come to this. Now as I compose this the landlord is at my door making noise working in the backyard after 6pm at night. No respect. It was advertised quiet peaceful private … Some people just shouldn't be landlords

6 Later that evening the tenant sent the following email to the Divisional Registrar:

> In continuum to my reasonable request, it's simply misleading and false advertising. If you buy a roast meal you'd expect the meat to be of decent quality and more vegetables than just potato. I am on disability pension for mental illness and agent and landlord knew that from the start.

7 Still later that evening, the tenant emailed the Divisional Registrar requesting that he be contacted by telephone as he would have 'no call or data credit from tmrw.' This email was received and processed by the Divisional Registrar in the course of the day on 20 January 2017, and was handed to the Tribunal just prior to the hearing. The request was not dealt with by the Divisional Registrar as a request for a telephone hearing, and there were no telephone hearing facilities available (at that time) in the hearing room.

8 Early in the morning of 20 January 2017 the tenant emailed the Divisional Registrar again stating:

> In light of everything, woken this morning by landlord and his father with tradesman with power tools blaring at 7am. Icing on the cake. Pushing me to my limit. No respect. Deliberately after a reaction. Despicable people.

9 At 11:00am on 20 January 2017 the Divisional Registrar received an email from a

medical practice enclosing a medical certificate for the tenant. That certificate is given by a General Practitioner and states: “[t]his is to certify that Mr Paul Sinclair is having anxiety due to his current circumstances and will benefit from the postponing of the Tribunal.”

Tenant’s request for adjournment

10 The tenant did not attend the hearing. The Tribunal was therefore required to determine if it should grant the tenant’s request for an adjournment of the hearing or if it should proceed to hear and determine the application in the tenant’s absence on the basis of the urgency asserted by the landlord.

11 There are a number of legal principles to be considered in determining this question. The ‘foundation’ principles are found in sections 36 and 38 of the NCAT Act.

12 Section 36 sets out a ‘guiding principle’ that is to be applied in all aspects of the Tribunal’s practice and procedure, which is to ‘facilitate the just, quick and cheap resolution of the real issues in the proceedings.’ The guiding principle incorporates the values of substantive justice in outcome with instrumental justice in the legal process. However, it is clear that if there is any tension between the two values what is required to achieve substantive justice in outcome must take precedence over efficiency and cost considerations: *Queensland v J L Holdings Pty Ltd* (CLR) 189 CLR 146 at [154]; *Wilson v Chan & Naylor Parramatta Pty Ltd as trustee for Chan & Naylor Parramatta Trust* [2016] NSWCATAP 236; *Cameron v Ozzy Tyres Pty Ltd* [2016] NSWCATAP 70.

13 Section 38 of the NCAT Act sets out the principles upon which the Tribunal’s procedure is based. In subsection 38(1) it provides that the Tribunal may determine its own procedure in relation to any matter for which the NCAT Act or the Civil and Administrative Tribunal Rules 2014 (**NCAT Rules)** do not otherwise make provision. Neither the NCAT Act nor the NCAT Rules designate a specific procedure for dealing with applications on an urgent basis. The Tribunal therefore has discretion to determine if it will deal with an application on an urgent basis, and the manner in which it will do so. However, sub-section 38(2) provides that in dealing with an application, the Tribunal must observe the rules of natural justice, or procedural fairness. Subsection 38(4) requires the Tribunal to act with as little formality as the circumstances of the case permit, and according to “equity, good conscience and the substantial merits of the case” without regard to technicalities or legal forms. Subsection 38(5) requires the Tribunal to take such measures as are reasonably practicable to ensure that parties to proceedings before it understand the nature of the proceedings, and that they have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings. Subsection 38(6) requires the Tribunal to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceeding.

14 Section 51 of the Civil and Administrative Tribunal Act 2013 (**NCAT Act**) provides that the Tribunal may adjourn proceedings to any time and place, including for the purpose

of enabling the parties to negotiate a settlement. Rule 35 of the Civil and Administrative Tribunal Rules (**NCAT Rules**) provides that the Tribunal may proceed to hear an application in the absence of a party who has failed to attend the hearing if it is satisfied that notice of the hearing was duly served on the party, or the Tribunal is satisfied that service of notice of the hearing on the party has been attempted, and that justice requires that the matter be dealt with in the absence of the party.

15 Having regard to these legal principles, the questions the Tribunal must pose and answer in determining if it will grant the tenant's application for an adjournment are therefore as follows:

(a) has the tenant been served with Notice of the hearing?

(b) do the reasons the tenant has given provide sufficient justification for an adjournment to be granted?

(c) has the tenant been given a fair opportunity to attend and present his case?

(d) would there be any prejudice to the landlord if the adjournment were granted?

Notice of the hearing

16 Rule 13 of the NCAT Rules sets out the requirements for service of, among other things, a Notice of a Tribunal hearing. Sub-Rule 13(2)(b)(ii) provides that a Notice may be served by post to a person's residential address. Sub-Rule 13(4)(a) provides that if the Notice is served by post it is taken to be delivered on the fourth working day after the date on which the Notice was posted to the person. In this case the Divisional Registrar posted Notice of the hearing to the tenant on 18 January 2017. The tenant was therefore not deemed served with Notice of the hearing by post until 24 January 2017, which was the fourth working day after the Notice was posted. This was after the hearing date. It is thus clear that the tenant cannot be considered served with Notice of the hearing in accordance with Sub-Rule 13(2)(b)(ii).

