Tenants' Union of New South Wales

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Director
Standing Committee on Law and Justice
Parliament House
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Consolidation of Tribunals Inquiry

To whom it may concern

During our appearance before the Committee on 15 December 2011, the Committee sought our views about Housing NSW decisions and the proper jurisdiction of a tribunal to review such decisions (see pp 62-63 of the transcript of proceedings). During those remarks, we took the following question on notice:

> **Mr David Shoebridge:** One of the aspects the Committee has to grapple with is what is not a tribunal and what should properly be considered the subject of an administrative tribunal process. We have to grapple with these types of current administrative decision that are not housed in what we recognise as a tribunal but within an administrative body. I would appreciate it if you could provide a further response about this particular process and if you have a view as to whether or not that type of decision making should be heard within a tribunal rather than within an administrative process.

This correspondence constitutes our further response. It provides more information about the 'particular process' of Housing NSW decision making (with close attention to rental rebate variations, which we mentioned on 15 December 2011) and elaborates our view on whether such decisions ought to be reviewable by a tribunal.

We confirm that our view is that adverse decisions by Housing NSW having substantial consequences for tenants should be able to be subjected to scrutiny by an independent tribunal that can make binding decisions.

GRANT OF A RENTAL REBATE

Housing NSW may grant a rental rebate to a tenant under Part 7 of the *Housing Act 2001*. It does so in accordance with 'guidelines' approved by the Minister (latterly, Housing NSW policies). In practice, the process generally works as follows.

A tenant applies for public housing and is added to a list of applicants waiting for an offer of housing. When appropriate premises become available, Housing NSW will

offer a tenancy to the applicant at a specified rent, subject to the ordinary terms of a residential tenancy agreement under the *Residential Tenancies Act 2010* and certain other additional terms. The rent specified under the agreement represents an amount that Housing NSW believes is equivalent to the market rent for those premises. If the tenant accepts, Housing NSW (the landlord under the agreement) enters into a residential tenancy agreement with a client (the tenant).

At or after the time of entering into the agreement, the tenant may apply for a rental rebate. Housing NSW will assess the tenant's eligibility – having regard to things such as household income and citizenship –and may grant a rental rebate.

The tenancy rent ledger reflects rent charged post rebate/subsidy. It shows only the amount demanded of the tenant and what is paid by the tenant. The calculation:

Subsidised rent = Market rent – Rental rebate

is done before the accounting.

CANCELLATION OR ADJUSTMENT OF A RENTAL REBATE

Having granted a rental rebate, Housing NSW may vary or cancel the grant (s 57 *Housing Act 2001*) after conducting an investigation to determine household income (s 58 *Housing Act 2001*).

In our experience, it is rare for Housing NSW to make active independent enquiries in conducting such an investigation[1]. In most cases, Housing NSW investigation will begin after receipt of information from a person in the community who has observed the activities of a Housing NSW tenant. For example, the informant may report their belief that the tenant has obtained employment, or that the tenant appears to be a in a relationship with a person who has become part of the tenant's household.

Following that report, Housing NSW will usually correspond with the tenant. It has often called a 'natural justice letter'. It generally invites the subject to disprove an allegation. The allegation will usually be general in nature and will not give any information about its source. The tenant, without any power to compel anyone to give them information, without a clear understanding of the allegation made against them, and, usually, without forensic skill, must go about proving a negative proposition, for example, that the alleged other person is *not* living with them. The tenant's solemn declaration that it is so will not suffice. Housing NSW may invite the tenant to a meeting or to submit various documents.

Ultimately, if Housing NSW is not satisfied that the tenant has demonstrated the relevant facts, it will cancel the rental rebate. In most cases, it will give the cancellation retrospective effect. It is usually unclear how Housing NSW has determined the appropriate retrospective period. This often creates difficulties, because, in the absence of proactive investigation, the facts are not positively established. Accordingly, the retrospective period often seems arbitrary.

The administrative decision is then accounted for by amendment of the rent account.

The tenant's rent account then shows substantial arrears. In a typical case, housing NSW will have backdated for several months. In some cases, the retrospective effect

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[1] To the extent that it constitutes such enquiry, Housing NSW, (both in individual cases and across the state) asks tenants to update their household details for rent rebate purposes.

goes back several years – in such cases, the arrears may amount to $100,000-$200,000. Housing NSW will ask the tenant pay the arrears and full market rent on an ongoing basis.

In most cases, recipients of a rental rebate will also rely on government payments as their chief or only source of income (such is the nature of the eligibility criteria for a rental rebate). Such a person will almost certainly not be in a position to service a substantial debt arising out of the rental rebate cancellation. Nor will they be in a position to pay the market rent. This jeopardizes tenancies and can create homelessness.

Implications of a rental rebate cancellation

The cancellation of a rent rebate with retrospective effect will mean that the recipient of the benefit owes a debt to Housing NSW. The existence of the debt has various implications for the tenant.

Debt – rent arrears

First, the cancellation results in an adjustment to the tenant's rent account. Thus the account will show the arrears created by the cancellation. Housing NSW will demand payment of the rent and the arrears. If the tenant does not satisfy the demand, Housing NSW will issue a Termination Notice under the RTAct and commence proceedings in the Consumer, Trader and Tenancy Tribunal seeking termination of the tenancy.

The Tribunal will take the rental ledger at face value and will not conduct any enquiry into whether the rent arrears have been validly imposed. It sees this as judicial review and, therefore, not part of its function. So, on the question of whether there is breach, the existence of the rent arrears is a fait accompli. Given the often extensive nature of the arrears, the seriousness of the breach will tend to lead to termination of the tenancy.

Two examples of Tribunal decisions are attached:
The *Elkazzi* decision demonstrates the usual result; eviction and
The *Rinaldi* decision is an example of an unusual result; the Tribunal used its discretion to not evict, based on the circumstances of the case.

Debt – future applications for housing

Following termination, Housing NSW will maintain a record of the arrears. To be successful in any future application for housing, the tenant must either pay off the debt or demonstrate that they are taking active consistent measures to acquit themselves of the debt.

Debt – enforcement as a judgment debt

The debt may also be the subject of ordinary enforcement mechanisms, such as action in the Local or District Court. It is rare for such a step to be taken, but it is often raised by Housing NSW in negotiation around termination of the tenancy.

Criminal prosecution

In the same context of negotiation about termination of tenancy, Housing NSW officers will sometimes mention Housing NSW's power of prosecution in such cases. The implicit (and, on occasion, explicit) message is: we might be able to prosecute you; if you agree to termination of your tenancy, we will not prosecute.

Review mechanisms currently in place

ADT

The ADT has no jurisdiction to carry out merits review of this kind of decision. The same is true of all Housing NSW decisions that affect residential tenants with whom it has a direct relationship, except *Government Information (Public Access) Act 2009* matters.

CTTT

As already mentioned, the CTTT has found that it cannot consider the question of whether the rent rebate cancellation is justified or properly done. It considers this to be judicial review and not part of its function.

Internal review

A tenant may seek internal review of many Housing NSW decisions. Among them, a decision to cancel a rental rebate. The tenant success rate at the internal review stage is relatively low.

External review – Housing Appeals Committee

If a person obtains an internal review of a Housing NSW decision and remains dissatisfied, they may take the matter further by application to the Housing Appeals Committee.

The Housing Appeals Committee has no legislative existence: no statute mentions it. Rather, it appears to be a Ministerial creation mentioned in published Housing NSW policies and in its own brochures.

The Housing Appeals Committee may seek the Housing NSW file. As a matter of policy, Housing NSW may pass the file on. There is no practice of showing the file to the tenant during this process (though the tenant may seek it under the *Government Information (Public Access) Act 2009*). The tenant is invited to tell their story. Having heard the tenant and (usually) made some enquiries with Housing NSW, the Committee will determine the matter by recommendation to Housing NSW.

Housing NSW will then consider the recommendation. In most cases, the recommendation is followed. In quite a few cases, the recommendation is followed only in part (some of the published statistics seem not to include such cases).

In our view, the Housing Appeals Committee has several shortcomings that inhere in its institutional structure:

a) Its recommendations are not binding. While Housing NSW will usually follow the HAC recommendation, there are cases in which Housing NSW will dismiss

that possibility in advance. In *NSW Land and Housing Corporation v Franklin [2007] NSWCTTT 467* (attached) the CTTT had to determine the tenant's application for an adjournment to allow for the review process to take place. Housing NSW argued that it did not need to follow a Housing Appeals Committee recommendation and, furthermore, it would not follow the HAC recommendation in that case, no matter what it was.

b) It has no formal powers to compel anyone to do anything. In highly contentious cases, Housing NSW has been known to withhold its cooperation. The Housing Appeals Committee has no legal powers of any kind to ensure compliance with an effective process.

c) It is not formally independent. Clear legal and institutional independence is the touchstone of public confidence in a review process of this kind. The source of the Committee's power and existence is unclear to the public and its independence is unclear.

d) Its public profile is inadequate. The Housing Appeals Committee is a sui generis administrative body and public housing tenants have no clear understanding of its operations.

Alternatives

What should be subject to merits review?

We have detailed the decision making process with respect to rental rebates, but of course, Housing NSW makes many other kinds of decisions that affect the interests of individual tenants. Increasingly, these involve complex determinations about eligibility (Is the tenant eligible for public housing? What sort of lease are the eligible for? Six months later, is the tenant still eligible having regard to all of the information to do with their income, the state of the rental market and other matters?), succession of tenancy, transfer of tenancy and other matters that have very important consequences for the housing outcomes of tenants.

In our view, all Housing NSW decisions should be part of a unified, tribunal based, administrative merits review system in NSW. In its written submission to the Committee, the Administrative Decisions Tribunal remarked upon the continuing absence of clear guidelines about what sort of matters should be included in the ADT's jurisdiction for merits review (despite suggestions for such guidelines in the 2002 paper to which this Committee is to have regard).

The Administrative Review Council has published a document called, *What decisions should be subject to merit review?*[2] It starts with the basal proposition that an administrative decision that will, or is likely to, affect the rights of a person should be subject to merits review. Limited only by a very small number of decisions that, by their nature, are not amenable to such review.

It is unlikely that such a process would lead to sustained high volume of merits review work for the ADT or its successor. Rather, an initial period of high volume

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[2] http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#two [Accessed 11 January 2012].

would lead to changed (improved) practices and, over time, it would be increasingly likely that matters would be finalised at the initial decision making stage.

In any event, floodgate arguments in this area ought not carry much weight with the Committee. Given that the Housing Appeals Committee already has jurisdiction to conduct a kind of merits review of most Housing NSW decisions, the additional workload for a tribunal with jurisdiction to hear such matters should be reasonably easy to project and manage.

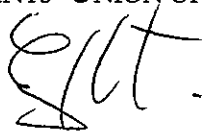
Where should merits review take place?

We have outlined our views on the shortcomings of the present review system. An internal review followed by merits review in the ADT or its amalgamated successor would cure many of these issues.

The ADT considers the correct and preferable decision and makes a binding decision in light of its view of the matter. It is clearly independent. It has powers to compel production of certain information. It conducts its proceedings in public. It has a fully worked system for meeting the requirements of natural justice. Its institutional framework includes a clear appeal pathway. Despite all of this, it is able to flexibly determine the case according to the substantial merits of the case.

