ACT CIVIL & ADMINISTRATIVE TRIBUNAL

NISAR & ANOR v PROPERTY PARTNERS CANBERRA PTY LTD (Civil Dispute & Residential Tenancies) [2024] ACAT 44

XD 1114/2023; RT 167/2024

Catchwords: **CIVIL DISPUTE –** whether the lessor's agent was trespassing during the rental inspection – whether proper notice given by the respondent – was consent obtained to enter – applicants sustained non-economic harm – damages awarded

RESIDENTIAL TENANCIES – rental bond dispute – whether the phrase "fair wear and tear" excuses the tenants from liability to repair some or all of the damage noted by the lessor in its final inspection – tenants damaged the property not to the extent the lessor's claims

Legislation cited:
ACT Civil and Administrative Tribunal Act 2008 ss 8, 16, 29
Civil Law (Wrongs) Act 2002 s 141
Discrimination Act 1991 ss 109, 110
Residential Tenancies Act 1997 ss 38, Sch 1, standard terms 52, 53, 79

Cases cited:
Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd [2001] HCA 63
Baltic Shipping Co v Dillon [1993] HCA 4
Bathurst City Council v Saban (1985) 2 NSWLR 704
Chen v Ghildyal & Anor; Ghildyal & Anor v Chen [2019] ACAT 25
Cope v Sharpe (No 2) [1912] 1 KB 496
Halliday v Nevill [1984] HCA 80
Huskisson v Roper [2011] ACAT 41
JA Pye (Oxford) Ltd v Graham [2002] UKHL 30
JSM Management Pty Ltd v QBE Insurance (Australia) Ltd [2011] VSC 339
Kibet v Empire Club (Human Rights) [2018] VCAT 1868
Kuru v New South Wales [2008] HCA 26
Munro v Southern Dairies Ltd [1955] VLR 332
Nickells v City of Melbourne [1937] HCA 45
O'Brien v Dunsdon (1965) 39 ALJR 78
Plenty v Dillon [1991] HCA 5
Proudman v Allen [1954] SASR 336

Public Transport Commission (NSW) v Perry (1977) 137 CLR 107
Residential Tenancies Tribunal v Offe (unreported, NSWSC, 1 July 1997, Abadee J)
Shahid v Australia College of Dermatologists [2008] FCAFC 72
Strahan v Residential Tenancies Tribunal (unreported, NSWSC, 30008 of 1998, Dowd J)
Tan v Xenos (No 3) [2008] VCAT 584
Taylor v Webb [1937] 2 KB 283
Victoria Park Racing and Recreation Grounds Co Ltd v Taylor [1937] HCA 45

List of Texts/Papers cited:

Allan Anforth, Peter Christensen, and Christopher Adkins, *Residential Tenancies Law and Practice New South Wales* (Federation Press, 7th ed, 2017)
Struan Scott, 'Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases' (2010) 12(2) *Otago Law Review* 391, 395

Tribunal:	Member M Hanna
Date of Orders:	21 June 2024
Date of Reasons for Decision:	21 June 2024
Date of Publication:	2 July 2024

Corrected under Section 63 of the *ACT Civil and Administrative Tribunal Act 2008* on 27 June 2024

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) XD 1114/2023

BETWEEN:

RAJA USAMA NISAR
First Applicant

SAHAR ALASMARI
Second Applicant

AND:

PROPERTY PARTNERS CANBERRA PTY LTD
ACN 605 325 442
Respondent

TRIBUNAL: Member M Hanna
DATE: 21 June 2024

CORRECTED ORDER

The Tribunal orders that:

1. The respondent is to pay the applicants the sum of $2,135 within 14 days of this judgment, comprised of:

   (a) the filing fee of $635; and

   (b) damages of $1,500.

……..
Member M Hanna

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) RT 167/2024

BETWEEN:

RAJA USAMA NISAR
First Applicant/Tenant

SAHAR ALASMARI
Second Applicant/Tenant

AND:

BRETT RUSSELL
Respondent/Lessor

TRIBUNAL: Member M Hanna
DATE: 21 June 2024

ORDER

The Tribunal being satisfied that:

1. The bond for the tenancy in question was $2,000.
2. The named respondent is the director of Property Partners Canberra Pty Ltd ACN 605 325 442 (the **lessor**) the latter being the correct respondent in this matter.
3. Property Partners Canberra Pty Ltd (the **lessor**) previously applied for and received the full bond of $2,000 in relation to damages at the property by the tenants.
4. The tenants dispute the lessor's claim for damages.
5. Upon the tribunal reviewing the damage claims in detail, the lessor's claims for $300 cleaning and $545 for damage to the property are confirmed but other damages claims are not established, such that the remaining bond of $1,155 should revert to the tenants.

The Tribunal orders that:

1. In accordance with section 29 of the *ACT Civil and Administrative Tribunal Act 2008*, the named respondent is replaced by Property Partners Canberra Pty Ltd ACN 605 325 442.

2. The respondent is to pay the applicants the sum of $1,155 being the balance of the bond within 14 days of this order.

……..
Member M Hanna

REASONS FOR DECISION

Introduction

1. Directions issued on 18 March 2024 stated that the two matters are heard together as both are related to the same tenancy. The first matter, RT 167/2024, requested return of the bond in full, to the applicant/tenants. The second matter, XD 1114/2023, is a civil dispute application in relation to a routine inspection at the premises.

2. The respondent/lessor in the bond application is incorrectly named as the principal of the respondent's company, rather than the company itself. The company itself is correctly named as the respondent in the civil dispute application. In line with section 29 of the *ACT Civil and Administrative Tribunal Act 2008* (the **ACAT Act**), the respondent in the civil dispute application has been corrected to be the same as the respondent in the bond application.

3. The applicants were self-represented. Their civil dispute application claimed trespass as the cause of action but, in the course of the hearing, the applicants asserted the claim was actually for damages for "breach of privacy and religious discrimination" as well as breaches of clauses 52 and 53 in schedule 1 of the *Residential Tenancies Act 1997* (**RT Act**), Standard Residential Tenancy Terms (**Standard Terms**). The respondent was given the opportunity to respond to those alleged breaches as well as trespass.

