South Australian
Civil and Administrative Tribunal

Statement of Reasons

Case number	2017/SIR000022

CASE INFO

Applicant

Andrew and Jane Battersby (Landlords)

Respondent

Mahesh and Sampurna Thapa (Tenants)

Regarding

Internal review of decision

HEARING INFO

Before	Justice Parker
Hearing location	Hearing Room 1, Pirie Street
Hearing date	10 February 2017 at 10.00 am
Attendees	Mahesh Thapa Kevin Hodges and Wendy Marshall-Hodson, Kevin Hodges Real Estate (for Landlords)

STATEMENT OF REASONS

1. This is an application by the landlords for internal review of a decision made by Member Sudano on 11 January 2017. The case concerns an application for payment of the bond and compensation following the breaking of a tenancy agreement by the tenants. Ms Sudano held that the landlords had not met their obligation under s 78 of the *Residential Tenancies Act* to mitigate their loss by lowering the rent even after the agent had requested in writing that they do so after a period of three months in which there had been little interest by prospective tenants. On that basis Ms Sudano concluded that the tenants were not liable to pay compensation and dismissed the landlords' application.

2. For the reasons that follow, I do not consider that Ms Sudano made the correct and preferable decision. I am satisfied that tenants have not proven that the landlords did not take reasonable steps to mitigate their loss. I therefore uphold the landlords' application, set aside the orders made by Ms Sudano and instead order that the tenants pay compensation on account of their breach of the tenancy agreement.

Principles to be applied when deciding an internal review

3. I have set out in full in an appendix to these reasons my views about the principles to be applied when deciding an application for internal review under s 70 of the *South Australian Civil and Administrative Tribunal Act.* I have done so for the benefit of those involved in tenancy disputes because the previous cases where I have stated my views related to the making of guardianship

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and administration orders and mental health orders. However, precisely the same questions arise because s 70 applies to all internal review proceedings regardless of the subject matter.

4. The essential points are that when deciding an application for internal review under s 70 of the SACAT Act the Tribunal may set aside a decision if it is not considered to be the correct and preferable decision. In doing so, the Tribunal must give appropriate weight to the decision under review and may decide to receive further evidence.

Background

5. It is convenient to set out a chronology. The relevant events were as follows:

- On 8 September 2015 the tenants entered a residential tenancy agreement for a fixed term of 12 months at a rent of $300 per week for Unit 4, 40 Clark Avenue, Glandore. A bond of $1,800 was paid.
- By email message dated 30 April 2016 the tenants advised the agent that they intended to break the lease and move out of the unit on 24 May 2016.
- By letter dated 2 May 2016 the agent advised the tenants that they were legally obliged to continue paying rent until expiry of the agreement or "until a new tenant was approved".[1]
- The letter dated 2 May 2016 also referred to the entitlement of the landlords to costs associated with the breach of the lease under s 79(1) and s 79(2) of the *Residential Tenancies Act 1978*. That Act was repealed on 10 August 1995 and has had no legal effect since then, ie well over 20 years. The letter should have referred to s 110(1)(c) of the *Residential Tenancies Act 1995.* That provision empowers the Tribunal to award compensation for, amongst other matters, a breach of a residential tenancy agreement.[2] While the agent should update its standard correspondence, the error in the letter does not affect the claim made by the landlords.
- On 24 May 2016 the tenants vacated the property as they had purchased a home of their own.
- The tenants paid rent until 4 July 2016, ie six weeks after they vacated the property.
- By email message dated 1 August 2016 the agent recommended to the landlords that they consider reducing the rent that they were seeking below $300. The agent has also disclosed that there were earlier oral recommendations to the same effect. The landlords declined to accept that advice.
- The property was let to new tenants with effect from 24 August 2016 at a rent of $300 per week.
- In addition to paying rent up until 4 July 2016 the tenants made five payments of $15 each between 23 September 2016 and 29 October 2016.

6. In addition to the matters set out in the preceding chronology the agent has stated, and Ms Sudano accepted, that the property was continuously advertised on nine different rental websites, including the agent's own website. Twelve open inspections were conducted. Ms Sudano noted that those open inspections had been offered between 6 May 2016 and 12 August 2016 at different times on weekdays and at weekends with little response. A copy of the agent's diary provided evidence of the dates and times.

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[1] See discussion at paragraph 19 below.

[2] In cases where the tenancy has been abandoned a letter might instead refer to s 94(3). That provision also provides for the award of compensation for losses, including rent, incurred by a landlord upon a property being abandoned. In the present case the property was not abandoned.

7. Ms Sudano noted in her reasons that several potential tenants whom had been referred to the agent by the tenants were assessed as being unsuitable by the agent. I was informed, as was Ms Sudano, that the agent did not regard these prospective tenants as being suitable. The agent informed me that concerns were held about the lack of a rental history in Australia, lack of suitable references and like matters.