Merits review is an important part of the NSW administrative framework. It ought not be fragmented, subjected to different rules, procedures, standards and institutional structures. Rather, the ADT (or its successor) ought to be the single point for review of the merits of administrative decision making in NSW. Subject to sensible constraints, all Housing NSW decisions affecting the interests of individual tenants ought to be subject to such review.

Yours faithfully,
TENANTS' UNION OF NSW CO-OP LIMITED



for Carl Freer
Solicitor

Consumer, Trader and Tenancy Tribunal of New South Wales Decisions

NSW Land and Housing Corporation v Franklin (Tenancy) [2007] NSWCTTT 467 (15 August 2007)

Last Updated: 18 September 2007

NSW Land and Housing Corporation v Franklin (Tenancy) [2007] NSWCTTT 467 (15 August 2007)
CONSUMER, TRADER AND TENANCY TRIBUNAL

Residential Tenancies Division

APPLICATION NO:	RT 07/20613
APPLICANT:	NSW Land and Housing Corporation
RESPONDENT:	Brian Franklin
APPEARANCES:	Mr Weeks for the Applicant Mr Freer for the Respondent
HEARING:	26 June 2007 at Sydney
LEGISLATION:	*Consumer, Trader and Tenancy Tribunal Act* 2001 *Housing Act* 2001 *Residential Tenancies Act* 1987
APPLICATION:	Termination of Tenancy

ORDER

The matter is adjourned to a date to be fixed by the Registrar, with a time estimate of half an hour, not before 31 August 2007.

If the internal review process has not been concluded by 31 August 2007, the parties may apply to the Tribunal for a further adjournment.

REASONS FOR DECISION

APPLICATION

This is an application by the Applicant, the NSW Land and Housing Corporation against the Tenant, Mr Brian Franklin for the termination of the tenancy agreement and vacant possession. At this hearing the Applicant was represented by Mr Weeks and the Tenant by Mr Freer.

This is also an application by the Tenant for an adjournment of these proceedings to allow the appeal/application for internal review lodged on 4 May 2007 with the Applicant to be dealt with and then, if necessary, to pursue a further appeal/review of the decisions made by the Applicant.

JURISDICTION

The Tribunal has jurisdiction to determine whether the tenancy agreement should be terminated pursuant to the *Residential Tenancies Act 1987*.

The Tribunal does not however have jurisdiction in relation to the Applicant's decision to withdraw the rental subsidy provided to the Tenant.

BACKGROUND

On 18 April 2007 the Applicant filed an application with the Tribunal seeking an order ending

the tenancy and for possession of the premises.

It is not in dispute that there is a residential tenancy agreement between the parties relating to "...", Surry Hills which was entered into on 9 August 2002.

It is also not in dispute that since the Tenant has occupied the residential premises his rent has been subsidised.

In early 2006 the Applicant conducted an investigation regarding an allegation that there was an unauthorised person or persons living with the Tenant. After that investigation the Applicant concluded that the allegations were founded, it cancelled the rental subsidy and charged the Tenant the market rent, backdated to the beginning of the tenancy. The Applicant gave notice of this decision and sought payment of these "arrears" from the Tenant. The Tenant rejects the findings of the investigation and the resultant decisions of the Applicant.

Not surprisingly, the Tenant was not in a financial position to pay the arrears and the Applicant issued a Notice of Termination on 13 March 2007, expiring on 9 April 2007. There is no dispute that, given the Applicant's decisions in relation to the subsidy, the Notice of Termination is valid. There is however a dispute about whether the Applicant's decisions were correct.

By the time this matter was heard the amount of arrears the Applicant claims is outstanding is in excess of $50,000. It is not in dispute that the Tenant has paid and continues to pay the subsidised amount when rental payments full due.

The monetary jurisdictional limit in the Residential Tenancy Division of the Tribunal is $10,000. The Applicant does not seek any order for payment of arrears, only a termination of the tenancy and vacant possession of the residential premises.

On 4 May 2007 the Tenant, through his advocates at Redfern Legal Centre, lodged with the Applicant a request for a review of the Applicant's decisions to both cancel the Tenant's rental subsidy and to backdate that cancellation. In that request for an internal review the Tenant submits that:

1. The decision was contrary to law;
2. The decision was contrary to the Department's own policy;

3. Alternatively the decision involved a harsh interpretation of policy;
4. The decision was based on incorrect information; and
5. Inadequate consideration was given to the Tenant's personal circumstances.

THE TENANT'S APPLICATION FOR AN ADJOURNMENT

The Tenant sought an adjournment of the Applicant's termination application so that he can be "*afforded the right to receive a reply to his first tier appeal and so he may further appeal to the Housing Appeals Committee, if necessary.*"

He submitted the following in support of his adjournment application:

1. The case of *NSW Department of Housing v Soboleva Veronika [1993] NSWRT 115* is authority for the proposition that the Tribunal will accept whatever rent the Department asserts is payable provided that the tenant has had the ability to use the internal appeal mechanism.
2. It would constitute a denial of natural justice if a public tenant was unable to exercise a right of review on the validity of the revocation of the rental subsidy and the application of a debt before a decision was made about the consequences of that debt.
3. Although Part 7 of the *Housing Act 2001* provides that the Department of Housing can make determinations on rental subsidies, it does so in accordance with its policies. The Department has a policy of Appeals and Reviews which provides a two tiered system of internal review. Although the first tier review application has been lodged there has been no decision communicated to the Tenant.
4. Procedural fairness dictates that the Tenant has the right to pursue the internal reviews. (The Tenant relies on *Twist v Council of the Municipality of Randwick [1976] HCA 58; (1976) 136 CLR 106.*)
5. The Tribunal must consider under s64(2)(a)(i) whether or not the Applicant has established a ground for terminating the tenancy. In order for the Tribunal to be satisfied under s64(2)(a)(i) the Tribunal must allow the Tenant the right to have the decision to cancel the subsidy reviewed.
6. The Tenant has commenced the internal appeal procedure without delay and no disadvantage to the Applicant will accrue during the adjournment period.
7. The Tribunal is bound by s28(2) of the *Consumer, Trader and Tenancy Tribunal Act 2001*, requiring it to provide procedural fairness to the parties and an adjournment will be necessary in this case to satisfy that requirement.

It is the Tenant's submission that this matter should be adjourned to a date to be fixed by the Registrar following confirmation from the Applicant that the Housing Appeals Committee process has been finalised.

THE APPLICANT'S SUBMISSION REGARDING AN ADJOURNMENT

The Applicant is strongly opposed to the application for an adjournment.

The Applicant initially raised as an issue that the appeal was not lodged in the correct format or addressed to the correct person. This point was not however pressed. Although the Applicant addressed the Tribunal generally on the point of the length of time the review application took to be lodged, it did not refer me to any particular time limits. The Applicant accepts that ordinarily a tenant is entitled to pursue the decisions made in relation to rental subsidy through the internal review process. The Applicant submits however that in this case that entitlement has been lost because of the length of time the Tenant has taken to lodge the application for review. The Applicant argues that the Tenant has had full information and support throughout the process and should have acted much earlier.

Mr Weeks in opposing the application for an adjournment submitted that there is clearly a breach of the residential tenancy agreement, and it is clear that over $50,000.00 is owing to the Applicant at this point in time. He says the Tenant has been well aware of the situation since 1 June 2006 when everything was explained to him in the presence of the Tenant's caseworker from the Salvation Army. Mr Weeks submits that throughout the whole process the Applicant has provided natural justice to the Tenant.

Mr Weeks acknowledges the Tenant has medical conditions but submits they can all be controlled by medication and are not life threatening. The Applicant has a waiting list in this area of something like 5 to 10 years and a number of these housing applicants have more severe medical conditions than the Tenant.

FINDINGS

On 7 May 2007 the matter was first listed before the Tribunal. On that day the parties were represented as they were during this hearing, the Applicant by Mr Weeks and the Tenant by Mr Freer. The matter was adjourned by Member Rosser, with procedural directions, to a formal hearing not before 7 June 2007. The reasons the Member recorded in allowing the adjournment were for the filing of evidence and the parties were awaiting the outcome of an internal appeal.

The matter was listed for formal hearing on 30 June 2007. As at this date no decision, in relation to the first tier appeal lodged by the Tenant on 4 May 2007, had been received.

Under Part 7 of the *Housing Act 2001* the Applicant can make determinations on rental

subsidies to its clients. The terms under which this is done are set out in its policy. The NSW Department of Housing Policy Document "Appeals and Review of Decisions – EST0015A" which was current at the date of the Hearing begins as follows:

"***Policy Statement***

In a range of circumstances, tenants and applicants (clients) can appeal Department of Housing decisions that affect their entitlements. That is, a client can ask for a review of the decision.

The objective of the appeal process is to ensure that the correct decision has been made in each individual case under review. ***Appeal officers are required to make the original decision again*** *(my emphasis). They will do this by considering the established and relevant facts. Based on those facts, and the relevant law and policy, they will decide what the correct decision is.*

The Department's appeals process aims to be fair, economical, informal and prompt. The Department:

- *Seeks good decision-making at all levels of its service delivery to clients,*
- *Aims to adequately explain decisions, and*
- *Will provide useful information on alternative products and services where the Department cannot directly or immediately assist the client.*

The Department has this policy to ensure that there is a fair process for decisions to be reviewed if those decisions cannot be considered by other bodies, for example, the Consumer, Trader and Tenancy Tribunal."

It is clear from the Applicant's policy that in the review the Applicant is obliged to consider all relevant material and make 'the original decision again'. There are several possibilities as to the result of the review. The review may make the same decisions or it may decide that the rental subsidy should not have been cancelled, thus reducing the arrears to nil or it may decide not to backdate the cancellation of the subsidy at all or to backdate it to a date other than to the beginning of the tenancy. It is not the role of the Tribunal to predict what that decision might be.

The Tenant argues that the Tribunal must wait for the outcome of the reviews as it is only then that the Tribunal will know if the grounds are made out for termination and what the circumstances of the case are. If the appeal results in there being no arrears then the Applicant has no grounds on which to issue a Notice of Termination. He also argues that if the decision is made to change the date for which arrears are backdated this will be relevant in the decision the Tribunal makes as the Tribunal is required to consider the circumstances of the case.

In *Swain v Residential Tenancies Tribunal* (unreported, Supreme Court, NSW, 22 March 1995), Rolfe J decided that s64(2) of the *Residential Tenancies Act 1987* did not allow the Applicant an absolute right to an order of possession upon the serving of a valid notice and that the Tribunal was required to consider whether the "*circumstances of the case*" (s64(2)(c)) justified an order for possession.