17 Sub-rule 13(2)(g) of the NCAT Rules provides that a hearing Notice may also be served on a person electronically by means of an email address or mobile phone number if that person has consented to this manner of service. Pursuant to Sub-Rule 13(4)(d)(ii) of the NCAT Rules and Clause 13 of Schedule 1 of the *Electronic Transactions Act* 2000 a Notice sent electronically if served on a working day before 5pm is taken to have been served on that day. In this case, the Divisional Registrar sent the Notice of hearing to the tenant by email before 5pm on 18 January 2017, which was a working day. However, there is no evidence that the tenant ever consented to this manner of service. In any event, although it is clear that the tenant received the covering email, it is also clear he was unable to open the Notice enclosed. It is also thus clear that the tenant cannot be considered served with Notice of the hearing in accordance with Sub-Rule 13(2)(g).

18 Sub-Rule 13(2)(i) of the NCAT Rules provides that service of a hearing Notice may also

be effected in any such other manner as the Tribunal or a registrar may direct in a particular case. Rule 15 of the NCAT Rules provides for substituted and informal service of documents authorised or required to be served on a person under the NCAT Act. It provides:

> **15 Substituted and informal service generally**
>
> (1) If a document that is required or permitted to be served on a person in connection with any proceedings before the Tribunal:
>
> (a) cannot practicably be served on the person, or
>
> (b) cannot practicably be served on the person in the manner provided by law, the Tribunal or a registrar may direct that, instead of service, such steps be taken as are specified by the Tribunal or registrar for the purpose of bringing the document to the notice of the person concerned.
>
> (2) The Tribunal or a registrar may direct that the document be taken to have been served on the person concerned on the happening of a specified event or on the expiry of a specified time.
>
> (3) If steps have been taken, otherwise than under a direction under this rule, for the purpose of bringing the document to the notice of the person concerned, the Tribunal or a registrar may direct that the document be taken to have been served on that person on a date specified by the Tribunal or registrar.

19 In this case the Divisional Registrar directed that the Notice be brought to the attention of the tenant by sending it by express post to his residential address, by email to the tenant's email address which was provided to the Tribunal by the landlord's Managing Agent, and by telephone. Two of those attempts failed – the tenant could not open the file containing the Notice in the email he received, and the Divisional Registrar's call to him went unanswered. However, it is clear that the tenant received the Notice of hearing sent to his residential address by express post on 19 January 2017, the day before the hearing. Pursuant to Sub-Rule 15(3) I therefore direct that the Notice be taken to have been served on the tenant on that date.

20 It is clear that the tenant had very little notice of the hearing (less than one day). He may have received notice of the landlord's application with the first notice of hearing a day or two earlier, but on any view, the tenant had very little time to prepare for the hearing.

21 It is also clear, however, that the tenant had no other commitment at the time of the hearing that prevented his attendance. The Notice of hearing issued to the tenant carried a standard warning in the following terms: "[i]t is important that you are on time as the Tribunal may decide the matter in your absence. The decision made will be binding on you." The tenant was thus on notice that failure to attend the hearing may result in a decision being made in his absence.

22 The tenant failed to attend the hearing without knowing if his request for an adjournment was granted or not. A party to a proceeding before the Tribunal cannot avoid or frustrate the legal process by failing to attend the hearing. In this respect, the President has issued a procedural direction to the Consumer and Commercial Division of the Tribunal (Procedural Direction 1: Adjournments; 1 January 2014) under section 26 of the NCAT Act. Among other things, that procedural direction directs that the

Tribunal's duty to ensure that its proceedings are efficient and effective requires that it supervise, control and consent to all requests for adjournment of proceedings [at 2]. It warns parties that unless they are notified by the Tribunal of an adjournment, they must assume that the hearing will proceed in their absence [at 3].

Reasons given to justify an adjournment

23 The tenant makes a number of points by way of explanation for his failure to attend the hearing and in support of his application for an adjournment. He contends that he was taken by surprise by the Divisional Registrar's decision to bring forward the hearing date, and that this has not provided him with adequate time to obtain legal advice and representation. Specifically, he contends that he needs more time to prepare his case for a rent reduction based on an alleged failure by the landlord to carry out requested repairs and improvements. The tenant has also submitted a medical certificate that states he is experiencing anxiety due to his current circumstances and would benefit from the hearing being postponed.

24 The tenant contends that he needs time to contact a tenant advocate or lawyer to obtain legal advice and representation. He contends that he had not had a fair opportunity to do this because 'tenant advocates only work half days.' The tenant does not provide any specific information about his attempts to contact a tenant advocate or lawyer; for example, evidence of a forthcoming appointment when the advice he seeks would be obtained. Had he done so, this element of his application for an adjournment would have been more persuasive. As it is, the tenant is expressing only a general intention to obtain such advice. This is an application for termination of an RTA under section 92 of the RT Act on the basis, among other things, of alleged serious threats and abuse of a landlord. The Tribunal is entitled to expect the tenant to act immediately to consider his position, including by obtaining any advice he considers necessary. In any event, this hearing was set down in the Tribunal's Sydney Registry. A tenant advocate was available on site on the day of the hearing to provide information and advice to tenants appearing in proceedings before the Tribunal on that day.

25 Section 45 of the NCAT Act provides that a party to proceedings before the Tribunal has the carriage of the party's own case and is not entitled to be represented by any person unless the Tribunal grants leave for the party to be represented. The tenant had not made any application to the Tribunal for leave to be represented by a lawyer, and it follows that no such leave has been granted. The tenant thus continues to have the carriage of his own case and was responsible for attending the hearing in person. Had the tenant made an application for leave to be legal represented at the hearing, that application would have been considered on its merits. In this respect I note that it is not unusual for the Tribunal to grant leave to a tenant to be legally represented in the context of a section 92 termination application. By failing to attend the hearing the tenant deprived the Tribunal of a proper opportunity to consider if there ought to be a grant of leave for legal representation in this case.

26 In this respect, the reason stated by the tenant in his email to the Divisional Registrar for wanting to obtain legal advice and representation is not compelling. He states it is in order to pursue the landlord for a rent reduction due to the landlord's alleged failure to carry out necessary repairs and improvements to the residential premises. The tenant has no such application before the Tribunal, and contentions to this effect have very limited, if any, relevance to the issues to be determined in these proceedings. If this were the sole basis of any application by the tenant for leave to be legally represented in the proceedings, it would have been refused.