The dispute

4. The foundation of this matter is a residential tenancy and a scheduled six-month routine inspection.

5. The applicants and the respondent entered into a residential tenancy agreement in relation to premises in Kingston, ACT on 2 February 2023 for a fixed period of twelve months, starting from 3 March 2023 to 2 March 2024. The tenants had lived in the property for five years prior in accordance with earlier leases.

6. A six-monthly routine inspection was scheduled for 31 August 2023 (the **August inspection**). It commenced at approximately 12:21pm and concluded at

approximately 12:34pm. Later that day, the first applicant contacted the agent forcefully complaining about the inspection.

7. The applicants left the premises after notifying the agent on 9 September 2023 that they would not stay without an apology from the respondent for the August inspection. The fixed term lease ended on 2 March 2024. When they left, a break-lease fee was paid to the respondent.

8. The applicants have requested the bond of $2,000 be paid in full to them.

Background – Established and disputed facts

9. On 14 August 2023, the respondent emailed and texted the first applicant regarding a change of date for the routine six-month inspection to 31 August 2023 "between 8.30am and 3pm". The email requested a response if the tenant had issues with the new inspection arrangement.

10. The first applicant (the **husband**) received the emails regarding the inspection but did not answer them. He admitted that in the six years he had been living there, he "had never responded to notices" regarding inspections, and these inspections had proceeded as planned. The second applicant's (the **wife**) written statement confirmed that she and her husband were aware that an inspection would occur sometime between 8:30am and 3:00pm on 31 August 2023, but no further delineation of a time had been set.

11. The respondent's agent (the **agent**) arrived at the apartment building around 12:23pm on 31 August 2023. Video footage subpoenaed by the applicants shows that the agent entered the building without ringing the doorbell in the lobby of the apartment block.

12. The agent arrived at the applicants' apartment front door around 12:25pm. In the agent's written statement, he claimed he knocked several times on the front door, then on receiving no response, entered the apartment with a master key. Upon entering, he shouted out to check if anyone was home, to which he received no response. After walking through the kitchen and bathroom, he entered the main bedroom and came upon the wife in bed.

13. The applicants dispute that the agent knocked before entering or announced himself after entering.

14. The wife was present at the time of the agent's arrival in the bedroom, though sleeping, along with her infant son. Not long after the agent entered the premises, she "heard a person in the apartment" and hid under the bedsheets.

15. When the agent walked into the bedroom and saw someone in the bed, both parties testified they were "shocked". The agent identified himself and informed the wife why he was there. He says he requested approval to continue the inspection. The wife agrees he identified himself but said "I was confused." She denies that he asked her whether he could continue the inspection or not, but concedes she may have replied, "Oh, ok" to the agent after he stated who he was and why he was there.

16. The agent gave oral and written testimony that, once he received approval to continue the inspection, he left the bedroom and continued the inspection quickly after which he thanked her and left the premises. His witness statement omitted any mention that he had returned to the bedroom in the inspection.

17. At 12:31pm, the agent re-entered the bedroom for a couple of minutes. This is known because the wife used her phone to video the agent walking around the room from under the sheet, and this video was raised at the hearing. The video was viewed by the respondent before being allowed into evidence. The wife testifies that she "began recording from under the bed covers, unable to emerge promptly due to not wearing my Islamic scarf to meet strangers" and "felt trapped and concerned for my safety".

18. At around 12:33pm, the agent left the room and, within a minute, left the apartment.

19. After the inspection was complete, the wife phoned the husband and told him what had occurred. At 3:31pm on the same day, the husband made an abusive telephone call to the respondent which included swearing, shouting, and threats of violence, citing upsets regarding the conduct of the inspection. He later emailed

the respondent demanding an apology for the way the inspection had been carried out.

20. On 9 September 2023, the applicants notified the respondent that they were going to break the fixed term tenancy early because the respondent had refused to apologise for the agent's intrusion. They eventually left in December 2023. The fixed term lease expired on 2 March 2024. As of 29 December 2023, the applicants owed the respondent $1,752.49 in unpaid rent.[1]

21. After they left, the respondent completed an extensive exit conditions report with hundreds of photographs and claimed substantial damage. They then requested and received the bond of $2,000. The applicants disputed that damage shows more than wear and tear.

22. The orders the applicants sought in their applications were:

    (a) Damages "for financial losses incurred, including relocation expenses and additional rental costs."

    (b) Orders "to ensure compliance with tenancy laws and regulations in future dealings with tenants."

    (c) "$25,000 compensation for the violation of privacy and discrimination against our religion."

    (d) The return of the bond of $2,000.

23. In oral submissions, the applicants claimed that the nature of the agent's entry and continued presence on the property constituted "breach of privacy"; was "a violation of our right to quiet enjoyment", caused "trauma and humiliation"; and that the actions of the agent "discriminated against their religious faith". It was evident the applicants felt that the respondent had committed negligence, discrimination, and potentially nuisance. The applicants did not, either in their filed application, nor when asked by the Tribunal at the hearing, identify a statutory or case law basis for their claims, other than the Standard Terms of the RT Act.

[1] Respondent's submissions dated 28 March 2024, Annexure F

24. There is no recognised tort for breach of privacy in Australia, so the Tribunal approached the civil dispute application as a trespass matter.[2]

25. The applicants claim that the respondent discriminated against them and their religion. The Tribunal reviewed whether there was a potential action under the *Discrimination Act 1991*. In accordance with sections 109 and 110, a matter may be referred to the ACT Civil and Administrative Tribunal (the **ACAT**) by the Human Rights Commission, but this is not the case in this matter. Therefore, the ACAT has no power to review this application in relation to the *Discrimination Act 1991*.