In *Adavale Realty Pty Ltd v Williams (RTT 96/024133),* the Residential Tenancies Tribunal set

out a list of features that are relevant to a consideration of s64(2)(c), including the period of occupation, age, employment status and state of health of tenants, whether the rent is up to date and whether the Applicant requires the premises for any other person.
In *NSW Land and Housing Corporation v Gazal [2005] NSWCTTT 821*, a case where the rent arrears arose due to the withdrawal of the rental subsidy, Senior Member Durie noted that *"[t]he Tribunal has no power to consider the validity of any withdrawal of the rental subsidy – see s.44(2) of the Act. I consider that the Tribunal may consider the withdrawal of subsidy as a matter coming within the circumstances of the case – see s.64(2)(c)(ii)."*

In the *Department of Housing NSW v Elkazzi [2004] NSWCTTT 633* the Tribunal said: *"The Tribunal must consider under s64(2)(a)(ii) that the breach in the circumstances of the case is such as to justify termination of the agreement. It is in this context that the Tribunal may consider the evidence of the circumstances which led to the cancellation of the subsidy as evidence relevant to the breach, but not as to whether there has been a breach of the agreement."*

I respectfully agree with comments made by the Tribunal in both *Gazal* and *Elkazzi*. The decisions made on the internal review may have a significant impact on the cases both parties put to the Tribunal and ultimately on the Tribunal's decision.

In order to decide whether to terminate the tenancy, the amount of arrears, the length of time over which those arrears accumulated, the ability and willingness of the Tenant to repay arrears and the circumstances in which those arrears arose, must all be relevant to the circumstances of this case. The Applicant's view *at this stage* is clear in relation to all these matters. However the Applicant's own appeal mechanism allows for an appeal *de novo*, which could significantly alter 'the circumstances of the case' and such appeal process has not yet run its course.

In each of the following cases the Tribunal adjourned, on *at least* one occasion, the Applicant's application for termination on the basis that the Tenant was pursuing his/her right to an internal review/appeal against the decision of the Corporation to cancel a rebate - *NSW Land and Housing Corporation v Wilson [2006] NSWCTTT 734, NSW Land and Housing Corporation v Hutcherson [2005] NSWCTT 392, NSW Land and Housing Corporation v Soames [2004] NSWCTT 664 and Department of Housing of NSW v Elkazzi [2004] NSWCTTT 633.*

An adjournment was however refused in *NSW Land and Housing Corporation v Gazal [2005] NSWCTTT 821*. In that case the rental subsidy had been withdrawn as the tenant had not provided relevant documents. The applicant was seeking a termination of the tenancy. The tenant sought an adjournment on the basis that the Housing Appeal Committee had not given notice of its decision. In refusing the tenant's application for adjournment the Tribunal said:

"11.....The Applicant has an appeal committee to consider requests to overturn administrative decisions. The Respondent had appealed to that committee, seeking to overturn an administrative decision to revoke the rental subsidy she had previously been allowed. Her appeal had been considered on 26 October, but no recommendation had been sent to the parties. However in this case, the Applicant had decided in advance of any decision that it would not accept a recommendation to restore the subsidy.

12.....As the Applicant had already decided that it would not reinstate the subsidy there was no value in adjourning the hearing. Further, the matter had had an unfortunate history, with an initial hearing followed by a successful application under the provisions of the Consumer, Trader and Tenancy Tribunal Act s 68. The application was coming on for a hearing almost a year after it was lodged. I reluctantly refused the application for adjournment."

Gazal, like this case, had arrears that arose due to the withdrawal of the rental subsidy. This case can however, in my view, be most relevantly distinguished because in *Gazal* the first tier appeal had been determined and the applicant had already decided, no matter what recommendation emanated from the second tier appeal, that it would not reinstate the subsidy so there was *"no value in adjourning the hearing."*

In the case of *NSW Department of Housing v Soboleva Veronika [1993] NSWRT 115* the Tribunal adjourned the proceedings to allow the tenant to lodge an application for internal review. When the matter came back to the Tribunal for hearing the tenant had not lodged any such application nor had she taken any steps to lodge an application. The Tribunal went on to determine the case and said:

"The Tribunal has no jurisdiction to determine whether the cancellation of a rebate by the Department is right or wrong. If the cancellation of a rebate is not overturned by the Appeal Panel or if the Department does not reinstate a rebate of its own motion then arrears that accrue at the fully (sic) weekly rental as a result of that cancellation constitute arrears of rent that may cause a notice of termination to be given by the landlord"

The Tenant argues that this case is authority for the use of the internal review process as a condition precedent to the Tribunal exercising its powers or discretion. I do not accept that the *ratio* of the case is that the Tribunal will accept whatever rent the Department asserts is payable **provided** that the tenant has had the ability to use the internal appeal mechanism. This argument was not raised or discussed in the decision. I do accept the case only as another example of the Tribunal allowing an adjournment for the purpose of pursuing the internal review process.

The Tenant argues also that it is a right of procedural fairness that a tenant be able to exercise the right to an internal review. He relies on the authority of *Twist v Council of the Municipality of Randwick [1976] HCA 58; (1976) 136 CLR 106*, where Barwick CJ, at 109-110 stated:

"The common law rule that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power is both fundamental and universal: see Cooper v Wandsworth Board of Works (1863) 143 ER 414 and r v Electricity Commissioners; Ex parte London Electricity Joint Committee Co (1920) Ltd [1924] 1 KB 171 at 205. But the legislature may displace the rule and provide for the exercise of such a power without any opportunity afforded the affected person to oppose its exercise. However, if that is the legislative intention it must be made unambiguously clear."

The Applicant submitted that it did afford the Tenant, throughout the whole process, the opportunity to provide documents, explanations and arguments before it reached its decision and it therefore did afford procedural fairness.

The fact is however that the internal review mechanism is a part of the whole decision making process in the system. The Tenant may very well have been afforded procedural fairness in the initial investigation and the decisions that were made pursuant to that investigation. If there is a request for an internal review when the original decision is made again, then the requirement of procedural fairness arises again.

Two recent Supreme Court cases have considered requests for adjournments in this Tribunal where it was argued that such adjournments were necessary to provide procedural fairness. In the case of *Kelly v Chulio & Ors [2007] NSWSC 677*, Hoeben J said:

"29. A refusal to grant an adjournment may give rise to procedural unfairness. Some guidance is provided in Italiano v Carbone [2005] NSWCA 177:

"[102] No doubt, as the Master recognised, a refusal to grant an adjournment may give rise to procedural unfairness. In Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597 at [40], Gaudron and Gummow JJ said:

"Procedural fairness, which is one aspect of the rules of natural justice, requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to answer it. The opportunity to answer must be a reasonable opportunity. Thus, a failure to accede to a reasonable request for an adjournment can

constitute procedural unfairness."

The relevant question is what test a court exercising supervisory jurisdiction should apply in considering whether the request was "reasonable". In Touma v Saparas [2000] NSWCA 11, this Court applied the principles in House v The King [1936] HCA 40; (1936) 55 CLR 499 in determining whether a District Court judge had erred in refusing an adjournment, so as to render the trial before him procedurally unfair: at [27]. The minimum requirement of fairness, consistent with a legal exercise of power, will depend not only on the circumstances of the case, but also upon the statutory regime. The fact that the provisions of the CTTT Act referred to above permit the Tribunal a considerable area of discretion in moulding its own procedures suggests that the bounds of legality may need to be expanded beyond those which might apply in other circumstances. Indeed, it is well understood that the requirements of natural justice may need to be modified from time to time "to meet the particular exigencies of the case": see Kioa v West [1985] HCA 81; (1985) 159 CLR 550 at 615, per Brennan J.

In *O'Hara v Consumer Trader and Tenancy Tribunal & Ors [2007] NSWSC 663*, Hoeben J said:

"21 One of the functions of the CTTT is to adjudicate disputes between Applicants and tenants. It is not constrained by the formality of a courtroom. Its objects are to ensure that it is accessible, proceedings are efficient and effective, its decisions are fair and to enable proceedings before it to be determined in an informal expeditious and inexpensive manner. The CTTT is to act 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 (s 28 of the Act.)

22 The CTTT nevertheless has its own statutory obligations to ensure fairness its consideration of matters before it. Section 35 provides:

"The Tribunal must ensure that each party in any proceedings is given a reasonable opportunity:

> *(a) to call or give evidence and otherwise present the party's case (whether at a hearing or otherwise), and*
> *(b) to make submissions in relation to the issues in the proceedings."*

The circumstances of the case are that the Tenant is an elderly man, with significant health problems. He does not read and write. He currently has an entitlement to public housing which is extremely valuable to him. An indication of just how valuable it is was given by Mr Weeks when he told the Tribunal that the waiting list for entry into public housing is 5-10 years. The consequences of any decision against him could very well lead to his losing that entitlement. The Tenant has only relatively recently accessed proper legal advice. The purpose of the

adjournment is to pursue the Applicant's own appeal procedures which may result in the parties presenting a significantly different case than that which would be put today if the adjournment is refused. Although the Tribunal does not make any comments on the merits of the appeal or make any prediction about its outcome, it is apparent that the appeal is not a frivolous one.

The Tenant submits that no detriment will accrue to the Applicant if an adjournment is granted. I do not accept this. There is detriment to the Applicant. During an adjournment rental arrears are accruing and in these circumstances it is arguable that there is little prospect of the sum being recovered. Also if there were to be a determination today that the tenancy was to be terminated and vacant possession given then this would reduce, though minimally, the Applicant's waiting list.

I accept that the Tenant could have sought legal advice sooner than he did. However in all the circumstances of the case, including the fact that the matter was adjourned on the last occasion to await the outcome of the appeal which is still pending, and taking into account sections 28 and 35 of the *Consumer, Trader and Tenancy Tribunal Act* 2001, it is my view that it is appropriate to grant the adjournment to allow the Tenant to pursue the Applicant's internal review process.

The Tenant has suggested that the matter be re-listed by the Applicant at the conclusion of the reviews. In my view the Tribunal should remain in control of the case management of its proceedings and the matter will be adjourned to a date to be fixed by the Registrar, with a time estimate of half an hour, not before 31 August 2007. If it is apparent to the parties that the reviews will not have been completed by 31 August 2007 then the parties should apply for a further adjournment. The parties may make such an application in writing to the Tribunal.

ORDERS

The matter is adjourned to a date to be fixed by the Registrar, with a time estimate of half an hour, not before 31 August 2007.

If the internal review process has not been concluded by 31 August 2007, the parties may apply to the Tribunal for a further adjournment.

Tracy Sheedy
Member

Consumer Trader & Tenancy Tribunal

15 August 2007

Consumer, Trader and Tenancy Tribunal of New South Wales

NSW Land and Housing Corporation v Rinaldi (Tenancy) [2009] NSWCTTT 53 (19 February 2009)

Last Updated: 19 March 2009

NSW Land and Housing Corporation v Rinaldi (Tenancy) [2009] NSWCTTT 53 (19 February 2009)
CONSUMER, TRADER AND TENANCY TRIBUNAL

Tenancy Division

APPLICATION NO:	RT 08/10711
APPLICANT:	NSW Land and Housing Corporation
RESPONDENT:	Eva Rinaldi
HEARINGS:	10 June 2008 at Sydney 1 August 2008 at Sydney and 17 December 2008 at Sydney
APPLICATION:	Termination of Tenancy
APPEARANCES:	Mr A R Jungwirth of Counsel for the Applicant Mr N M Eastman of Counsel for the Respondent
LEGISLATION:	*Residential Tenancies Act* 1987 ("the Act") *Housing Act 2001*
CASES CITED:	*NSW Department of Housing V Christodoulou* [1996] NSWRT 8 (17 January 1996)

Commonwealth v Verwayen [1990] HCA 39; (1990) 170 CLR 394

Agricultural and Rural Finance Pty Limited v Gardiner [2008] HCA 57 (11 December 2008)

Department of Housing of New South Wales v Elkazzi [2004] NSWCTTT 633

ORDERS

This claim is dismissed for the reasons given below.