27 The medical certificate relied upon by the tenant in support of his adjournment application is of limited probative value. While it establishes the tenant is experiencing anxiety, it does not provide any information as to why this condition would prevent the tenant from attending the Tribunal. For example, it does not state that the tenant has been prescribed or administered any medication that would result in his sedation, or that he has been admitted to hospital for treatment. In this respect, it does not address the "critical question" of whether, and if so why, the medical condition would prevent him from travelling to the Tribunal and participating effectively in the hearing: *NAKX v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1559 at [6] per Lindgren J; cited with approval by the NSW Court of Appeal in *Bobolas v Waverley Council* [2016] NSWCA 139 at [221 to 222]. The Tribunal accepts the tenant may be anxious about the hearing. That is true for many parties who participate in Tribunal hearings on a daily basis. However, it is not a sufficient reason for an adjournment to be granted.

Fair opportunity to be heard

28 As has been noted above, the tenant had very limited notice of the application and the hearing date. It may be accepted that he had limited time to prepare any response to the application. However, the application was listed in a Group List for Conciliation and Hearing. Very frequently, tenancy disputes such as this one are resolved in conciliation with the assistance of a Tribunal Conciliator. I have also noted that there was a tenant advocate available at the Registry who could have provided the tenant with information and advice, supported him in conciliation, and with leave, represented him in the hearing.

29 The central questions before the Tribunal for determination are whether the tenant seriously threatened or abused the landlord and/or the landlord's agent, and whether the tenant intentionally intimidated or harassed the landlord or the landlord's agent. It is whether the tenant has had a fair opportunity to respond to these questions that is in issue. It appears from the tenant's email to the Tribunal that he concedes that he engaged in some form of conduct of the general nature asserted by the landlord. He says "I regret swearing and slamming doors and overall conduct"; "I regret my reaction"; and that he is "cross at myself for reacting." Of course, these statements are made without knowing the particulars of the landlord's allegations, and they do not amount to admissions to these particulars. But the tenant's comments do suggest he

knows in general terms the case he has to answer.

30 As I have noted already, the tenant's stated reason for seeking an adjournment is to provide him time to prepare an application for rent abatement:

> I'm requesting an adjournment so I can present my case for backdated 50% rent reduction which will give me immediate monetary option for new accommodation."
>
> "I will need legal representation as I will not settle for anything less than the said rent reduction and 21 days or as quick as I can find new accommodation to vacate. It shouldn't have had to come to this.

31 The questions of rent abatement or repairs to residential premises do not arise for consideration in an application for termination of a RTA under section 92 of the RT Act, and the tenant has no concurrent application before the Tribunal putting these matters in issue. There is therefore no unfairness associated with refusing an adjournment to the tenant where a primary reason given in justification of the application is preparation of a case that it not relevant to the issue in dispute that the Tribunal is called upon to determine.

Prejudice to the landlord

32 On behalf of the landlord, the Managing Agent contends that it is urgent that the Tribunal makes a termination order ending the tenancy because the landlord fears for his safety and that of his elderly parents who live with him.

33 In this respect, it is to be noted that the residential premises that are the subject of the RTA is a flat partitioned off on the ground floor of a two-storey house with an associated secondary dwelling which is also let for rent. The landlord lives in the second-storey of the house. His elderly parents live with him for significant periods of time during the year. The flat and the second storey of the house are connected via an interior stairwell with a locked door. The exterior gardens and lawns are for the use of the landlord and the tenant of the flat and secondary dwelling. The tenant's email indicates that his primary source of income is a Disability Support Pension. It would appear that he is home most of the time. The Managing Agent gave evidence that the landlord is a nurse who frequently works an overnight shift, and is home during the day. The tenant and the landlord thus live in very close proximity, and there is a high degree of likelihood of them coming into contact in the course of the day.

34 The tenant states in his email that he lives with a mental illness. There is no medical evidence before the Tribunal as to this condition, and it would be inappropriate for the Tribunal to speculate about it. What can be directly observed from the tenant's email is that he has a strong sense of persecution by the landlord and the landlord's agent, that he is experiencing acute mental distress from this sense of persecution, and that he believes he is being pushed to and beyond his limits of tolerance. This is sufficient for the Tribunal to conclude that the situation is volatile.

35 Prior to embarking on the full hearing, in the context of considering the tenant's application for an adjournment, the Tribunal required the Managing Agent to provide an overview of the tenant's alleged threatens, abuse, intimidation and harassment of the

landlord and the Managing Agent. This conduct is outlined in detail following. For present purposes, it is sufficient to state that having heard this overview, the Tribunal was satisfied that the Application concerned allegations that the tenant had engaged in seriously antisocial behaviour towards the landlord and the Managing Agent, which presented a potential risk to the safety of the landlord. It was thus satisfied that there would the potential for serious prejudice to the landlord if the application for a termination order were to be adjourned.

Conclusion – adjournment request refused

36 Weighing each of these factors in the balance the Tribunal determined it would refuse the tenant's application for an adjournment of the hearing. A party to a proceeding before the Tribunal cannot frustrate or avoid the legal process by not attending a hearing. The Notice of Hearing contained a warning that failure to attend the hearing may result in the Tribunal deciding the application in the tenant's absence. In this case, it is clear that the tenant had received notice of the hearing. While that notice was very short, it is clear the tenant knew the generality of the case he had to answer. A tenant advocate was available to inform, advise, and with leave, represent the tenant at the hearing. There is no unfairness in refusing a party a requested adjournment where they justify that request on the basis that they need time to prepare a case that is not relevant to the issues to be determined in the proceeding. The medical certificate relied upon by the tenant in support of his application for an adjournment is not sufficient establish that the tenant was prevented by any medical condition from travelling to and participating in the hearing. The landlord had a strong prima facie case, and that case if proved, would establish that the tenant has repeatedly engaged in conduct that seriously threatened, abused and intentionally intimated and harassed the landlord and Managing Agent. There would therefore be serious prejudice to the landlord if an adjournment were to be granted, particularly given the proximity of the tenant and landlord's living arrangements.