26. The applicants' written application claimed the respondent had trespassed on their property. Trespass can be summarised as intentionally or negligently entering or remaining on land, or directly causing any physical matter to come into contact with land, the land being in the possession of another person. It is a defence to trespass if the trespass was because of negligence and the trespasser "made a reasonable offer to make amends … before the action was brought."[3]

27. The respondent sought that the civil and bond applications be dismissed in their entirety.

Issues

28. The following issues arose:

    (a) Did the respondent trespass in the course of the August inspection?

    (b) If consent were gained to continue the inspection, was it under duress?

    (c) In relation to the application for return of the bond, was the damage outlined in the exit report "fair wear and tear" as claimed by the applicants?

Did the respondent trespass in during the August inspection?

29. The respondent has consistently denied any trespass occurred. They say that their agent only entered the property with authority after giving notice of a routine inspection in line with the Standard Terms.

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[2] See *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd* [2001] HCA 63

[3] *Civil Law (Wrongs) Act 2002* section 141(b) and (c)

30. The elements of the cause of action of trespass to land are:

    (a) the plaintiff is in exclusive possession of land;[4]

    (b) the defendant enters onto the land or otherwise directly interferes with the plaintiff's exclusive possession of the land;[5] and

    (c) the entry onto the land is a voluntary act or the direct interference with the plaintiff's exclusive possession of the land is an intentional act.[6]

31. The defences to an action for trespass to land are:

    (a) The entry or interference was reasonably necessary to protect a person or property from a threat of real and imminent harm (the necessity defence).[7]

    (b) The defendant has consent of the plaintiff (a licence) to enter onto the land or otherwise act in the manner that interferes with the plaintiff's exclusive possession of the land (the licence defence).[8]

    (c) The defendant has lawful authority under statute or at common law to enter onto the land or otherwise act in the manner that interferes with the plaintiff's exclusive possession of the land (the lawful authority defence).[9]

32. The respondent claims consent existed and/or that the agent had lawful authority under statute to enter to conduct the inspection. There is no question that authority exists under the RT Act to conduct a routine inspection every six months as long as proper notice is given.

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[4] See *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 per Lord Browne-Wilkinson; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [43] per Gleeson CJ

[5] See *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45 per Latham CJ; *Bathurst City Council v Saban* (1985) 2 NSWLR 704 at 706 per Young J

[6] See *Nickells v City of Melbourne* [1938] HCA 14 per Dixon CJ; *Public Transport Commission (NSW) v Perry* [1997] HCA 32 per Gibbs J

[7] See *Cope v Sharpe* (No 2) [1912] 1 KB 496 at 504 per Buckley LJ; *Proudman v Allen* [1954] SASR 336 at 338-340 per Hannan AJ; *Kuru v New South Wales* [2008] HCA 26 at [40] per Gleeson CJ, Gummow, Kirby and Hayne JJ

[8] See *Kuru v New South Wales* [2008] HCA 26 at [45] per Gleeson CJ, Gummow, Kirby and Hayne JJ referring to *Halliday v Nevill* [1984] HCA 80

[9] See *Kuru v New South Wales* [2008] HCA 26 at [43] per Gleeson CJ, Gummow, Kirby and Hayne JJ

33. The Tribunal examined a number of issues:

(a) Was proper notice given to gain authority?

(b) If there was a proper notice for the August inspection, did the agent act in a manner outside of the authority he had?

(c) Did the authority that the agent claims to have had, expire upon discovering the wife sleeping in the apartment, distressed by the presence of the agent?

(d) If the agent's authority did expire, did the agent restore his authority to remain on the premises upon stating who he was and the reason he was there?

(e) Was explicit consent needed for him to remain on the property?

(f) If explicit consent was needed, did the agent get such consent? Was it gained under duress?

Was proper notice given by the respondent?

34. On 14 August 2023, the respondent emailed notice to the applicants for a routine six monthly inspection. The notice identified an amended date for the inspection, 31 August 2023, and a time frame, "8.30am until 3pm". The notice asked if the applicant wanted to be present and whether they had "a preferred time", and, if so, "please let us know so that we can take that into account.". The email stated, "Should you not be available on this day, we will use the master keys to gain access to the property." The husband acknowledged he had received this email.

35. The applicants acknowledged that the procedure had been in place for the six years that they had lived there. The husband admitted that he "never replied to the emails or texts."

36. Clause 79 of the Standard Terms states:

(1) The lessor must give the tenant 1 week written notice of an inspection.

(2) The inspection must take place at a time agreed between the parties with reasonable regard to the work and other commitments both of the tenant and of the lessor (or their agents).

(3) If the parties are unable to agree on an appropriate time, the lessor or the tenant may apply to the tribunal for an order permitting access at a specified time.

37. Two-week notice was given, so the requirements for section 79(1) were met.

38. Whilst a window of time may well constitute a "time agreed", does a window of six and a half hours fall within that definition per section 79(2)? In the ordinary meaning of the words, six and a half hours is too broad to be an "agreed time".

39. The applicants however did not contend that they had not been notified, nor challenge the propriety of the notice given to them, nor that the time frame was improper or the day unsuitable. The respondent argued that the same notice had been used for six years and consent for the inspection can be inferred and therefore, that in these circumstances, the window constitutes a "time agreed".

40. Had a specific time been agreed upon by the parties, it is doubtful the wife would have been sleeping at the time agreed; the situation that led to this application might have been avoided.

41. The evidence showed that the opportunity to make a more specific time was offered by the respondent's email and the applicants failed to take this opportunity. On the facts presented, and on the balance of probabilities, the Tribunal finds that the broad window of time in these circumstances did constitute a "time agreed" and that the notice was proper.

Entry to the premises

42. Did the agent act in a manner to rescind the authority to enter during the August inspection?

43. Video footage subpoenaed by the applicants indicates that the agent arrived for the inspection outside the front door of their apartment building block, looked at various details on his mobile phone, then when the front door opened, took the opportunity to enter the premises and failed to ring the doorbell to the applicants' apartment.