REASONS FOR DECISION

This matter was heard in conjunction with a cross claim No. GEN 08/29176 which was lodged by Eva Rinaldi against the abovementioned applicant as the first cross respondent and also against a second cross respondent David Lockrey who is an officer of the first cross respondent. A submission was made on behalf of the cross applicant that should I dismiss the applicant's eviction proceedings or otherwise not order vacant possession of the premises then the cross applicant would not need to press her cross claim.

BACKGROUND

The parties have entered a number of tenancy relationships since 1996. At various times the respondent has leased the applicant's residential premises at Villawood, Bidwell, Five Dock, Concord, Russell Lea and then Five Dock for a second time. These various changes of address were made possible by a program known as mutual exchange whereby the tenants of properties belonging to the applicant may exchange homes.

Finally on 30 January 2004 the parties entered into a residential tenancy agreement in relation to premises at 44 Blackwall Point Road Abbotsford NSW 2046. That document became Exhibit 2. The respondent still occupies those premises with her son Joseph who was born on 17 July 1997. The respondent was born on 16 November 1971 and she is currently unemployed. The respondent is a single mother and she is in receipt of Centrelink benefits.

For the sake of convenience I will now quote from the brief summary that was prepared by the respondent's legal representatives:-

"The applicant/Department rents out premises at a general market rate. The applicant also has a subsidy scheme whereby if a tenant meets certain eligibility criteria the tenant is entitled to a rental rebate or rental subsidy. This scheme allows a tenant to pay a sum calculated at approximately 25% of household income as rent rather than pay the real market value.

The tenant/respondent received a rental subsidy from the commencement of her tenancies with the Department in 1966 until the subsidy was retrospectively cancelled in 2006. The reason given for the subsidy cancellation was that the tenant failed to advise the Department that she had commenced the operation of a business and such conduct disentitled her to a subsidy.

The tenant had raised this issue with Mr Lockrey (second cross respondent) prior to the tenant's establishment of her business. Mr Lockrey represented to the tenant (See Rinaldi affidavit at paragraph 29 – Exhibit 8).

"You don't need to contact the department until you start making money. Once you receive payment for any work you do depending on how much you earn your rent may go up".

The tenant relied on this representation and did not formally notify the Department about her establishment of the business. The business turned no profit and within 10 months of registration of the business the tenant had became bankrupt (in August 2005).

In December 2006 the Department finalised an investigation into the tenant's business and determined that she was not entitled to a rental subsidy pursuant to its policies". In 2005 the respondent was also employed by the Strathfield Community College for eight weeks but this College became insolvent and she did not receive any payment at all for this work.
It appears that in early 2005 the applicant/Department received an anonymous letter which indicated that the respondent was the proprietor of a business known as Cleopatra Cosmetic Academy and gave details as to web sites etc. An investigation was launched and subsequently the respondent's subsidy was cancelled retrospectively to 1 November 2004. As a result the respondent's rental ledger was debited with a large rental arrears.

There is an appeal and review process within the applicant's organisation which was then implemented. This culminated in a hearing that was conducted by the Housing Appeals Committee on 8 November 2007. The Committee agreed that the Department's decision was correct within the rental subsidy policy. The date this decision was made is not recorded on the decision.

Despite being invited to review these decisions I agree with the comments of Member Cochrane in the case of *NSW Department of Housing V Christodoulou* [1996] NSWRT 8 (17 January 1996) where he said:-

"The dynamic of the rental rebate process is not one which falls within the purview of the Residential Tenancies Tribunal. Experience has shown that the grant or withdrawal of such a privilege is not connected with compliance with the terms of the tenancy agreement". And later in that same decision:-

"Similarly many cases come before the Tribunal in which there has been a cancellation of a rebate either because of a failure to lodge and complete an application form or where the circumstances are shown to be otherwise than is stated by the tenant in the application form. In many cases this has led to a retrospective debiting of an amount into the rental account being the difference between the abated rent and the market rents or some other figure which should in fact have represented the correct abated rent amount. In my opinion moneys so debited to an account may truly be regarded as rent arrears". These comments are very pertinent to this dispute.

It is appropriate to record here clauses 31 & 32 of the Residential Tenancy Agreement (Exhibit 2) as they relate to the subsidy issue and they form a major issue in the respondent's submissions.

Clause 31 provides:-

"The tenant acknowledges that the landlord may formulate a policy for the granting of subsidies or waiver of rents. The parties agree that in accordance with such policy the Corporation/Department as landlord may grant a subsidy or waive rent in its absolute discretion".

Clause 32 provides:-

1. The tenant agrees to give written notice to the landlord of all income and any subsequent changes of the tenant and of all other persons residing on the premises within twenty eight (28) days of entering into this agreement and within twenty eight (28) days of any subsequent changes.

2. The tenant acknowledges that a failure to notify the landlord in writing within twenty eight (28) days shall constitute a breach of this agreement entitling the landlord to issue a Notice of Termination and seek possession of the premises.

The applicant issued a notice of termination to the respondent by pre paid post on 10 January 2008. This document became Exhibit 1. The applicant alleged in Exhibit 1 that the respondent had breached the Residential Tenancy Agreement (Exhibit 2) by not paying rent on time and that as at 10 January 2008 the arrears of rent that was then owed to the applicant based on a weekly rental of $345.00 was $33,945.52.

In the notice of termination the applicant requested vacant possession on 8 February 2008. The respondent did not then and has not since vacated the premises. On 25 February 2008 the applicant lodged this application with the Tribunal for "An order ending the Tenancy Agreement and taking possession of the premises due to rent arrears". In my opinion Exhibit 1 complies with Section 57 of the Act and is valid. No order was sought as to the repayment of the rental arrears and presumably the reason for this is that such a sum is beyond the limit of this Tribunal's jurisdiction.

Section 57 of the Act provides as follows:-

(1) A landlord or a tenant may give notice of termination of a residential tenancy agreement to the other party on the ground that the other party has breached a term of the agreement.

(2) A notice of termination given under this section shall not specify a day earlier than 14 days after the day on which the notice is given as the day on which vacant possession of the residential premises is to be or will be delivered up to the landlord.

(3) A notice of termination given by a landlord on the ground of a breach of the agreement to pay rent has no effect unless the rent has remained unpaid in breach of the agreement for not less than 14 days before the notice is given.

(4) A notice of termination given by a landlord on the ground of a breach of the agreement to pay rent is not ineffective because of any failure of the landlord or the landlord's agent to make a prior formal demand for payment of the rent.

(5) A notice of termination of a residential tenancy agreement that creates a tenancy for a fixed term given under this section is not ineffective because the day specified as the day on which vacant possession of the residential premises is to be or will be delivered up to the landlord is earlier than the day the term ends.

As indicated above I believe that the notice was correctly served and is valid. Exhibit 3 is a partial extract from the respondent's rent ledger whilst Exhibit 6 is a complete rent ledger. A cursory examination of these ledgers reveals that prior to 6 December 2006 the respondent was

always in credit apart from a very occasional small debit which was rectified at the next payment. On 6 December 2006 the respondent went from a credit of $580.88 to a debit of $41,526.92. However, at 28 July 2008 the respondent's rent account indicated an amount of rent arrears in the sum of $21,440.92 as a debit on the ledger.
The applicant submitted that it had clearly established a breach of clause 2 of Exhibit 2 and similarly of Section 18 of the Act. That Section provides:-

"It is a term of every residential tenancy agreement that the tenant shall pay the rent on or before the day set out in the agreement."

Clause 2 of the agreement provides

"The tenant agrees to pay rent on time".

Further, the applicant submitted that the Tribunal had sufficient evidence before it to establish that the breach satisfied the requirements imposed by Section 64 (2) (b) (ii) of the Act. That Section of the Act provides as follows:-

(2) The Tribunal, on application by a landlord under this section, is to make an order terminating the agreement if it is satisfied:

(b) in the case of a notice given by a landlord on the ground referred to in section 57, relating to a breach of the agreement:

(i) that the landlord has established the ground, and

(ii) that the breach, in the circumstances of the case, is such as to justify termination of the agreement, or

I shall consider "the circumstances of the case" in due course but first the respondent raised two issues to dispute that the breach had been established. I shall consider those two issues next and then I shall consider the respondent's third argument which was on "the circumstances of the case". It was further submitted that if the respondent failed on all three of these submissions then she would press the cross claim but not if she succeeded on any one of them.

The two issues that the respondent raised were:-

1. The respondent complied with the terms of the contract and
2. The applicant is not entitled to recover as rent arrears, rent which has been waived.

In relation to the first issue the respondent relies on clause 31 which I recited above. The respondent submitted that via clause 31 the Department's policy on rental subsidies (SUB0044A) is expressly incorporated into the Residential Tenancy Agreement. The respondent submitted that the tenant's subsidy has been cancelled punitively and not contractually by following the terms of the policy.

Further, the respondent submitted that the applicant's failure to follow the terms of the contract by following the terms of the policy established that the Department is not contractually entitled to have created rent arrears. Further, on the facts of the case there had been no proper cancellation of the subsidy in accordance with clause 31 and consequently there is no rent arrears as alleged.

I refer again to the quotations that are recorded above from the Christodoulou determination. I agree with those quotations even though the Respondent submitted that they cannot be a valid conclusion and I should not follow them. From the evidence given before me it would appear that the respondent's failure to comply with clause 32 (ie. written notification) caused the applicant to review her rent subsidy and then cancel it. I agree with Mr Cochrane's conclusion that monies so debited may correctly be regarded as rent due and that is the subject matter of this application for termination.

In the alternative the respondent submitted that the terms in relation to rent, its calculation and the subsidisation or waiver of it, are ambiguous. Again the provisions of clause 31 are cited as creating an ambiguity in the expressions "grant subsidies or waive rents". In my opinion meaning and intent of the clauses are clear enough and I do not agree that there is any ambiguity.

The second submission was that "the grounds of breach have not been made out as the Department has waived the rent the subject of the rental arrears. Absent a properly established rental arrears, there is no breach". Again I refer to the quotations that I recorded above from the Christodoulou determination.

It is not disputed that the respondent received a rent rebate over a period of years and accordingly I do not see it as necessary to record the Legislation or the Policies which established that rebate. The respondent submitted that the scheme constituted a waiver of rent and in the case of the *Commonwealth v Verwayen* [1990] HCA 39; (1990) 170 CLR 394 per Brennan J at 423, Toohey J at 474 - 475 and Gaudron J at 482 a right waived is a right abandoned once and for all. The waiver is not capable of being withdrawn. The respondent also took me to the case of *Agricultural and Rural Finance Pty Limited v Gardiner* [2008]

HCA 57 (11 December 2008).