Evidence before the Tribunal

37 Ms Valerie Naidoo, and Mr Jay Naidoo, both Managing Agents, attended the hearing on behalf of the landlord, and gave oral evidence under oath. On behalf of the landlord, they submitted into evidence a copy the Managing Agency Agreement; a copy of the RTA; copies of email correspondence between the tenant and representatives of the Managing Agent; file notes of contacts with the tenant, the tenant's case manager, and the landlord; a recording of an incident in which the tenant is allegedly engaged in threatening and abusive conduct towards the landlord; a statutory declaration made by Wayne (Wenghao) Huang (landlord) dated 18 January 2017; and call records for contacts between Ms Naidoo and the tenant.

38 The tenant has not formally filed any evidence in the proceedings. However, the views he states in his emails to the Tribunal will be taken into consideration. Additionally, there are emails from the tenant to the Managing Agent in which he expresses views

that will be considered in the course of the hearing, consistent with the Tribunal's duty to do justice between the parties on the best evidence available to it.

Jurisdiction

39 The tenancy which is the subject of this dispute was originally established under a RTA made on 2 November 2016, for a fixed-term of 12 months commencing from 3 November 2016. The RTA is a standard form agreement. The rent payable under the RTA is $245.00 per week. The Tribunal is satisfied that the RTA is a tenancy agreement to which the RT applies.

40 The landlord applies to the Tribunal for termination of the tenancy pursuant to section 92 of the RT Act. Pursuant to sub-section 92(3) of the RT Act, the landlord is entitled to do so without giving the tenant a Termination Notice. I am thus satisfied that the Tribunal has jurisdiction to hear and determine this Application under section 92 of the RT Act.

Material facts

41 The material facts to emerge from the evidence may be stated as follows:

41.1 the residential premises from which this dispute arises form part of the ground floor of a two storey dwelling on a block of land with gardens and lawns which has an associated secondary dwelling which is also rented out. The landlord lives upper level of the house. He is a single person, but his elderly parents live with him for significant periods of time each year;

41.2 the residential premises are connected to the upper level of the dwelling by an internal staircase closed off by an internal door which is locked on the landlord's side;

41.3 the tenant's primary source of income is a Disability Support Pension. He says he is eligible for this payment because he has a mental illness. When the tenant moved into the residential premises a portion of his bond was paid (or was arranged to be paid by Housing NSW) by a support agency. The tenant appears to receive some form of case management service from that support agency. However, that is the full extent of what is known about any community supports available to the tenant. The Managing Agent has attempted to involve the case manager in efforts to resolve the tenant's complaints about the residential premises and the landlord's concerns about the tenant's conduct but such involvement has been refused by the tenant or the case manager (it is not clear which);

41.4 the tenant relies heavily on television for entertainment and to pass the time. It appears that he experienced difficulties in obtaining TV reception from the commencement of the tenancy. When he raised the matter with the landlord the landlord suggested that he take out a Foxtel subscription which would also provide him with an aerial that would provide reception for TV channels, because there was no aerial installed to the ground floor. The tenant did not believe that this would be necessary as he had observed two satellite dishes in the environs of the dwelling when he viewed the residential premises. He believed he would be able connect to one of these to obtain reception. For reasons that are not explicit in the evidence this turned out not to be the case. The tenant has experienced difficulty in obtaining reception for most TV channels. He is very frustrated and angry about this. He objects to the landlord's suggestion that he subscribe to Foxtel to resolve the problem;

41.5 the tenant also objects to the quality of the water supply to the residential

premises (at least as he perceives it). He claims it is dirty and presents health risks to him. The landlord and Managing Agent claim to have inspected the water supply and to have found nothing wrong with it. It is the same water supply from which water to the upper level of the dwelling and secondary dwelling is derived. The landlord and Managing Agent also claim that there is no problem to the water supplied to these areas;

41.6 it appears from his email communications to the Divisional Registrar and to the Managing Agent that the tenant has a degree of sensitivity to noise. He claims his sleep and quiet enjoyment of the residential premises is disrupted by noise generated by people walking in the upper level of the house. He also claims he is disturbed by them snoring at night. He claims that the landlord also does yard work, such as mowing and clipping early in the morning and in the late afternoon/earl evening which creates noise nuisance for him;

41.7 the residential premises does not have a separate electricity metre and the tenant is not charged for electricity under the terms of the RTA. There is an air conditioning unit installed in this area of the house which the landlord apparently sought to decommission and not offer as part of the residential premises under the tenancy by taping off the electricity supply. It appears that the landlord did so because of the likely cost he would incur from the air conditioning unit being used by the tenant. When he moved into the residential premises, the tenant removed the tape from the electricity supply and used the air conditioner. This resulted in a dispute with the landlord. The landlord has insisted either that the tenant cease using the air conditioner or otherwise pay a weekly contribution of $15.00 to $20.00 towards electricity charges in advance. The tenant refuses to do so because there is no separate electricity metre to the residential premises;