44. The respondent's legal representative orally submitted that it was standard for their agents to first announce their presence by ringing the doorbell of a premise before entering for an inspection. In relation to why this did not occur on this occasion, the respondent's solicitor stated that "this may not have occurred on 31 August because the agent may have been distracted by a very busy day." On

the video footage, the agent's demeanour appeared relaxed and unhurried and that there was no evidence otherwise led to support the submission he was in any rush.

45. After taking the elevator to the applicant's door, the agent's written statement testified that:

> [I] *knocked three times, as I have always done for every routine inspection I attend. ...* [after entering the property] *I called out in a loud voice: "Is anyone at home?" There was no answer. So, I proceeded with the routine inspection.*[10]

46. It also outlines a detailed conversation he asserts he had with the wife on discovering her and her son in bed:

> *I opened the door to go into the second bedroom ... but found that a person was in bed, under the sheets, with a child.*
>
> *I was shocked to discover someone was at home, so I said: "I am from Canberra Property Partners, here to do a routine inspection, I am sorry – I knocked and yelled out, but I thought that no one was at home` . Should I leave and come back another day?"*
>
> *The person replied by saying: "No that's fine. Please continue with what you're doing."*[11]

47. The applicants deny this. The wife orally testified that she heard no knocks at the door, that "I am a light sleeper"; that "the apartment is small, and I would have heard any knock". She continued, "the property agent entered utilising his personal master key to enter the apartment, where my two-year-old son and I were still peacefully sleeping in the enclosed bedroom." When he entered the bedroom, "I was shocked" to see him there.

48. The wife's written statement omits any reference to a request to continue the inspection:

> *Only after realizing that we were present did he identify himself as the property agent and explain the purpose of his visit for inspection. Subsequently he closed the bedroom door ... and proceeded to inspect the rest of the residence. Meanwhile I found myself in a vulnerable position under the bed covers, unable to emerge promptly due to not wearing my Islamic scarf to meet strangers ...*[12]

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[10] Agent's written statement dated 28 March 2024 at [3]

[11] Agent's written statement dated 28 March 2024 at [7]-[9]

[12] Second applicant's written statement dated 14 March 2024 at [3]

49. In her oral testimony, the wife admitted that, whilst he may have identified himself and may have said to her, "I am here for the inspection", he "never asked for permission to continue". She admitted she may have said, "Oh, OK" but only in answer to the agent stating who he was and the purpose of his entry. In her submission, at no time did the agent seek approval to continue.

50. It is undisputed that after the entry into the bedroom, the agent left the bedroom and continued the inspection. Some minutes later, he re-appeared in the bedroom.

51. The wife's written statement clearly states what she experienced:

> *3 ...Meanwhile I found myself in a vulnerable position under the bed covers unable to emerge ...*
>
> *4 Feeling trapped and concerned for my safety, I began recording from under the bed covers when the agent returned to the bedroom for the second time to take photos...*[13]

52. Orally, the wife testified that she "did not know why he was back in the room" and was "terrified" that "he's a big man" and that "I was concerned for my safety".

53. The video evidence shows two legs and shoes of a man walking around the room for a period of about three minutes, filmed from under a sheet.

54. To deal with the conflicting evidence, the agent was called to the witness stand. The Tribunal posed various questions to the agent. In particular, the agent was asked wh would he continue an inspection in the circumstances he found himself with one person, as it turned out, a woman, present and, in bed?

55. The agent was adamant. While he was shocked to find someone on the premises after he had knocked and announced himself, he had "seen much stranger things than a person in bed in my inspections"; and he "had a job to do" and that he "asked for and received approval to continue".

56. The Tribunal asked the agent to recall, to the best of his memory, the sequence of his entry to the apartment. He described knocking on the door, entering the door

[13] Second applicant's written statement dated 14 March 2024 at [3]-[4]

with the master key, moving to the kitchen, then the bathroom, before entering the bedroom and seeing the person in bed.

57. On being asked to repeat the sequence of events, the agent used words to the same effect. In both narratives, he omitted any reference to verbally announcing his presence in the apartment.

58. Shown in his witness statement dated 28 March 2024, and in particular paragraph 4, where he asserted "I called out in a loud voice: "Is anyone home", the agent testified that "I do not remember the day well", "I do lots of inspections", and that it was "possible that I might not have called out on this one occasion". When asked if he remembered calling out on this occasion, he said he was "not entirely sure" but insisted "it is my usual practice".

59. The agent's oral testimony raises the Tribunal's concerns for the credibility of the agent's written statement. It was observed:

    (a) In his statement and on the witness stand, the agent claimed that ringing the bell is his *standard practice* – but he had no explanation why it did not do so on that day.

    (b) The absence in his oral testimony of any verbal announcement of his presence in the apartment on entering contrasts with assertions detailing a "loud announcement" of his presence in his written statement.

    (c) He admitted that his recall of the day was uncertain, yet in his written statement, he details a very specific conversation he asserts to have had with the wife in which she authorised him to continue the inspection in contrast to her assertion that no such conversation took place.

60. In contrast, the wife's evidence seemed consistent and believable. She testified that she was "confused", "fearful", and "concerned for her safety".

61. What did the response to the agent of "Oh, OK" mean? Was this an acknowledgement to his notice of his identity and purpose for visit? Or, as the agent testified, was it consent for the visit to continue? The wife was adamant in her evidence that she did not give approval for the inspection to continue and that, if she muttered these words, it was just to acknowledge what he had said.

62. Whilst it is uncertain whether or not the agent asked to continue, he asserts he did. On the balance of probabilities, it is more likely that the wife did not give consent to continue. She may well have said "Oh, OK" but was it more than a stumbling response to his presence as she claimed? It may be that the agent took "Oh, OK" as an acceptance of a request to continue but the wife states it did not mean that.

63. The likelihood that the wife said, as claimed by the agent, "No, it's fine. Please continue with what you're doing" must be very low considering the evidence points to the fact that she was confused, scared, and hiding under a sheet point to this conclusion. Her reported consent, as testified by the agent, sounds matter of fact and relaxed. It is unlikely a person hiding under sheets would say words of that nature.