The respondent also quoted extensively from the case of the *Department of Housing of New South Wales v Elkazzi* [2004] NSWCTTT 633 which was a matter determined by Member Balding who held at page 14

"The waiver is conditional on the tenant complying with his obligations as to disclosure of the persons residing in the premises and their income which, whatever else they might also be, are contractual obligations under the residential tenancy agreement".

The respondent submitted that "the decisions in Elkazzi and Verwayen cannot be reconciled. The latter High Court case is correct, and the former Tribunal cases are not". It was the respondent's submission that:

"The alteration of a rental ledger to show an amount of rent that has been waived offends the doctrine of waiver and is unlawful. The creation of an alleged rent arrears in this fashion is impermissible and therefore cannot form the basis of a breach of the residential tenancy agreement. In the absence of such a breach, orders under sections 16 (compensation for breach) or 64 (termination for breach) of the *Residential Tenancies Act* 1987 (the Act) cannot be made".

Curiously this submission then advanced an argument that the result was not unfair as the Department retained the right to pursue an action under Section 57 of the Housing Act to recover an amount of money where it cancels a rental subsidy "as a debt due in any court of competent jurisdiction". However, it was submitted that this Tribunal is not a court of competent jurisdiction. As stated earlier the applicant did not request an order to recover any monies in these proceedings. What I find curious is how the submission that a right waived is a right abandoned once and for all is compatible with a right to commence proceedings to recover the monies which are said to have been waived. I am inclined to agree with Member Balding's decision.

The applicant in reply submitted that:-

"Rent had not been waived by NSW Land and Housing Corporation: a rebated amount of rent or a subsidised level of rent (reduced from the "market" or "benchmark" amount of rent due from subsidy-eligible tenants) is payable by and due from the respondent only if the terms of the residential tenancy agreement are met. NSW Land and Housing Corporation does not seek

any money orders in this application and its capacity to seek or recover monies due from the respondent (Section 73 *Housing Act, 2001*) has no bearing on these proceedings".

As indicated above I am inclined to the view expressed by Member Balding and also reiterated by the applicant it its submission that the only sensible conclusion is that the reduced rent is dependent upon the respondent complying with her obligations of disclosure. It would be an absurd conclusion to reach that the applicant is therefore estopped from pursuing any monies owed to it after it has cancelled a rental subsidy.

Having considered the evidence that has been submitted to me I am satisfied that under Section 64 (2) (b) (i) of the Act "the landlord/applicant has established the ground" and is therefore entitled to an order for termination of the agreement and possession of the premises. I will now consider the material that has been submitted to me in relation to Section 64 (2) (b) (ii) of the Act as to whether "the breach, in the circumstances of the case, is such as to justify termination of the agreement".

The applicant requested that I have regard to the following issues when considering the circumstances of the case:

1. The amount of rent arrears is substantial.
2. The respondent has made no proposal to reduce the arrears.
3. The respondent's extremely poor rent payment history.
4. Further recent poor history of rent payments by the respondent.
5. The respondent was appreciably aware of her obligations to maintain the integrity of her subsidy and she executed a number of documents attesting to her agreement as to the terms upon which subsidies are granted and for which her eligibility is to be assessed.
6. The breach is a serious one in terms of quantum, a lack of willingness to reduce the rent owed or to pay at least the subsidised rent and little likelihood of improvement in the future.
7. NSW Land and Housing Corporation maintains lengthy waiting lists for this type of property in this housing allocation zone.
8. The history relevant to the respondent's tenancy in terms of rent payment militates against any discretion being exercised in favour of the respondent (Section 64 (4) (e).

The only comment that I would make about the above submissions is the case before me was about termination of the lease and was not about recovery of monies that were due or owing. It is true, arrears of rent was a feature of the hearings but recovery of the same was not an issue that was litigated before me. Had the proceedings been about recovery of monies that were due or owing then it is possible that some of the issues recorded above would have been more fully aired at these hearings.

The respondent's submissions in relation to the circumstances are somewhat lengthy and I do not intend to repeat them here as they are set out in great detail in her Affidavit which is Exhibit 8. Those submissions commence at paragraph 37 on page 5 of Exhibit 8 and run through to paragraph 63 on page 7 of her Affidavit. Those submissions are comprehensive and apart her comments at 58, 59 and 60 about rent repayments and 61 and 62 about breaches of the Residential Tenancy Agreement there is no evidence whatsoever to dispute those submissions.

After a consideration of all the above material it is my opinion that whilst the breach has been established I will not terminate the agreement in view of all of the circumstances of the case. In particular I note the respondent's period of residence in this area, the fact that she is a single mother, her age and that of her son, her state of health, her unemployment, her unfitness for work, her reliance on Centerlink support, her friends, her religious and social contacts within the area and her inability to obtain alternative accommodation or if evicted her inability to financially survive in an open rental market.

In conclusion, I would like to add that the respondent had a long history of being a good tenant but then she got herself into a financial mess through what I am sure was her lack of business experience. What she gained was enormous debt not only to the applicant but also to other traders and she ended up in bankruptcy. It is crystal clear from her taxation returns and others documents that were submitted to me that she made not one single penny from this business venture or her other brief employment. For her sin of omission she is now in considerable financial debt.

D A Turley
Member
Consumer, Trader & Tenancy Tribunal

19 February 2009

Consumer, Trader and Tenancy Tribunal of New South Wales Decisions

Department of Housing of NSW v Elkazzi (Tenancy) [2004] NSWCTTT 633 (31 August 2004)

Last Updated: 16 November 2004

Department of Housing of NSW v Elkazzi (Tenancy) [2004] NSWCTTT 633 (31 August 2004) CONSUMER, TRADER AND TENANCY TRIBUNAL

Tenancy Division

APPLICATION NO:	RT 03/83534
APPLICANT:	Department of Housing of New South Wales
RESPONDENT:	R Elkazzi
CROSS CLAIM:	GEN 03/50431
CROSS APPLICANT:	R Elkazzi
CROSS RESPONDENT	NSW Land and Housing Corporation
APPLICATION:	Landlord's application for termination and possession for rent arrears, tenants application for relief from payment
APPEARANCES:	Mr. Enright of counsel for the Corporation Mr. Eastman, solicitor for Mr. Elkazzi

HEARING: 10 March 2004 and 28 May 2004 in Sydney

LEGISLATION: *Residential Tenancies Act 1987*, *Consumer Claims Act, 1998*, *Housing Act 2001*

ISSUES: Cancellation of rental subsidy, effect of cancellation on rent arrears, breach of the tenancy agreement, relevant circumstances, whether the landlord is estopped from claiming rent debited to account is rent arrears, whether the landlord is obliged to grant the tenant a rental subsidy

CASES CITED: *NSW Department of Housing v Christodolou [1996] NSWRT 6,*
Matthews v New South Wales Land and Housing Corporation and Ors, Supreme Court of NSW, O'Keefe J, 7 January 2004, unreported
Central London Property Trust v High Trees Limited [1947] KB130
Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387
Director of Housing v Young [2002] VC 80227
Probiz Software Pty Ltd & Anor v Magee & Ors [1998] NSWSC 36

Fairey Australasia Pty Ltd v Joyce [1981] 2 NSWLR 314

State of NSW v RT & YE Falls Investments Pty Ltd (2003) 57 NSWLR 1.

ORDERS

FILE RT 03/83534

The Tribunal orders that:

1. The residential tenancy agreement is terminated and possession is to be given to the landlord on 9 November 2004.

2. The tenant to pay the landlord an occupation fee of $62.28 from 1 September 2004 to the date possession is given. To be paid by instalments of $450.00 per week commencing 8 September 2004.

3. Leave is given to the Applicant to relist the matter if orders are sought in respect of rent arrears.

FILE GEN 03/50431

1. The application is dismissed.

REASONS FOR DECISION

APPLICATION

By an application lodged with the Tribunal on 26 May 2003, the Department of Housing as it was then known lodged an application with the Tribunal seeking orders ending the tenancy agreement and taking possession of the premises based on rent arrears and an occupation fee. The application was made following service of a notice of termination served on Mr Elkazzi, the tenant for breach of the agreement, failure to pay rent arrears.

HISTORY OF THE APPLICATION

The matter came before the Tribunal on a number of occasions between June and December 2003. The matter was adjourned by consent of the parties as Mr. Elkazzi, was pursuing his right to appeal against the decision of the Corporation in cancelling his rebate. The matter then came on for hearing before me.

CORPORATION'S CASE

The parties had entered into a residential tenancy agreement commencing 21 May 1990 for premises at "...", Glebe. The rent at that time was $300.00 per week. It appears that there were some rent increases during the course of the tenancy in particular on 5 April 2001. Notice was given to the tenant that the market rent would be $450.00 per week from 4 June 2001.

Evidence was given on behalf on the Corporation by Mr. B Spackman, an investigator with the legal services branch. On 4 December 2002 the corporation sent a letter to the tenant noting they were in receipt of information that the rental subsidy applications completed by the tenant were incorrect.

The tenant was invited to refute the allegation by providing written documentation or by attending an interview. An interview took place in between Mr. Spackman, the tenant and his daughter Mrs. N Nakhle on 17 December 2002. Following that meeting further information was provided by Mr. W Nakhle the tenant's son in law. Following receipt of that information the Corporation reviewed the documentation and the rental subsidy.

By letter of 16 April 2003 the Corporation wrote to the tenant advising of the results of the investigation and that they have formed the view that both Mr. and Mrs. Nakhle had been residing in the premises since 1990 and during that period Mr. Nakhle had been working as a taxi driver. The Corporation would retrospectively cancel the rental subsidies for the period 1990 to the start of the last rental subsidy period being 13 May 2002. The subsidy period of 13 May 2002 to 10 March 2003 was also cancelled. The cancellation of the subsidy for that latter period resulting in the amount of $11,826.79 being debited to the tenant's rental account.

By letter of 24 April 2003 the Corporation wrote to the tenant informing him that the

cancellation of the rental subsidies for the period 21 May 1990 to 13 May 2002 had resulted in a debit to the account of $112,158.90. As at 19 April 2003 the total amount debited to the account was $125,635.69.

A notice of termination was issued on 2 May 2003 and sent to the tenant by post. The notice required vacant possession to be given on 25 May 2003 due to rent arrears of $125,635.69 based on a weekly rental of $450.00.

The tenant sought a review of that decision and the matter was referred to the Housing Appeals Committee for hearing on 5 August 2003. The committee was required to decide whether the tenant was eligible for rental subsidy from 21 May 1990 to 13 May 2003. A copy of the committee's decision was attached. The recommendation made by the committee was to agree with the Corporation's original decision.

Included in the documents tendered by the Corporation was the letter of Mr. and Mrs. Nakhle of 20 December 2002 when they provided the tax assessments for Mr. Nakhle for the period 30 June 1990 to 30 June 2002, a letter from Mr. and Mrs. Panabianco, the operators of a café where Mrs Nahkle was doing work experience, income statements for Housing Authorities from Centrelink for Mrs. Nakhle, copies of the certificates of title for property they owned. Also provided were the application for rental rebate completed by the tenant in 1995, and 2001, files notes of conversations with the tenant regarding the income of Mr. Nakhle in October 2001.