41.8 on 16 December 2017, at approximately 7:00pm, there was an incident in which the tenant threatened and abused the landlord for a period of approximately 1 hour. There is no direct evidence of this incident in the evidence before the Tribunal. The best evidence of it is hearsay evidence given by Ms Naidoo based upon two conversations with the landlord in the course of the incident. Telephone call records for the calls made by Ms Naidoo to the landlord at that time are in evidence. Ms Naidoo's oral evidence is supported by some contemporaneous file notes she made, although these notes are in general terms. Ms Naidoo gave oral evidence that the landlord reported to her that the tenant continuously and loudly slapped, thumped and/or kicked the internal door leading to the upper level of the dwelling. She gave evidence that the tenant yelled abuse and threats at the landlord while he did so, calling him a "fuckin cunt", "asshole", "Asian cunt", and "cockhead" among other things. She also gave evidence that the tenant threatened to physically attack the landlord saying words to the effect "I'm going to get you for this" and "I'm going to punch your fuckin head in cunt". Ms Naidoo said that following this incident, the landlord told her that he and his parents laid awake all night terrified that the tenant might break through the internal door and attack them;

41.9 on 23 December 2016, there was another incident, apparently during the day, in which the tenant again threatened and abused the landlord. Again, the best evidence of this is hearsay evidence given orally by Ms Naidoo based upon a telephone call she had with the landlord at or about the time of the incident. Ms Naidoo gave evidence that the landlord told her that the tenant repeatedly or continuously and loudly slapped, thumped and kicked the internal door over a period of approximately 1 hour, and that he repeatedly yelled abuse at the landlord while he did so. To the best of her recollection Ms Naidoo told the Tribunal that the landlord reported that the tenant had repeatedly called him a "fuckin cunt", "fuckin dickhead", "fuckin cockhead", "fuckin asshole", "fuckin moron', and "fuckin troll' and yelled words to the effect that he would "punch him in the fuckin head". The tenant also repeatedly yelled to the landlord words to the effect that he should "get on your fuckin spaceship and go back to where you

came from." Ms Naidoo gave evidence that the landlord told her that he felt extremely stressed by this incident and other similar incidents that had occurred over the previous week and was unable to sleep properly (he is a nurse who at the time was working night-shift requiring him to sleep during the day);

41.10 on 2 January 2017 there was another incident of approximately 2 hours duration from 10am to 12noon in which the tenant threatened and abused the landlord. The best evidence of this incident is Ms Naidoo's oral hearsay evidence. However, there is also in evidence general contemporaneous notes taken by Ms Naidoo at the time, and telephone records which establish the calls Mr Naidoo made to the landlord and tenant in the course of the incident. Again, Ms Naidoo gave evidence that the landlord told her that the tenant repeatedly or continuously slapped, thumped and kicked the internal door, and yelled abuse and threats to the landlord as he did so. The abuse was in the same or similar terms to that outlined above in relation to the incidents of 16 and 23 December 2016. The tenant threatened to "make the landlord pay for this" and that he would "get him for this", that he was "not going to put up with it (or them)" and that he "was not going to let him get away with it" (apparently referring to the problems he was experiencing with TV reception and perceived water quality);

41.11 Ms Naidoo telephoned the tenant in the course of the incident in an effort to cause him to cease his behaviour and calm down. She gave evidence that the tenant was abusive to her in the course of this call calling her words to the effect that she was a "fuckin bitch", "fuckin liar". In the course of this conversation with the tenant, Ms Naidoo first offered to release the tenant from the RTA without penalty so that he can move somewhere else. She told the tenant that he could not continue to live at the premises if he engaged in such behaviour towards the landlord;

41.12 on 8 January 2017 there was an incident in the rear garden area of the property in which the tenant yelled abuse at the landlord, and pointed at him in a menacing or threatening manner. Again the best evidence of this is Ms Naidoo's oral hearsay evidence, based upon reports to her made by the landlord and his parents during a meeting she had with them that day. It appears the abuse was in similar terms to that outlined above in relation to the incidents of 16 and 23 December 2016;

41.13 following this incident, the Managing Agent made appointments to meet with the tenant at her office on 10 and 11 January 2017 to discuss the tenant's concerns about the TV reception, water quality and air conditioning at the residential premises, and the landlord's concerns about the tenant's conduct towards him. However, the tenant failed to attend either appointment without giving any notice to the Managing Agent. On 11 January 2017, Ms Naidoo telephoned the tenant is an effort to arrange another meeting time. In the course of this conversation the tenant refused any meeting, and yelled abuse and threats at Ms Naidoo, after which he hung up. To the best of Ms Naidoo's recollection, the words used by the tenant were to the effect that she was a "fuckin cunt" and "bitch" and that he would "get back at them for what they have done". In an email to the tenant later that day Ms Naidoo again expresses concern about the tenant's failure to attend the appointments and requests that he make another time to meet with her. She also reiterates the landlord's offer to release the tenant from the RTA without penalty;

41.14 on 15 January 2017 between approximately 9:30pm and 9:50pm there was an incident in which the tenant engaged in repeated loud slapping, thumping and kicking on the internal door of the stairwell leading to the upper level of the dwelling while yelling threats and abuse at the landlord. The landlord recorded this incident, apparently advising the tenant he was doing so, and this recording is in evidence. From an objective point of view this conduct was menacing. It is difficult to hear in places. However, the following words are reasonably audible over loading banging noises in the background:

> Wayne, you're a fucking cunt, you have no fucking respect. Do you understand it's a

> shit unit, I'm every fucking day going to do that (referencing his slapping and thumping on the door) if you don't give me the respect. You can't sit there with your recorder. I can't sit down and watch fuckin TV without fuckin reception. Treat me like second rate, you're a mental health nurse and you push someone to the fuckin limit. Fucking moron. Fucking cock head. You people are fucking cockheads. Fuckin asshole. Wayne you're a cunt. I will fuckin punch you.

41.15 on 16 January 2017 at approximately 8:30pm in the evening, the Managing Agent emailed the tenant to raise concerns that it had been reported to her by the landlord that he (the tenant) had been banging on the internal door and shouting that he was unable to obtain television reception. The Managing Agent advised that she and the landlord considered his behaviour to be "intimidating, threatening and disrespectful" and that any recurrence would in the matter being referred to Police. The Managing Agent reiterates the landlord's offer to the tenant to release him from the RTA without penalty. She also asks the tenant to make a further appointment to meet her at her office.