64. The Tribunal concludes, on the balance of probabilities, that it is unlikely the wife did grant any direct consent for the inspection to continue. There must even be some doubt if she was even directly asked.

65. The nature of the entry – where the agent's own claimed standard practices of ringing the bell, knocking, and announcing one's presence on entering the premises seem to have been violated – does not appear to directly rescind his authority to enter the premises or constitute trespass.

66. However, upon starting his inspection and discovering the wife and her child, in a vulnerable state, did his authority to continue a routine inspection *continue*? If it did, why then did the agent feel the need to request, as he claims he did, authority to continue?

67. In the High Court case of *Halliday v Nevill*,[14] Brennan J said:

> *The principle applies alike to officers of government and to private persons. A police officer who enters* ***or remains on private property*** *without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless his entering or remaining on the premises is authorized or excused by law.* (emphasis added)

[14] [1984] HCA 80 at [4]

68. In *Plenty v Dillon*,[15] High Court Justices Gaudron and McHugh said:

> *If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official*.

69. Their Honours then quoted Lord Denning, adopting a quotation from the Earl of Chatham:

> *"'The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.' So be it – unless he has justification by law."*[16]

Was consent obtained to continue the inspection? If so, was duress a factor?

70. Consequent to the above facts and case law, did the agent *continue to* have authority to remain on the premises and inspect them? The respondent submitted that that must be the case because the wife never said words to the effect of "Leave the premises!" or "Get out!" Indeed, it was borne out in the evidence that the wife did not state anything specific telling the agent to leave. Did the lack of a clear order from the tenant to the agent to leave the premises equate to continuing approval to remain on the property?

71. It would appear the agent himself had doubts as to whether his authority to remain continued. He stresses in his written statement that he asked, "Should I leave and come back another day?" to which he asserts the wife replied, "No, it's fine. Please continue with what you're doing."

72. If this conversation did occur, it raises further questions. Would consent granted in such circumstances constitute *lawful consent*?

73. Assuming this conversation did occur, the parties to it would have been:

    (a) a large man, a stranger to the premises, who had just walked into the bedroom; and

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[15] [1991] HCA 5 at [24]

[16] *Southam v Smout* [1964] 1 QB 308, page 320

(b) a woman who had been sleeping with her infant child but discovered a man walking around her apartment.

74. Could a conversation occur in those circumstances in the terms that the agent framed, in which consent could be valid?

> *Duress occurs when one person ... brings improper pressure to bear on another ... to make them agree to do something* [due to unconscionable conduct.] *... Case law reveals ... that the application of the doctrine of duress in a particular case depends on the evaluation of five distinct, yet intertwined, enquiries. These are:*
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> 1. *whether the pressure can be described as "improper" in those circumstances;*
> 2. *whether there is a prior relationship between the plaintiff and the defendant;*
> 3. *whether the defendant's motivation in exerting the pressure can be described as 'improper' in the circumstances;*
> 4. *whether the outcome is inappropriate, either because the contract should not have been procured by these means or is intrinsically unfair; and*
> 5. *whether the plaintiff felt sufficiently pressured to enter into a contract which he or she might not otherwise have entered into.*[17]
>
> *The requirements of "improper pressure" and "absence of practical choice" are, in turn, a product of two considerations which the courts view as being particularly important in shaping the doctrine of duress.*[18]

75. Being asked, if she was, to allow him to continue an inspection when she is cowering under sheets has the hallmarks of improper pressure. If the conversation never occurred and he continued, what practical choice did a fearful woman in her circumstances have to tell him to leave?

76. Duress is often considered in matters involving financial contracts, mortgages, and the like. Whilst we may not be discussing such oppressive long-term commitments, there is no reason the doctrine cannot be applied to matters of this nature. The question remains if consent was not needed, why did the agent's

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[17] Struan Scott, 'Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases' (2010) 12(2) *Otago Law Review* 391, 395

[18] Struan Scott, 'Duress and the Variation of Contracts – Looking Beyond General Statements of Principle to the Results in Particular Cases' (2010) 12(2) *Otago Law Review* 391, 395

evidence specifically assert that he sought and received it? Did he feel it would be improper to continue in the circumstances otherwise?

77. A review of the five factors above cast doubt that proper consent was sought and gained. The agent orally testified his primary motives on that day were "I had a job to do". The agent also testified that he "ha[d] seen much stranger things in my time and saw no reason to stop." Understandably, he wanted to get his job done and move on. Is it proper to continue a routine inspection when a woman is clearly fearful, hiding from a stranger, with an infant child, and in a vulnerable position? What should have been his motivation? There was no urgency to this routine inspection – it could have easily been rescheduled. The applicants argue it was intrinsically unfair for the inspection to continue. This is hard to argue.

78. The agent's assertion that the wife replied, "No that's fine. Please continue with what you're doing" lacks credibility. Those words are the words of someone relaxed, at ease with the conversation and the person to whom she is talking. All the evidence points to the fact that the wife was fearful and confused. It is more likely the wife hoped he would just go away.

79. However, should a conversation of the nature asserted by the agent have occurred, with the wife hiding under a sheet, protecting her modesty, could such "consent" have been gained freely?

80. On the evidence provided, it appears unlikely that consent was given by the wife and certainly not the words afformed by the agent. Even if some consent was verbally uttered, such consent could only be classified as consent gained under a degree of duress, whether intended or not by the agent or not. In this tribunal's view, a woman fearful of someone who has entered her home, embarrassed by her lack of modesty as she repeatedly testified, and in a vulnerable position hiding as she was under sheets, is not in a fair position to conduct such a conversation with a large male, stranger to her, standing unexpectedly in her room.

81. Consent granted in such circumstances, in the view of this Tribunal, could not possibly be described as freely given or constitute lawful consent.

82. Section 141 of the *Civil Law (Wrongs) Act 2002* states:

> *It is a defence to an action for trespass to land if the defendant establishes that—*
>
> *(a) the defendant does not claim any interest in the land; and*
>
> *(b) the trespass was because of negligence or was not intentional; and*
>
> *(c) the defendant made a reasonable offer to make amends to the plaintiff before the action was brought.*

83. Whether (a) and (b) were present, no evidence was presented to the Tribunal that the respondent made any reasonable offer to make amends.