TENANT'S CASE

Mr. Elkazzi gave his evidence with the assistance of an Arabic interpreter. He came to Australia in 1986 from Lebanon with his wife. His daughter and son-in-law came later that year. They all applied for and received social security payments. They initially rented a property in the Mascot area then moved into the Glebe premises in 1990. In 1990 he lived at the premises with his wife, daughter, her husband and their first child.

At the commencement of the tenancy Mr. Elkazzi was given the subsidy application form to complete every six months. It was his practice to complete the subsidy application forms writing in all their names and their income.

It was Mr. Elkazzi's evidence that Mr. Nakhle was in receipt of social security payments in 1990 when they moved to the premises. Mr. Nakhle started working as taxi driver two to three days per week in 1992 and also received social security. In 1995 Mr. Nakhle started working full time. He was aware that Mr. Nahkle was in receipt of social security payments because correspondence came for him at the premises.

Mr. Elkazzi was somewhat inconsistent in relation to his evidence about how he obtained the information about his daughter and son-in-law's income. At one point he said he assumed that they were all in receipt of the same amount though he was aware Mrs. Nahkle received an additional amount for the children. In response to one question his evidence was that he asked Mrs Nahkle what she earned and thereby obtained the information to complete the forms. In response to another question he said he did not discuss her income with her he just looked at the correspondence from Centrelink to his daughter at the premises.

It was his evidence that he filled the form in the same way each year. For example in the subsidy application in November 1999 all of the occupants received a $117.70 per week. The subsidy application form of May 2002 showed they all received $161.30 per week.

It was his evidence that Mr. Nakhle moved to Punchbowl in 1992 when he bought a house. He denied that his son-in-law had been living with him at Glebe since that time. It was his evidence that Mrs. Nakhle did not live full time at the premises, she would stay 3 or so days per week and Mr. Nakhle woud stay there up to 3 days per week. His evidence included the following exchange:

Mr Enright Q. You will confirm to me please that Mr. W Nakhle has been living at "...", Glebe from 1990 to 2002?
Mr. Elkazzi A. After he moved to his house he used to come and stay with us for days but the papers that we used to fill and for the children to stay with us.
Q. You've told the Department from 1990 to May 1992 that your son-in-law has been a resident in the premises at "...", Glebe, haven't you?
A. I used to fill the form as it is, I never changed anything in it.
Q.So that's your explanation, is it?
A.Yes.
Q. In fact you were telling the truth when you filled in those forms to the Department, weren't you, you were saying that your son-in-law did live there with you?
A. I made wrong mistake 'cause as I filled the form the first time and I said like my son and my daughter who live with me, when he moved out I didn't fill that he left 'cause I was scared that you were going to take the house from us because it's a big house.
Q.So you were lying to the Department, were you?

A. I didn't lie, I was paying so we can stay in the house.

Mr. Elkazzi's evidence was that his grandchildren were at the local school and the children would stay at the premises during the week and on weekends and school holidays would stay at Punchbowl. His grandchildren are now 16, 10 and seven years old.

At the interview on 17 December 2002 with Mr. Spackman no one told Mr.Spackman that his son-in-law and daughter were not living with them.

Correspondence for both Mr. and Mrs. Nakhle came to the Glebe premises.

Mr. Elkazzi referred to a number of health problems including heart disease, that he had had open heart surgery in 1998, an artificial hip since 1996, stomach problems and high blood pressure. Mr. Elkazzi's evidence at first was that he had no assets. This was challenged in cross examination when he agreed he had a part share of some land in Lebanon, approximately 3,000m2 near the village where he lived, part of which had been resumed for a freeway.

Mrs. N Elkazzi, the tenant's wife gave evidence with the assistance of the interpreter. It was her evidence that Mr. and Mrs. Nakhle had moved out of the premises in 1992. Mrs. Nakhle returned to the premises for certain periods between 1992 and 1995 because of her husband's medical condition and her own domestic issues and stayed for several months in 1995

following an accident. Between 1996 and 2000 Mrs. Nakhle would stay with them for a few nights a week to care for the children and Mr. Elkazzi. Since 2000 Mrs. Nakhle has spent more time with her husband at Punchbowl and has not spent more than a few nights at the Glebe premises.

Mrs. Elkazzi agreed that she would sign the subsidy application form when presented with it by her husband, but she did not complete the same. In responding to questions put to her about the form Mrs. Elkazzi gave her evidence in an evasive manner and often did not answer the question put to her. It was put to her that she knew her husband was telling the Corporation in that form that her daughter and son-in-law were staying with them. She made no direct reply, and said she made no comment on what was being put in the form saying only that her daughter had stayed with them but she had left a long time ago. Further questions along a similar line were put. Mrs. Elkazzi only dealt with part of the question repeating the period for which her daughter stayed in the premises.

Mrs. Elkazzi's evidence was that Mr. Nakhle had started driving a taxi in 1995, he did not drive a taxi at the time he was living with them and she had never seen a taxi at the premises at that time.

Mr. W Nakhle the tenant's son-in-law provided a written statement and gave evidence at the hearing. His statement was in similar terms to Mrs. Nakhle's statement and Mrs. Elkazzi's statement. His evidence was different in some important respects. It was his evidence he became a taxi driver in 1990 working part time while he was living at the Glebe premises. He started working full time as taxi driver in 1995.

His evidence was that he has stayed at the premises occasionally since he moved out in 1992. On many occasions he has provided the Glebe premises for his address.

It was his evidence that he knew nothing about the completion of the subsidy application form. He denied ever signing such a form. He denied signing the application for rental rebate dated 14 September 1995. He agreed that the signature on the form was printed, which is the same as he has done on his driver's licence. He also denied that it was Mrs. Nakhle's signature on the form. He could not provide an explanation as to why something which purported to be his signature appeared on the document.

Mr. Nakhle was shown the subsidy application form of 18 September 2001 which also appeared to have his signature on it. He denied that it was signature. He denied having a Centrelink number.

Mrs. Nakhle provided a statement and gave evidence at the hearing. I have noted above the statement of Mrs. Nakhle was in similar terms to that of her husband and Mrs. Elkazzi however, her statement was inconsistent in that her evidence was that Mr. Nakhle had only commenced working once they had purchased and moved into the Punchbowl property in 1992 however she says in her statement that he had been working part time since sometime in 1990.

Her evidence was that she had not spent more than a few nights at the Glebe premises since approximately 2000.

Mrs. Nahkle initially denied seeing the subsidy application forms but then agreed that her father had asked her to sign the forms and she had done so on several occasions without reading the forms. She could not recall if her husband had signed the forms. Her husband had last received Centrelink payments in 1995 when he started working full time as a taxi driver. She denied that she assisted her father in completing the forms. She may have given him some information at the beginning about her income. She cannot remember the last form she signed. It was her evidence that she probably arranged for her husband to sign the forms from time to time, she may on occasions have signed for her husband.

Mrs. Nahkle denied signing the 1991 subsidy application form but agreed to signing the 2001 subsidy application form.

It was put to Mrs. Nakhle that she was asked at that the meeting with the Corporation in December 2002 if she was living at the premises and she said she was. Mrs. Nakhle could not recall the question or her reply. It was her evidence that she had lived at the premises however now she only stayed approximately three days every couple of weeks. It was put to her that at the meeting she had asked the Corporation's representative whether the debt would be forgiven if she, her husband and their children moved out. She agreed she may have said something to that effect but she may not have understood what was being asked of her at the meeting.

Mr. Elkazzi called a number of witnesses to give evidence on his behalf.

Ms. T Ta was friend of Mrs. Nakhle from around 1996 when their daughters were at school together and she would visit Mrs. Nakhle at the Glebe premises between 1996 and 1998. It was her understanding that Mrs. Nakhle was living there during that period. On some occasions in 2002 and 2003 she would visit the family in Punchbowl. She had never met Mr. Nakhle and cannot say whether he lived at Glebe. She was told by her daughter that Mr. Nakhle did not live there.

Evidence was given by Ms. K Beckett who has lived next door to the premises since September 2001. She sees the children at the premises on school days but not on weekends. She does not see Mrs. Nakhle there often. Mrs. Nakhle has a four wheel drive vehicle and she seems to sleep at the premises one or two nights per week. She is at the premises almost everyday.
She first saw Mr. Nakhle a while after she had moved in he was driving a taxi. He visits the premises on occasions with other taxi drivers.

Mr. E Azzi, Mr. Elkazzi's brother gave evidence. Mr. Azzi came to Australia in 1973. It was his evidence that his brother was not a farmer when he was in Lebanon, he was employed by the government. He visits his brother at Glebe every month or so. Mrs. Nakhle had told him she had been living at Punchbowl since 2002, she lived in Glebe up to that point. When Mrs. Nakhle was living at Glebe she lived there with her husband Mr. Nakhle. Mr. Azzi did not know when Mr Nahkle had started driving taxis.

Evidence was given by Mr. S Nakhle, Mr. W Nakhle's brother. It was his evidence that Mr. Nakhle had lived in the Punchbowl premises since 1992 and he had visited him there on a weekly basis since then. When asked whether Mrs Nakhle was living at Glebe until about 2 years ago, he said that she usually lived in Punchbowl. His evidence was Mr. Nakhle always stays at Punchbowl and Mrs. Nakhle and the children were there on weekends.

It was his habit to visit Mr. Elkazzi in Glebe approximately three times per week, sometimes Mrs. Nakhle was there. Mr. Nakhle was rarely there.

Evidence was given by Mr. Y Naklhe, Mr. W Nakhle's father. He knew Mr. Elkazzi as they were from the same village in Lebanon. He thought Mr. Elkazzi was a farmer but he was not sure. He also lives in Punchbowl, it takes him about a quarter of an hour to walk to his son's house. It was his evidence that Mrs. Nakhle was living in Punchbowl but goes on and off to Glebe. He does not know if Mr. Nakhle lives in Glebe.

DECISION

The tenant entered into a written residential tenancy agreement with the Corporation in 1990. The tenant moved to the premises with his wife, daughter, son-in-law and grandchild in 1990.

At that time the tenant, his wife, daughter and son in law were in receipt of social security payments. There is no doubt on the evidence that in addition Mr. Nakhle was in receipt of income as a taxi driver. His taxable income to 30 June 1990 was $12,816.00 and to 30 June 1991 was $13,578.00.

During the term of the tenancy the tenant completed many applications for rental rebate. Based on the information provided in the application the Corporation has granted the tenant a subsidy to reduce the rent from market rent. The tenant received a subsidy from the commencement of the tenancy and completed and submitted the rental subsidy form every six months. He was shown on the first occasion how to fill it out and then he started to fill it out himself. On the forms he would write the names of the occupants and how much he was paid. The subsidy forms which were available were tendered in evidence, the rest had been destroyed in an accident at the Corporation. All the forms tendered disclosed the tenant, his wife, his daughter, his son-in-law and their children as they were born as occupants of the premises.

None of the subsidy application forms disclosed that Mr. Nakhle was employed.

Mr. Nakhle's evidence is that he started working part time in 1990 as a taxi driver. Mr and Mrs Elkazzi do not appear to have realised this saying that he did not start working as a taxi driver until 1992. I find it highly unlikely that the Mr Elkazzi was not aware that Mr. Nakhle was working as a taxi driver at that time.