41.16 on 17 January 2017, the Managing Agent emailed to the tenant requesting that he leave the side gate unlatched so as to allow the landlord access to a lawnmower and gardening tools in the back shed. In part of his response, the tenant says:

> [t]he overall lack of regard on their part is unacceptable, I'm therefore not obliged to show them any respect anymore…. I didn't attend appointments because there is nothing to discuss. I'd go through the roof if you show me anymore disrespect, a little less conversation a little more action please. Treat people the way you like to be treated, he is a mental health nurse? You are encouraging a fool when u should be reminding him of his obligations. Instead my mental health is compromises … fools give you reasons, wise people don't.

He later replied again:

> [o]f course its common ground, he is pushing his luck at 8:30 at night though. Cut the attitude Val, don't give me anymore reason. I'll see you in court."

41.17 also on 17 January 2017 a representative of the Managing Agent contacted the tenant to advise that they had a listing of another rental property at $220.00 per week which he may be interested in. The Managing Agent offered the tenant $200.00 towards his removal costs. The tenant also apparently informed the Managing Agent that he was looking for other premises to rent;

41.18 on 19 January 2017, Police attended the property to speak with the landlord. A Police Officer told the landlord that they had attended based upon information received from the tenant's case worker that the tenant had threatened the landlord. After speaking with the landlord Police then left and spoke to the tenant. Further information about this event is not in evidence;

41.19 in his statutory declaration made on 18 January 2017, the Mr Huang (the landlord) states in part:

> the tenant Paul Sinclair has persistently banged the doors and walls and swore vulgar and abusive language on numerous occasions. He shouts loudly and threateningly. … This behaviour is scary and my elderly parents are afraid of the tenant. We are stressed and cannot sleep or function properly.

Applicable law

42 As noted above, the landlord seeks termination of the tenancy pursuant to section 92 of the RT Act. Section 92 is in the following terms:

> **92 Tribunal may terminate residential tenancy agreement for threat, abuse, intimidation or harassment**
>
> (1) The Tribunal may, on application by a landlord, make a termination order if it is satisfied that the tenant, or any person who although not a tenant is occupying or jointly

> occupying the residential premises, has:
>
> (a) seriously or persistently threatened or abused the landlord, the landlord's agent or any employee or contractor of the landlord or landlord's agent, or caused or permitted any such threats, abuse or conduct, or
>
> (b) intentionally engaged, or intentionally caused or permitted another person to engage, in conduct in relation to any such person that would be reasonably likely to cause the person to be intimidated or harassed (whether or not any abusive language or threat has been directed towards the person).
>
> (2) The termination order may specify that the order for possession takes effect immediately.
>
> (3) A landlord may make an application under this section without giving the tenant a termination notice.
>
> (4) The Tribunal may make a termination order under this section that takes effect before the end of the fixed term if the residential tenancy agreement is a fixed term agreement

43 It may be observed that in order to engage the Tribunal's discretion to terminate the tenancy it is not necessary for the landlord to prove that the tenant has contravened both sub-sections 92(1)(a) and 92(1)(b). Proof of a contravention of either sub-section is sufficient to engage the Tribunal's discretion to terminate the tenancy. However, it is open to the Tribunal to find on a factual basis that both sections have been contravened by the same conduct or different conduct.

44 In order to establish that the tenant has breached sub-section 92(1)(a) of the RT Act, the landlord must do more than prove that the tenant has engaged in threatening or abusive conduct. The landlord must further prove that this conduct is "serious" or "persistent." It is to be observed that the landlord is not required to prove that the impugned conduct was both serious and persistent. It is sufficient for the landlord to prove that the impugned conduct was either serious or persistent. However, it is open to the Tribunal to find on a factual basis that the impugned conduct is both serious and persistent.

45 "Serious' and 'persistent' are ordinary English words that are to be interpreted and applied on a normative basis in the context of section 92 of the RT Act.

46 In *Lindsay v NSW Land and Housing Corporation* [2016] NSWCATAP 128 the Appeal Panel of this Tribunal reviewed the relevant authorities and determined that the word "seriously" in the context of sub-section 92(1)(a) of the RT Act is to be construed and applied as meaning "grave" or "concerning" [at 36]. This is an objective test to be decided on the facts before the Tribunal: *Lindsay* [at 35]. The word should be given the same meaning in the context of section 92 of the RT Act.

47 The word "persistently" in the context of sub-section 92(1)(b) of the RT Act does not appear to have been the subject of Appellate consideration. Having regard to the Oxford English Dictionary definition of "persistent" I am satisfied that the word should be understood as meaning "determined" "repeated" or "continuous" conduct. This is also an objective test.

48 In order to establish that the tenant has contravened sub-section 92(1)(b) of the RT Act the landlord must prove that the tenant "intentionally engaged … in conduct in relation

to the landlord or the landlord's agent that would be reasonably likely to cause that person to be intimidated or harassed."

49 In *Cure v Bridge Housing Ltd* [2014] NSWCATAP 80 the Appeal Panel of this Tribunal established the test for "intention" in the context of section 90 of the RT Act. It determined that the word was to be given its ordinary meaning which required proof that the tenant had "determine[d] mentally on [a particular] result or such result must be that person's aim or purpose" (in the context of section 92(1)(b) that result is intimidation or harassment of a landlord or Managing Agent). It held that intention will not be present if the result was unforseen [at 43]. In *Lindsay* the Appeal Panel determined, consistent with its' decision in *Cure,* that this result must be "pre-meditated" [at 45].