84. It is evident that the respondent harmed the tenants by causing:

(a) The loss of the applicants' quiet enjoyment (if for only a small amount of time).

(b) Unnecessary emotional distress and discomfort, particularly to the wife, which lingered on and resulted ultimately in their leaving the property.

Non-financial loss

85. Non-financial loss includes interference with the enjoyment of land.[19] Aggravated damages can be awarded where the person who commits the harm has behaved poorly and, while generally not available for negligence actions, are available for trespass. Exemplary damages may be awarded, usually for actions where intention to do harm is proven. In some circumstances, damages can include an award for inconvenience.[20]

86. There is no evidence that the respondent has acted with intent to harm or to cause the applicants' distress. Nevertheless, it is evident that the emotional distress was caused by only two things – entry to the property in a manner that appears to have lacked the degree of care, or professionalism, that a reasonable person in the same circumstances would have shown and by continuing the inspection when arguably, a reasonable person would have left and rescheduled when they found themselves in the circumstances as those in this case.

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[19] See *Munro v Southern Dairies Ltd* [1955] VLR 332, page 335

[20] See Allan Anforth, Peter Christensen, and Christopher Adkins, *Residential Tenancies Law and Practice New South Wales* (Federation Press, 7th ed, 2017), pages 366-72 [2.187.5]

87. There was no evidence put to the Tribunal demonstrating harm to the applicant tenants was financial.

88. As a general proposition, damages (or compensation) may not be awarded for breach of contract for anxiety, inconvenience, or other emotional disturbance.[21] One exception was where the High Court ruled there had been a failure on the part of a cruise line to deliver *the core thing* for which patrons had contracted and paid.[22]

89. In the case of residential tenancies, Anforth argues that if:

> *the tenant is deprived of the quiet enjoyment … or if the tenant is deprived of the exclusive right of occupancy, then this tenant has suffered a loss of a core benefit for which the tenant contracted. It is this loss that enlivens the Baltic Shipping principle and an award of compensation for non-economic loss.*[23]

90. This is supported in *Residential Tenancies Tribunal v Offe*[24] where it was ruled "it would be open to the Tribunal to award compensation for non-economic loss in an appropriate case".[25] Similarly in *Strahan v Residential Tenancies Tribunal*,[26] the court "affirmed the power of the Tribunal to award compensation for non-economic loss".[27]

91. Damages are assessed "on the basis of prevailing general standards in the community, having regard to the subjective experience of the innocent party arising out of the breach."[28] Thus, "it is necessary to explore the level of distress, anxiety, arising for the particular applicant concerned in the light of his or her particular circumstances and personality".[29]

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[21] *Shahid v Australia College of Dermatologists* [2008] FCAFC 72

[22] *Baltic Shipping Co v Dillon* [1993] HCA 4

[24] Allan Anforth, Peter Christensen, and Christopher Adkins, *Residential Tenancies Law and Practice New South Wales* (Federation Press, 7th ed, 2017), pages 366-72 [2.187.5]

[24] *Residential Tenancies Tribunal v Offe* (unreported, NSWSC, 1 July 1997, Abadee J)

[25] *Residential Tenancies Tribunal v Offe* (unreported, NSWSC, 1 July 1997, Abadee J) at [10]-[11]

[26] *Strahan v Residential Tenancies Tribunal* (unreported, NSWSC, 30008 of 1998, Dowd J)

[27] Allan Anforth, Peter Christensen, and Christopher Adkins, *Residential Tenancies Law and Practice New South Wales* (Federation Press, 7th ed, 2017), pages 366-72 [2.187.5]

[28] *O'Brien v Dunsdon* (1965) 39 ALJR 78

[29] Allan Anforth, Peter Christensen, and Christopher Adkins, *Residential Tenancies Law and Practice New South Wales* (Federation Press, 7th ed, 2017)), pages 366-72 [2.187.5]

92. That distress was caused by the conduct of the agent during the August inspection is evident from the oral and written testimony of the wife.

93. It is fair to discount that some of the distress felt by the wife in regard to modesty, such as the fact her arms were not covered in the company of a stranger, do not fall within the "prevailing general standards in the community". This does not discount that she felt that way.

94. Nevertheless, there is little question that continuing to conduct a routine inspection when, upon entering premises, one discovers a woman and small child hiding head to toe under sheets in a bed, appears to be inconsistent with prevailing community standards and would cause distress to a significant number of the community in the same circumstances.

95. There was no evidence put to the Tribunal that the applicants had sought medical or psychological assistance nor any form of counselling from religious figures in her community. There was no report to any authorities, other than the complaint filed to this Tribunal.

96. Similarly, it is arguable that the respondent trespassed for a period of only minutes and then restored the applicants to the position they would have been in had the wrong not been committed. The evidence indicates that the distress the applicants felt due to the events of the August inspection and the failure of the respondent to apologise for what had occurred, led to the break of the lease before the end of the fixed term.

97. Although the applicants seek damages "for financial losses incurred, including relocation expenses and additional rental costs," no evidence was put to the Tribunal, either in the application or at the hearing, outlining any specific costs directly demonstrated to harm caused by the conduct of the respondent, nor quantifying a loss.

98. When the Tribunal asked the applicants how the figure of "$25,000 compensation for the violation of privacy and discrimination against their religion" was quantified, the husband stated, "How do you value your respect and your religion being violated like this, in your own house?"; "It was the maximum figure that

we could claim" and that "it was a breach of privacy". As there is no tort of "breach of privacy", no damage can be held to have occurred in that context.