The evidence is clear that for the period up to approximately the middle of 1992 Mr. Nakhle was an occupant of the premises and was in receipt of an income beyond social security payments. All the evidence is that Mr. and Mrs. Nakhle were living with Mr. and Mrs. Elkazzi at their premises at Mascot and moved with them to the premises at Glebe. At the commencement of the tenancy commenced in May 1990 it is highly likely that Mr. Nakhle had been working for most of 1989 and 1990. Mr Elkazzi did not disclose that Mr. Nakhle was in employment during that period as is required by the tenancy agreement, and it appears that his level of income would have affected the amount of subsidy to which Mr Elkazzi would have been entitled.

Mr Elkazzi's evidence about how he obtained the information about what his daughter and

son-in-law were earning was not particularly satisfactory. The tenancy agreement imposed an express obligation upon him to disclose the income of all the occupants. The evidence is clear that he breached that obligation and that he did so knowingly in that period.

The evidence of Mr. Elkazzi was that his daughter did not live full time at the premises after the purchase of the property in 1992 but she would stay approximately 3 days per week and her husband was there 3 days per week to see the children. It was his evidence that for most weeks Mrs. Nakhle and her husband were at the premises.

This evidence is at odds with evidence given by all of the other witnesses as to the extent to which Mr. and Mrs. Nakhle stayed at the premises, except for Mr. Azzi. Mr. Nakhle certainly had the Glebe address listed for a number of service providers.

I do not think much weight can be placed on the evidence of Ms. Ta and Ms. Beckett, neither appear to have seen Mr. Nakhle at the premises ever and there in no doubt on the evidence of all the other witnesses including Mr. Nakhle that he was regularly at the premises.

All of the other evidence was given by family members. In making this comment I am not saying that because of this no weight should be given to such evidence, however where it conflicts with other evidence it can be rejected.

On Mr. Elkazzi's evidence his son-in-law was staying at the premises a maximum of three days per week. I consider that I can accept Mr. Elkazzi's evidence on this matter as it was given in a direct manner, it was given in a context where that is the main issue, and as he is the party to the proceedings I consider it open to me to prefer his evidence over that of the other witnesses. Is staying at the premises three days per week the same as residing at the premises for the purposes of clauses 24, 26 and 27 of the tenancy agreement? Mr. Elkazzi has disclosed Mr. Nakhle as a resident for the whole of the tenancy in completing the subsidy application forms. At one level the view can be taken that he was a resident as he has been disclosed as such by Mr. Elkazzi. Mr. Elkazzi now seems to want to change his position and submit his son-in-law was not in fact residing at the premises despite his representation that he was.

Having regard to the nature of the agreement I consider that a broad interpretation should be given to the words "reside" and "residing in the premises". Whether by Mr. Nakhle's use of the premises it can be said that he is residing in the premises must be considered in all of the circumstances before me. The fact that Mr. Nakhle has been staying at the premises up to three days per week in my view is sufficient to make a finding that he has been residing at the premises. The frequency and regularity of the occupation supports a finding that he has a home at the premises and is part of the household. The fact that he may spend time residing in other premises does not mean I must find he is not residing part of the time with the tenant at Glebe.

The next issue to determine is whether Mrs. Nakhle was living there. Again Mr. Elkazzi's evidence is that his daughter was there at least 3 days a weeks and 3 days in her own home. The evidence of the other witnesses, excluding Mr. Azzi and including Mrs. Nakhle was that she had frequently stayed at the premises up until 2000 and since then she had resided for the most part at the premises at Punchbowl coming almost everyday to the Glebe premises and staying on occasions. It does not appear to be any dispute about the disclosure of her income in relation to the subsidy. I find that it is more likely than not that Mrs. Nakhle was a resident of the premises having regard to the frequency with which she stayed at the premises.

The next matter to consider is the context in which these findings are made. It was submitted by Mr Enright on behalf of the Corporation that the Tribunal did not have jurisdiction to review the withdrawal of a subsidy or rebate. It was submitted by Mr. Eastman that the Tribunal has jurisdiction to consider whether the Corporation has acted in accordance with the tenancy agreement in cancelling the rental subsidy and debiting the tenant's account with the amount as rent arrears. Reference was made to clause 26 of the agreement which provides as follows:

The landlord and the tenant agree that the landlord may formulate a policy for the granting of rebates or waiver of rents. The parties agree that in accordance with such policy the Department may grant a rebate or waive rent at its discretion.

Clause 27 provides:

The tenant agrees to notify the landlord in writing of all income and any subsequent changes to the income of the tenant and of all other persons residing in the premises.

In *NSW Department of Housing v Christodolou [1996] NSWRT 6*, a decision of the predecessor of this Tribunal the Tribunal held that it does not have jurisdiction to consider "the dynamic of the rental rebate process". Mr. Eastman submitted the decision should not be followed as in effect the granting or the withdrawal of the subsidy is connected with the compliance by the tenant with clauses 26 and 27 of the residential tenancy agreement. In this matter the Corporation claims that the subsidy has been cancelled because of the incorrect provision of information in accordance with clause 27 of the agreement. The application for termination is not based on the failure to comply with clause 27 however clauses 26 and 27 are inextricably linked to compliance with the provision for the payment of rent. The Tribunal must inform itself of the compliance with clause 27 and the exercise of discretion having regard to the policy that the parties agree will be formulated in accordance with clause 26 in order for it to be satisfied of the condition in s64(2)(a)(ii) that the circumstances of the breach justify termination.

In my view under the jurisdiction conferred by the *Residential Tenancies Act 1987* the Tribunal cannot review the Corporation's decision as to the granting or cancellation of the subsidy under the residential tenancy agreement. Clause 26 refers to the possibility that the Department may formulate a policy for the granting of rebates or waiver of rents and the parties agree that in accordance with such policy the Department may grant or waive a rebate at its discretion. It does not provide a contractual obligation to do so. In the absence of any dispute as to the calculation of the rent which is payable as a result of the cancellation of the subsidy the Tribunal cannot make orders regarding the amount credited to the account.

Mr. Eastman submitted that the Corporation bears the burden of proving its case and therefore should produce the evidence it requires to establish a right to cancel the rebate. I am not satisfied that this is the case and I am not satisfied that the Tribunal has jurisdiction to determine whether the rebate was correctly cancelled or not. It must accept the cancellation on the face of it in the terms of deciding whether the tenant was more than 14 days in arrears as at the date of service of the termination notice, though I consider the Tribunal may deal with any dispute over the amount claimed to be due as rent arrears once the rebate is cancelled. This is what appears to have been contemplated in *Matthews v New South Wales Land and Housing*

Corporation and Ors, Supreme Court of NSW, O'Keefe J, 7 January 2004, unreported.

I agree with Mr. Eastman's suggestions as to the power of the Tribunal only to the extent that the Tribunal must consider under s64(2)(a)(ii) that the breach in the circumstances of the case is such as to justify termination of the agreement. It is in this context that the Tribunal may consider the evidence of the circumstances which led to the cancellation of the subsidy as evidence relevant to the breach, but not as to whether there has been a breach of the agreement.

It was submitted by Mr. Eastman on behalf of Mr. Elkazzi that the cancellation of the rental subsidy does not create rental arrears under the residential tenancy agreement but rather a cause of action to recover a sum of money under the s57 of the *Housing Act 2001*. The submission was made on the basis that the ledger relied upon by the Corporation records prior to the cancellation of the subsidy the debiting of the weekly rent then crediting of two amounts, the weekly payment made by the tenant to the Corporation of $175 and a weekly payment made by the Corporation of $275.45. The alterations to the ledger made on 10 March 2003 and again on 17 April 2003 with the debiting of the differences between the market rent and the subsidised rent creates a fiction. As the money has been paid to the tenant the Corporation cannot seek to recover that sum as rent arrears.

I will deal with the second point first. I do not consider that the entry on the ledger of an amount which is the difference between the subsidised rent and the market rent is in fact a payment to the tenant The creation of the debt is not a fiction, it is probably better to view the amount which has been debited to the tenant's ledger as a debt for rent arrears, the liability for which had been conditionally waived on apparent compliance with contractual and other requirements, and the waiver withdrawn on a determination made that conditions for the waiver have not been satisfied.

The next matter to consider is whether the amount can comprise rent arrears for the purposes of founding a termination notice based on breach of the obligation to pay rent. The submission that it does not relies on the terms of the *Housing Act 2001*. The parts of that Act relating to rental rebates provide as follows:

Part 7 Rental rebate
54 Application of Part

> *This Part applies to tenants:*
>
> *(a) who are renting public housing, or*
>
> *(b) who are renting housing leased in accordance with the* HomeFund Restructuring Act 1993 *or that is substituted for housing leased in accordance with that Act, or*
>
> *(c) who belong to such class or classes of tenant as may be prescribed by the regulations.*

55 Application for rental rebate

> *A tenant to whom this Part applies may make an application to the Corporation in*

a form approved by the Corporation for a weekly rebate of rental.

56 Grant of rental rebate

(1) The Corporation may, after making an investigation under section 58, grant to an applicant a weekly rebate of rental.

(2) The amount of rebate is to be determined by the Corporation in accordance with guidelines approved by the Minister.

57 Cancellation or variation of rental rebate

(1) The Corporation may, after conducting an investigation under section 58, vary or cancel any rental rebate granted under this Part.

(2) The Corporation is to determine the date (being a date occurring before, on or after the making of the determination) on which the variation or cancellation has effect or is taken to have effect.

(3) The Corporation is to give notice in writing to a tenant of any decision to vary or cancel any rental rebate being received by the tenant and is to include in the notice the date on which the variation or cancellation takes effect or is taken to have effect.

(4) If the Corporation reduces or cancels a tenant's rental rebate under this Part with effect from a preceding date, the Corporation may, by notice in writing to the tenant, require the tenant to pay to the Corporation:

(a) an amount equal to any rental rebate or part of a rental rebate received by the tenant on or after the date that the variation or cancellation took effect to which, because of the variation or cancellation, the tenant was not entitled, and

(b) interest (at the rate payable on unpaid judgments of the Supreme Court) on any outstanding amount under paragraph (a) from a date specified in the notice, being a date not earlier than the date on which the notice is issued to the tenant.

(5) Any amount (together with interest) referred to in subsection (4) that is unpaid may be recovered by the Corporation as a debt in any court of competent jurisdiction.

There was no submission made by either party that the provisions in operation under previous legislation were relevant to the matter before me.

The provisions and presumably their predecessors in earlier legislation form the basis for the policy which has been put into place by the Corporation. In my view there is nothing in the above provisions generally or s57(4) in particular which supports the submission that the amount equal to the whole or part of the rental rebate which may become due following cancellation of the rebate cannot also be considered as rent arrears. I note the submissions as to the interpretation which should be given to s57(4) having regard to the second reading speech however I do not accept the construction proposed.

It is probably appropriate to characterise the nature of the rebate policy in order to fully consider how it can be seen in the contexts of the parties' claims under the *Residential Tenancy Act 1987* and otherwise.