50 The harm proscribed by section 92 is conduct by a tenant that is 'threatening', 'abusive' or which constitutes 'intimidation' or 'harassment'. These are also ordinary English words which are to be interpreted and applied on a normative basis. They are words that have similar meanings. Having regard to the relevant dictionary definitions and the legislative context in which these words appear I am satisfied that 'threat' and 'threaten' in the context of section 92 means words and actions that 'menace', 'endanger', 'scare' or 'terrorise' a person protected by that section (**protected person**). 'Abusive' and 'abuse' mean words and actions that 'harm,' 'hurt', 'insult,' 'humiliate', 'degrade,' and 'frighten' a protected person. 'Intimidate' means words and actions that 'frighten', 'menace', 'terrify', or 'overbear' a protected person, for reasons that may include in an effort to make that person behave in a particular way or to achieve a particular result.

51 The term 'harass' (or 'harassment') are not defined in the RT Act. However, these terms have been the subject of substantial consideration in the fields of employment and anti-discrimination law. Although section 92 is a different legislative context, it appears to me the term 'harassed' ought to be given a meaning consistent with that which has developed in employment and anti-discrimination law. In *McCormack v Commonwealth* [2007] FMCA 1245 the Court relied upon the Macquarie Dictionary definition to conclude that harassment means to "trouble by repeated attacks, incursions, as in a war of hostilities; harry; raid; to disturb persistently; torment, as with troubles, cares." Notably, the court found that for conduct to constitute harassment it must be repeated or persistent (see also: *Penhall-Jones v State of NSW* [2008] FMCA 832).

52 Subsection 83(1) of the RT Act provides that when the Tribunal makes an order terminating a RTA, it must also make an order for possession of the residential premises specifying the day on which the order takes effect. While it requires that an order for possession must be made upon termination, it provides the Tribunal with discretion as to when it will order vacant possession be given.

53 Pursuant to section 114 of the RT the Tribunal also has the power to suspend the operation of an order for possession of residential premises. Section 114 is in the following terms:

114 Suspension of possession orders

> (1) The Tribunal may suspend the operation of an order for possession of residential premises for a specified period if it is satisfied that it is desirable to do so, having regard to the relative hardship likely to be caused to the landlord and tenant by the suspension.
>
> (2) The Tribunal may impose an obligation on a tenant to pay a specified occupation fee for the period for which the order for possession is suspended.

54 In my view, the test contained in sub-section 114(1) of the RT Act is also the appropriate test to be applied in determining the operative date for an Order for possession made pursuant to section 83(1) if an order for possession is not given on the date of termination.

Consideration

55 The issues for the Tribunal to determine in this Application are therefore as follows:

(a) Did the tenant contravene section 92(1)(a) of the RT Act by seriously or persistently threatening or abusing the landlord and/or Ms Naidoo in any or all of the incidents outlined above? (**justifying factor**) or

(b) Did the tenant contravene section 92(1)(b) of the RT Act by intentionally engaging in conduct in relation to the landlord or Ms Naidoo in any or all of the incidents outlined above that would be reasonably likely to cause either or both of them to be intimidated or harassed (whether or not any abusive language or threat has been directed towards them)? (**justifying factor**)

(c) If so, should the Tribunal exercise its discretion to terminate the tenancy having regard to the justifying factor or factors and any other relevant considerations?

(d) If the Tribunal exercises its discretion to terminate the tenancy, should it suspend the order for possession for any period of time, and if so, for what period, having regard to the relative hardship likely to be caused to the landlord and the tenant by the suspension? and

(e) If the Tribunal determines not to terminate the tenancy, should any other orders be made?

56 The evidence establishes to my comfortable satisfaction that on 16 and 23 December 2016 and on 2, 8, and 15 January 2017, and at other times during the month of December 2016 and January 2017, the tenant seriously threatened the landlord by repeatedly or continuously slapping, thumping and kicking the internal door separating the tenant's premises from those of the landlord. Additionally, I am satisfied that the tenant threatened the landlord with physical harm in the course of each of these incidents, repeatedly threatening to assault the landlord, and repeatedly threatening to carry out some form of unspecified act of revenge. This conduct was menacing. It had the purpose or effect of causing the landlord to fear for his personal safety and security. Although there is limited information about it in evidence, I am also satisfied that the tenant threatened some form of harm to the landlord on 19 January 2017 that was sufficiently serious for his case manager to contact Police and cause their attendance at the property.

57 I am satisfied that this conduct is proscribed by section 92(1)(a) of the RT Act. In this respect, I consider the tenant's conduct to amount to a very "concerning" threat to the

landlord's safety and security. I am satisfied on the evidence that this conduct was both serious and persistent in the sense that each of the incidents of 16 and 23 December 2016, and 1, 8, and 15 January 2017 were of extended duration involving repeated threats, and in the sense that this conduct has recurred from 16 December 2016 up to the date of the hearing.

58 Also with respect to subsection 92(1)(a) of the RT Act I am comfortably satisfied on the evidence that the tenant's conduct on 16 and 23 December 2016 and on 2, 8 and 15 January 2017 involved serious and persistent verbal abuse of the landlord. The words spoken by the tenant in the course of each incident were vulgar, derogatory and humiliating. They had the purpose or effect of causing distress and hurt to the landlord, and of making him fear for his safety and security. This conduct is sufficient to be very concerning in its nature.

59 With respect to sub-section 91(1)(b) I am also comfortably satisfied that the landlord might reasonably have been intimidated by the tenant's conduct on 16 and 23 December 2016 and on 2, 8, 15 and 19 January 2017. I am satisfied that this conduct was intentional in the sense that it was a deliberate act – there was nothing accidental or inadvertent about it.