99. In seeking assistance from case law regarding what damages might be applicable in this matter, this Tribunal has reviewed a number of cases that have discussed or awarded damages for non-economic loss and these cases guide this Tribunal's hand. As Senior Member Steele stated in *Kibet v Empire Club*:[30]

> *As the authorities point out, non-economic loss will often be hard to quantify in monetary terms.*
>
> *Each case must turn on its own circumstances.*
>
> *Reference to other awards, while it might provide some limited guidance, cannot be decisive.*

100. In the same matter, Senior Member Steele highlighted that there must be a cause or link between the breach and the applicant's loss, damage, or injury. That is the case in this matter.

101. In *Tan v Xenos (No 3)*[31], Judge Harbison stated: "The purpose of the award of damages is to attempt to measure, in monetary terms, the hurt that has been done to the Complainant by the Respondent's act …"

102. In *Chen v Ghildyal & Anor; Ghildyal & Anor v Chen*[32], a 2019 ACAT matter, it was noted by the Tribunal that "Damages includes financial loss, such as the cost of remediation or loss of market value, and it also includes non-financial loss such as interference with the enjoyment of land."[33] Damages of $2,000 to each of the applicants were awarded in that matter.

103. In the matter of *Huskisson v Roper*[34] ***(Huskisson v Roper)*** it was held that:

> *The compensation that may be awarded includes compensation for:*
>
> *(a) direct economic loss arising from the breach; and*
> *(b) for non-economic loss to compensate for those breaches associated with the loss of use of the part of the premises concerned; and*

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[30] [2018] VCAT 1868 at [128]
[31] [2008] VCAT 584 at [556]
[32] [2019] ACAT 25
[33] *Chen v Ghildyal & Anor; Ghildyal & Anor v Chen* [2019] ACAT 25 at [16]
[34] [2011] ACAT 41

(c) for the associated loss of use and quiet enjoyment of the part of the premises"[35]

104. Further, "The measure of the amount of compensation payable is essentially assessed by reference to comparative awards after due allowance for the inevitable differences in the facts of each case."[36]

105. The Tribunal in *Huskisson v Roper* found that the landlord's access to the shed was a trespass, and a breach of the tenant's quiet enjoyment of the property[37] but, as the nuisance to the tenants was of a minor nature, awarded a sum of just $200.

106. Finally, in an unreported NSW Supreme Court case, Dowd J held that a caravan park owner promised but failed to deliver a sealed road which caused considerable non-economic inconvenience to the plaintiff in 1998. The plaintiff was awarded $1,000 in damages.[38]

107. Using these matters as a guide, it is evident that damages for non-economic loss as a result of the trespass on the August inspection are justified. The harm the trespass caused can be seen not just in the emotional distress to the wife but fact that the applicants cited it and the failure to receive an apology for it as the reason the tenants broke their fixed lease and left the property.

Regarding the bond, was the damage outlined in the exit report "fair wear and tear" as claimed by the applicants?

108. The applicants claim that the damage found by the respondent on their departure from the property consisted of fair wear and tear and that the bond of $2,000 should be returned to them in its entirety.

109. The Tribunal reviewed the exit condition report and listened to considerable oral submissions from both parties in relation to the issues raised in the exit report upon their departure.

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[35] *Huskisson v Roper* at [56]
[36] *Huskisson v Roper* at [57]
[37] *Huskisson v Roper* [2011] ACAT 41 at [79]
[38] *Strahan v Residential Tenancies Tribunal* (unreported, NSWSC, 30008 of 1998, Dowd J)

Fair Wear and Tear

110. The tenancy agreement did not require the return of the property in the condition it was provided in absolute terms. Rather, the tenant was required to leave premises in "substantially" the same condition as it presented at commencement of the lease – and fair wear and tear is "excepted".

111. In issue is whether the phrase "fair wear and tear" excuses the tenants from liability to repair some or all of the damage noted by the lessor in its final inspection.

112. In the case of *Maroney v Bullard*,[39], Presidential Member G McCarthy reviewed case law applicable to the notion of fair wear and tear in great detail. The summary he made is worth repeating here.

> *24. In Taylor v Webb [1937] 2 KB 283, the UK Court of Appeal noted that the phrase 'wear and tear' has been common in leases and tenancy agreements for two to three centuries. It covers two classes of disrepair:*
> *(a) Disrepair caused by the normal or ordinary operations of natural causes, such as sun, wind and weather.*
> *(b) Disrepair caused by a tenant or other persons on the premises with the consent of the tenants as a normal and unintentional incident of their occupation of the property.*
> *25. The UK Court of Appeal noted that the word 'fair' contemplates 'reasonable'. It would not include intentional or negligent damage, for example damage caused by pets, or by manifest lack of care or improper or impermissible use of the property.*
> *26. The approach in the UK has been adopted in Australia. In JSM Management Pty Ltd v QBE Insurance (Australia) Ltd [2011] VSC 339 at [19] – [29] (footnotes excluded), Osborn J said:*
> *19 The word 'wear' [in the Oxford English Dictionary] has as one of its meanings:*
> *The process or condition of being worn or gradually reduced in bulk or impaired in quality by continued use, friction, attrition, exposure to*
> *atmospheric or other natural destructive agencies; loss or diminution of substance or deterioration of quality due to these causes.*
> *20 The Macquarie Dictionary expresses its meaning as being:*
> *To impair, deteriorate or consume gradually by use or any continued process*
> *21 In turn the Oxford English Dictionary describes the meaning of the phrase 'wear and tear' as:*
> *wearing or damage due to ordinary usage; deterioration in the condition of a thing through constant use or service.*
> *22 The Macquarie Dictionary describes the meaning of the phrase*

[39] [2016] ACAT 33 at [22]-[49]

as 'diminution, decay, damage, or injury sustained by ordinary use'.

23 Black's Law Dictionary [8th edition 2006] also gives the primary meaning of the phrase as 'deterioration caused by ordinary use'.

24 In my opinion, the ordinary meaning of the phrase 'wear and tear' is that given as its primary meaning by both the Oxford English Dictionary and the Macquarie Dictionary, namely damage due to or sustained during ordinary usage.