Having regard to the provisions of the *Housing Act 2001*, the subsidy application forms before me and the terms of the residential tenancy agreement between the parties the rebate or subsidy provided by the Corporation can be seen as a conditional waiver by the Corporation of the tenant's obligations to pay market rent under the residential tenancy agreement. The mechanisms by which the subsidy procedures operate are for the most part outside the scope of the residential tenancy agreement, however there are clauses in the tenancy agreement which deal with at least part of the tenant's obligations in respect of the rebate policy. The tenancy agreement imposes an obligation on the tenant to pay the rent agreed to under the agreement. The exemption provided under s132 in relation to notices of rent increase is not relevant to that obligation. To that extent the view can be taken that when a rebate is given it is given as to part of the rent and is therefore a waiver of part of the obligation to pay rent under the agreement. The waiver is conditional on the tenant complying with his obligations as to disclosure of the persons residing in the premises and their income which, whatever else they might also be, are contractual obligations under the residential tenancy agreement. There may be other arrangements between the parties to support the rebate policy however in my view there is sufficient connection to the tenancy agreement for the amount of rebate which is cancelled to form rent arrears under the tenancy agreement.

It was further submitted on behalf of Mr. Elkazzi that it would be unfair or a denial of natural justice in circumstances such as this to allow the Corporation to enforce the claim for rent arrears in the way it has and that the Corporation should afford the tenant natural justice before withdrawing the rebate. The submission was not specific as to what the Corporation has failed to do and I assume from the submission the claim was that natural justice had not been afforded, though what more should have been done by the Corporation was not spelt out. I note the hearing before the Tribunal was delayed while Mr. Elkazzi pursued the internal review rights and the appeal to the Housing Appeals Committee. In any event the Tribunal has no general power to review the conduct of the Corporation it can only consider its conduct in the terms of compliance with the residential tenancy agreement and appropriate parts of the Act.

It was submitted on behalf of Mr. Elkazzi in response to the application for termination generally that the Corporation ought to be estopped from applying the debt to the rental ledger. The claim was made based on estoppel by conduct. The submission quoted a description of what forms estoppel by conduct as follows:-

'This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed state of fact the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about enter. Where the parties have acted in their transaction, upon the agreed assumption that a given statement of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of fact so assumed.'

The submission noted that the tenant had in the past put in applications for rental rebates which have been approved by the Corporation. The tenant and Corporation have both conducted

themselves in a manner that indicates that there was an agreed set of facts, namely that the tenant is entitled to a rental subsidy. The Corporation under the contract is able to rescind the previous representation and has statutory remedy to recoup the money under the provisions of the *Housing Act 2001*. However the Corporation should be estopped from seeking to recoup that money as rent arrears and from seeking to terminate the tenancy based on the rental arrears.

Reference was made to the decision in *Central London Property Trust v High Trees Limited* [1947] KB130. In that matter a landlord made a representation to the tenant that the rent would be reduced by half during the course of the war. When the landlord went into receivership the receiver attempted to the demand the balance. It was held that the landlord was estopped from enforcing the additional amount even though there had been no consideration for the promise by the landlord to relinquish a right under the agreement. Reference was made to Australian decisions which have recognised and advance that principle.

Reference was made to the decision in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and the principles required to establish an estoppel:

'1. The plaintiff assumed or expected that a particular legal relationship existed between the plaintiff and the defendant or that a particular legal relationship will exist between them, and the latter case, that the defendant is not free to withdraw from the expected legal relationships;

2. The defendant has induced the plaintiff to adopt that assumption or expectation;

3. The plaintiff acts or abstains from acting in reliance on the assumption or expectation;

4. The defendant knew or intended him to do so;

5. The plaintiff action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and

6. The defendant has failed to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.

The submission goes on to set out the manner in which it is claimed that these principles apply in the facts of this case. In my view those six matters are not established. There maybe an assumption by the tenant in the circumstances of Mr. Elkazzi that if they comply with the provisions of the Corporation's rental rebate policy that they will be granted the benefit of that policy. The publication of the policy and the steps taken by the Corporation to implement the policy may amount to an inducement for the tenant to adopt that assumption or expectation. However, the third step requires that the tenant act or abstain from acting in reliance upon that assumption or expectation. I am not satisfied that any reliance can be established in this regard. The tenant has not met the requirements of the Corporation's rebate policy. He has disclosed from the beginning of the tenancy that his daughter and son-in-law were living with him at the premises and he has failed to disclose correctly his son-in-law's income from driving a taxi. Significant income was earned by Mr. Nakhle during 1990, 1991 and 1992 when all the evidence shows he was residing at the premises and since then, in the period for which I have

found he was residing at the premises. It cannot be said in such a context that that the Corporation can be estopped from cancelling the subsidy or treating the amounts which then become due as rent arrears.

The documents provided in relation to the rental subsidy set out quite clearly the seriousness of the disclosure and the consequences which flow from inaccurate disclosure. No case has been put forward that Mr. Elkazzi did not understand or appreciate the significance of what he was doing. Indeed he appears to have been of the view that even though they were staying at the premises on a regular basis his son-in-law and daughter were not residing in the premises but he was concerned that if there were less persons living in the premises than when the household was originally established that tenancy maybe terminated. Even on his evidence tenant was intending to deceive the Corporation.

THE CONSUMER CLAIM

Mr. Elkazzi lodged a cross application against the Corporation under the *Consumer Claims Act 1998*. An order was sought that the tenant not have to pay the Corporation the sum of approximately $8,250.00 arising out of the incorrect cancellation of the subsidy from May 2003 to the date of the determination.

The application sets out the submissions on which the tenant claims to have a consumer claim. In my view a tenant can bring a claim against a landlord in circumstances such as these as the definitions of consumer claim, consumer, supplier, services, trade or commerce and business under the *Consumer Claims Act 1998* are broad enough to cover most landlord and tenant relationships. I note the Victorian Civil and Administrative Tribunal in *Director of Housing v Young* [2002] VC 80227 determined that the Victorian Director of Housing, having regard to the repetitious and continuous nature of its activities in letting premises to tenants was carrying on business of providing services within the definition of trade or commerce in the Victorian *Fair Trading Act 1999*.

The claims which constitutes the consumer claim are for orders either that the Corporation be ordered to supply a service being the continued provision of accommodation in a subsidised manner to which he is entitled and secondly a claim for the relief from payment of moneys allegedly owed to the Corporation for outstanding rent due to a failure to correctly disclose details for calculation of the rental subsidy.

It was acknowledged there is an argument as to whether the discretion of the respondent to grant a rental subsidy arises directly under the residential tenancy agreement entered into by the parties pursuant to clauses 26 and 27 of the agreement. However it was submitted that a consumer claim need not arise directly out of a contract it only needs to arise out of the supply of goods and services by a supplier to a consumer. As noted, that phrase was considered by James J in *Probiz Software Pty Ltd & Anor v Magee & Ors* [1998] NSWSC 36, to be at least as wide as the interpretation given by Yeldham J in *Fairey Australasia Pty Ltd v Joyce* [1981] 2 NSWLR 314, to the words a claim 'arising out of a contract for the supply of goods or the provision of services.' It was stated in *Fairey Australasia* that such a claim may exist if it has a reasonable relationship to and exists in consequence of a contract between the consumer and another person engaged in the business activity.

It was submitted that the policy for the granting of the rental rebate is a matter which arises out of the supply of goods or services, and is referred to expressly in the agreement between the parties. The tenants seeks to be relieved of payment of rent beyond that which maybe calculated by reference to the proper application of the subsidy operating from 2003 when the subsidy was cancelled. As estimate of some $8,000.00 was given as the amount of the rental rebate which has not been provided.

In one set of submissions lodged on behalf of the tenant under the heading *"Outline of submission 4 – relief from payment of an amount of money/provision of a service: the consumer claim"* the submission notes *"The consideration of the consumer claim is only to be relevant if the Tribunal makes a finding that the landlord ought to be estopped from applying a backdated amount to the rental ledger when it has not previously been demanded for the period up until April 2003. The tenant would concede that he has continued in breach since the representation to subsidise the rent has been withdrawn, but this matter can be dealt with under the Consumer Claims Act 1998."* The submission does not clearly identify any particular cause of action which the tenant seeks to pursue as the consumer claim beyond the claim in estoppel which is set out as part of defence to the claim for termination and/or as part of the relevant matters to consider as to whether termination should be ordered if a breached has been established. However I have found that the requirements for estoppel had not been met on the facts before me in the context of the Corporation's claim and no different findings can be reached in the context of the tenant's consumer claim. The claim has not been made out and must therefore be dismissed If the tenant is by his consumer claim seeking a review of the Corporation's exercise of its discretion under the rebate policy then I am not satisfied that the Tribunal had jurisdiction to consider such a claim. I agree with the Corporation's submission there is no express conferral on the Tribunal of powers to review Corporation's exercise of its discretion under the rental rebate policy and further although some of the Corporation's activities may come within the definition of supply of services the exercise of its discretion in the provision of the rental rebate does not. In this regard I note the decision of *State of NSW v RT & YE Falls Investments Pty Ltd (2003) 57 NSWLR 1.*

TERMINATION OF THE TENANCY

I am satisfied on the evidence before me that the termination notice was validly given as the tenant was more than 14 days in arrears of rent as at the date of service of the termination notice. It is relevant in this regard to note it is not just the increase of rent arrears as result of the back dating of the cancellation of the rebate which are relevant but also that the tenant has continued to pay $175.00 per week being the rebated rent instead of $450.00 per week which is the market rent. The subsidy having been cancelled, the market rent applies and the tenant is obliged to pay the market rent. The rent arrears are significant and I consider the breach in the circumstances of the case is such as to justify termination of the agreement under s64(2)(a)(ii) of the *Residential Tenancies Act 1987*.

In considering whether to terminate the tenancy I must have regard to the relevant circumstances of the case under s64(2)(c) of the Act which in a matter such as this involves a consideration of the personal circumstances of Mr. Elkazzi and his family. Mr. Elkazzi has given evidence of his medical conditions however there is no evidence to show that he needs to remain close to the area for treatment. The length of occupation of the premises is significant, some 14 years. On his stated income Mr. Elkazzi would not be in a position to pay

market rent for similar premises in the area.

It is also relevant to consider the position of the other persons residing in the premises, Mrs. Elkazzi and Mrs and Mr. Nakhle and their children. I note the tenant's grandchildren all attend local schools which points to a strong need to stay in the area however no evidence has been given of any particular difficulty in obtaining an alternative accommodation for the extended family if they chose to remain in the area. Mrs. and Mr. Nakhle also have the option of living in the Punchbowl premises with their children.

In all of the circumstances I consider that the tenancy agreement should be terminated and possession be given to the landlord.

It was not clear from the evidence before me whether the Corporation was seeking a money order for rent arrear. The claim was referred to in the application but was not pressed at the hearing. The amount claimed exceeds the Tribunal's jurisdiction of $10,000. If a money order is in fact being sought leave is given to the Corporation to relist the matter by notifying the Tribunal in writing on or before 30 November 2004.

Orders made accordingly.

M. Balding
Senior Member
Consumer Trader & Tenancy Tribunal

31 August 2004