60 In this respect, although there is evidence to suggest that the tenant lives with a mental illness, there is no evidence before the Tribunal to the effect that at any relevant time the tenant was in an active psychotic phase of a mental illness that might render his conduct unintentional. The common law requires me to assume that the tenant, as an adult, has legal capacity, and the burden falls on any person seeking to disprove that fact: *Re T (An adult: Consent to Medical Treatment)* [1992] 4 All ER 649. While the tenant refers to his mental illness in his emails to the Divisional Registrar and Managing Agent, he does not suggest that his conduct was in any way involuntary at the material times.

61 From an objective point of view this conduct was reasonably likely to be experienced by the landlord as terrorising and menacing. It appears to have been carried out for the purpose or effect of inducing the landlord into carrying out repairs and improvements to the residential premises to which the tenant believed he was entitled. The landlord has given direct evidence, and it may reasonably be apprehended, that he was intimidated and frightened by the tenant's conduct.

62 The conduct engaged in by the tenant towards the landlord was repeated and continuous and it recurred on a number of occasions during December 2016 and January 2017, including on 16 and 23 December 2016, and on 2, 8, 15 and 19January 2017. In this respect, I am comfortably satisfied that the landlord might also reasonably have been harassed by this conduct.

63 I am also comfortably satisfied on the evidence before me that the tenant seriously abused the landlord's Managing Agent, Mrs Naidoo, on 2 and 11 January 2017, by calling her words the effect that she was a "*fuckin cunt', "fuckin bitch"* and "*fuckin liar".* This abuse is sufficient to be very concerning.

64 In relation to these findings, I note that a significant portion of the evidence upon which these findings are based is Ms Naidoo's oral hearsay evidence. As noted above, pursuant to sub-section 38(2) of the NCAT Act, the Tribunal is not bound by the rules of evidence and may inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice. I am therefore able to rely upon Ms Naidoo's hearsay evidence, although I take account of the fact it is not direct evidence of the incidents in question. Nevertheless, I considered Ms Naidoo a truthful witness and her hearsay evidence is entirely consistent with the direct evidence that is available about the tenant's conduct.

65 Having found that the tenant contravened both sub-sections 91(1)(a) and (b) of the RT Act by seriously threatening, abusing and intentionally intimidating and harassing the landlord, and by seriously abusing the landlord's Managing Agent, the Tribunal must now determine if these justifying factors warrant termination of the tenancy having regard to any other relevant considerations.

66 The tenant is a single adult male whose sole or primary source of income is a Disability Support Pension. He is a person with disability, being a mental illness. He appears to have some form of case-management assistance from a support service, but there is little information about this. In particular, there is no evidence of any support, treatment, or other intervention that might be provided to the tenant to avoid any recurrence of the conduct that gives rise to these proceedings.

67 It appears that the trigger for the tenant's conduct is poor television reception in the residential premises and his belief that the landlord is in some way responsible for this. The tenant believes that he is entitled to have the landlord carry out repairs and improvements to the residential premises that would provide him with television reception. There is also a dispute between the tenant and landlord about the quality of the drinking water supplied to the residential premises, and about the availability of air-conditioning. Frustration and annoyance about such issues do not justify or excuse conduct that seriously threatens, intimidates, and harasses a landlord, or which is seriously abusive of a landlord or Managing Agent in any circumstances. If there is a tenancy dispute that cannot be resolved between the parties the tenant's proper recourse is to NSW Fair Trading and then to this Tribunal where the merit of his claims cannot be determined, and if the appropriate grounds are established, where orders can be made requiring the landlord to carry out repairs. It is not acceptable for the tenant to attempt to secure repairs and improvements to which he believes he is entitled by seriously threatening and abusing, and intimidating and harassing the landlord.

68 Weighing the justifying factors and other relevant factors in the balance, I am satisfied that the justifying factors are sufficiently serious to warrant an exercise of discretion to terminate the tenancy. The tenant has engaged repeatedly in conduct that is seriously threatening and abusive, and intimidating and harassing of the landlord. Additionally, the tenant has seriously abused the landlord's Managing Agent on two occasions. This

conduct is inexcusable and it is intolerable.

69 Having reached the conclusion that the tenancy is to be terminated, the Tribunal must consider if the order for possession ought to be suspended for any period of time to enable the tenant time to find alternative accommodation and vacate the residential premises in an orderly manner. As noted above, this requires the Tribunal to assess the relative hardship that would be experienced by the landlord and the tenant from any such suspension.

70 The landlord seeks immediate possession of the residential premises. This is a compelling request given the seriousness of the tenant's conduct and the proximity within which the landlord and tenant live. The Tribunal accepts that the landlord lives on a daily basis in fear of being threatened, abused, intimidated and harassed by the tenant, and indeed, in fear that the tenant may carry out his threats of assault.

71 The Tribunal accepts that the tenant may experience difficulty in obtaining alternative accommodation due to his financial situation and disability. On the other hand it is clear on the evidence that the landlord has made previous offers to release the tenant from the fixed term agreement without penalty and pay $200.00 towards his removal costs. The Managing Agent has also offered one potentially suitable alternative rental property to the tenant for inspection. Those offers have not been taken up.

72 Weighing the relative hardship that might be experienced by the landlord and tenant in the balance, it is clear that the co-habitation of the landlord and tenant must be brought to an end promptly. Despite the hardship an order for immediate possession might create for the tenant that hardship is of a different register altogether to the daily fear in which the landlord lives. I therefore suspend the order for possession for a period of seven days only to provide the tenant with some time to vacate the residential premises in an orderly fashion while bringing the tenancy to an end promptly.

73 Until the date vacant possession is given, the tenant is to pay the landlord an occupation fee at a daily rate which is one-seventh of the weekly rent in the amount of $35.00 per day. Housing NSW is to notify the tenant of the orders made in this proceeding by delivery of a letter to the residential premises by 5pm on 13 February 2017.

P French

General Member

Civil and Administrative Tribunal of New South Wales

9 February 2017

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

Tribunal in which it was generated.

Decision last updated: 31 March 2017