25 This is because the word 'wear' is coupled with the word 'tear'. The concept unifying both words is damage caused by ordinary, as against extraordinary, events. 'Wear' is concerned with the result of usage taking place in respect of a thing. 'Tear' is concerned with the impact of ordinary natural causes such as weather upon a thing.

26 The phrase wear and tear is often used to confine the obligation of a tenant to keep premises in good repair.

27 A Dictionary of Modern Legal Usage states:

> ***Wear and tear**. In the context of leases, the phrase wear and tear – a 'reduplicative phrase', as linguists call it – includes not only the action of weather but also the normal use of property. A tenant is not liable to replace a carpet that becomes dingy from normal use during the tenancy – but a spilled bottle of black ink is another matter. **The phrase is usually preceded by a synonym, for good measure: normal wear and tear, reasonable wear and tear, and fair wear and tear are generally synonymous.*** (emphasis added)

28 The understanding of the phrase in the context of leases was elucidated by Scott LJ in Taylor v Webb:

> *The phrase 'wear and tear' is a very old English idiom and the clause 'fair' (or 'reasonable') 'wear and tear excepted,' has been common in leases and tenancy agreements for two or three centuries. It is, like many idiomatic expressions, complex in meaning; it implicitly refers to both cause and effect, and in each aspect it covers two classes of disrepair, (a) that brought about by the normal or ordinary operation of natural causes, such as wind and weather, in contradistinction to abnormal or extraordinary events in nature such as lightning, hurricane, flood or earthquake; and (b) that brought about by the tenant, and other persons present in or on the premises with the consent of the tenant, either unintentionally or as a normal incident of a tenant's occupation, in the course of the 'fair' (or 'reasonable') use of the premises for any of the purposes for which they were let. Sense (a), the first of the two senses covered by the phrase 'wear and tear' when used in repairing covenants, is somewhat analogous to the sense of the words when used in marine insurance. There the perils of the sea against which the policy protects are exceptional or abnormal marine events, at least in point of degree, and sufficiently so to constitute them 'accidents': and a line was drawn in old sailing-ship days between the normal damage and cutting away of sails, spars and ropes incidental to ordinary heavy weather on the one hand, which does not constitute a peril insured*

> *against, and an abnormal casualty which does; and the old law and even the old idiomatic phrase reappear in statutory guise in s 55, sub-s 2(c), of the Marine Insurance Act 1906. So in the law of landlord and tenant legal interpretation of the phrase as applied to the elements has produced a similar demarcation of degree between the normal and abnormal, the ordinary and the extraordinary; leaving a penumbral zone where a jury may wander and lawfully come to its own conclusion, a zone of 'give and take' decisions, as Willes J said in Scales v Lawrence. That the phrase 'wear and tear' includes in its scope my sense (b), namely, the tenant's user and its effect, is too plain to need argument, and is well recognized in the decided cases*
>
> *29 The judgment goes on to further discuss the meaning of 'fair' in the phrase 'fair wear and tear' when used in the context of a lease. The view of the legal consequences of a conventional fair wear and tear clause in a lease articulated in Taylor v Webb was subsequently overruled in Regis Property Company Ltd and Dudley. Nevertheless, the passage I have quoted expresses the fundamental notions of wear and tear. It also directs the reader to the context of marine insurance as illustrating the relevant concept of 'tear'.*
>
> *30 In this case … The question is whether the damage can be properly described as 'fair (or reasonable) wear and tear' such that the tenants should not be liable to the lessor for that damage.*
>
> *31 In my view, the question must be assessed objectively, meaning neither by reference to the views of a fastidious lessor nor the views of a tenant who is (or was) indifferent to the maintenance and care of the leased property. The need for an objective assessment requires the Tribunal to form a view as to where the balance lies …*
>
> *34 The tenants' obligation was to return the property to "substantially the same condition as the premises were in at the commencement of the tenancy agreement", or 'make good'. They did not do so, and compensation for the cost of making good is payable.* (Emphasis in original) (Citations omitted)

113. For this reason, I have assessed the claim for the cleaning by the lessor to be warranted in its entirety.

114. In contrast, having viewed the photos of the damage to the walls requiring patching and painting, it is hard to see more than quarter of this is anything other than reasonable wear and tear in the years that the tenants have been there.

115. The facts outlined at length in the hearing regarding the damaged cistern, reported to the lessor but never repaired, ultimately indicate responsibility lying equally between the tenants and lessor.

116. The claim for replacement of a degraded particle board vanity housed in a steamy bathroom over a period of six years is hard to sustain except to the degree that there was evidence that inadequate cleaning by the tenants, allowed mould to proliferate on its surface, which helped speed its degradation though far less than the steam and humidity naturally occurring in a bathroom.

117. For these reasons, I have allowed the lessors claims as indicated in this table:

Item	**% of claim allowed**	**Amount**
Cleaning	100%	$300
Replace broken cistern lid	50%	$300
Patch and paint damaged wall	25%	$125
Replace vanity and remove mould	20%	$120
Total		**$845**

Conclusion

118. As the Human Rights Commission did not refer the application to the ACAT in relation to potential violations of the *Discrimination Act* 1991, this Tribunal has no power to make a finding in regard to issues of discrimination.

119. The Tribunal finds that the respondent, did originally have authority to enter the premises. However, it exceeded its authority in the manner of its entry and failed to gain authority to continue the routine inspection when the agent found the wife in bed. From that point, the agent's continued presence constituted trespass and violated the quiet enjoyment of the applicants.

120. The Tribunal was not able to establish any evidence properly qualifying or quantifying the claim "for financial losses incurred, including relocation expenses and additional rental costs".

121. The Tribunal did find that the applicants sustained non-economic harm and losses, and damages have been awarded in accordance with a series of cases covered earlier in the reasons.

122. In relation to the exit report and application for return of the bond to the applicants, it is apparent that the applicants damaged the property but not to the

extent the lessor claimed and that, in accordance with the table cited above, $1,155 of the bond needs to be returned to the applicants.

……..
Member M Hanna

Date(s) of hearing:	9 April 2024
Applicants:	In person
Respondent:	A Chakrabarty, Adero Law