8. Ms Sudano also referred to the evidence from the agent that Unit 1 in the same group had been advertised from 15 July 2016 and could not be let until 4 November 2016 even though the rent being sought had been reduced from $310 to $295 per week during this period. Ms Sudano noted that the tenants had "refuted" that claim. The word "refuted" can either mean "disproved" or "disputed".[3] Unfortunately, Ms Sudano did not indicate which meaning that she intended. In view of the evidence in the form of a letter from Neale Realty received at the internal review (see below) it is clear that the tenants disputed rather than disproved the evidence given by the agent for the letting of Unit 1.

The landlords' submissions

9. The primary submission made by the agents on behalf of the landlords was that the tenants are bound by their contract and should not be permitted to break that contract without fully compensating the landlords. The agents also submitted that they had done everything that was reasonably possible to secure a new tenant. Nevertheless, it had taken over three months to find a suitable new tenant. The prospective tenants referred to the agents by Mr and Mrs Thapa were not considered to be suitable for the reasons stated at paragraph [7] above. The landlord should not be required to enter a tenancy agreement with persons whom the agents regarded as not suitable.

10. The agents sought to adduce further evidence at the internal review hearing by way of a letter and attachment from a property manager at Neale Realty. That was not opposed by Mr Thapa and, for the reasons given above, I am satisfied that it was appropriate to receive that fresh evidence. I will refer to that evidence below.

11. The effect of the letter from Neale Realty was to confirm the contention by the agents concerning the reletting of the neighbouring property at Unit 1, 40 Clark Avenue. This property also became vacant as a result of a breach of the tenancy agreement by the tenant. The letter states that Neale Realty conducted two advertised open inspections each week and "kept the price at $310 per week" although the property was eventually let at $295 per week. While the letter does not specify when the rent being sought was reduced, evidence was tendered at the hearing conducted by Ms Sudano in the form of an extract from the Domain website which suggests that $310 per week was sought for Unit 1 in July 2016, this was reduced to $300 later in July and to $295 per week in September 2016.

12. The agents also contended that Unit 4 was more attractive to prospective tenants than Unit 1. They said that Unit 4 has a much larger yard area and is generally more desirable. The relative size is an objective fact that was not disputed by Mr Thapa. Beyond that, the parties have not provided me with sufficient evidence to compare accurately the rental value of Unit 1 and Unit 4. Prior to the respective breaches of the tenancy agreements, the properties had been let at $310 and $300 per week. This suggests that there was not a great deal of difference between the two properties given that they are located in the same group of units. I therefore will proceed on the basis that the two properties were broadly comparable but not necessarily equally attractive to a prospective tenant.

[3] See *The Macquarie Dictionary* (4th ed) at 1192.

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The tenants' submissions

13. Mr Thapa submitted that the agents had not taken sufficient action to mitigate the landlords' loss. The basis for this submission was twofold. First, the prospective tenants that he and his wife had referred to the agents should have been accepted. There was no basis to refuse them as tenants.

14. Secondly, Mr Thapa contended that the landlords should have offered to let the property for less than $300. In support of that contention he produced a number of advertisements and website data published during the relevant period referring to the letting of units in Glandore other than at 40 Clark Avenue at weekly rents less than $300. As the receipt of this fresh material was not opposed by the agents, and was potentially relevant, I admitted it into evidence. However, as I observed during the course of the hearing, I am unable to place any weight on these advertisements as I could not be satisfied in the absence of additional evidence that these other properties were truly comparable with Unit 4. They may be smaller, not as modern, less well-maintained or in a location that was not so attractive.

15. The fresh material provided by Mr Thapa also referred to the letting of Unit 1, 40 Clark Avenue for $295 per week in October 2016 (as revealed by the Neale Realty letter) and the letting of Unit 3 at $290 per week in June 2016. I have already noted that the evidence provided to SACAT by the parties is not sufficient to determine whether the rent of $300 per week that was sought for Unit 4 was excessive when compared to that ultimately received for Unit 1. The same observation applies to any comparison between the rental received for Unit 4 and Unit 3.

16. Mr Thapa also supported his contention that the rent being sought by the landlord was excessive by producing a number of photographs depicting what he suggested was the poor state of repair of Unit 4. Once again, as there was no opposition by the agents and as it was relevant, I admitted this material as fresh evidence. Photographs sent by Mr Thapa to the agent on 16 September 2015 showed damage to fly screens and window frames and also appeared to indicate that several door handles had worked loose from the timber. Further photographs sent to the agent on 11 April 2016 revealed that there were a number of noticeable bumps in the carpet. The accompanying message from Mr Thapa stated that the matter was not urgent but the carpet may require re-stretching.

17. I was informed by the agents that the various minor defects shown in the photographs had been repaired after the tenants had vacated the property. The carpet had not been re-stretched until after the tenants had moved out as it had not been possible to do so while their furniture was in place. To that extent, the property was rendered more attractive to a potential tenant.

The duty to mitigate loss

18. It is a basic principle of the law of contract that a party who has breached a contract is liable to compensate the other party for the losses that they suffer as a result of that breach. However, the duty to compensate is subject to the requirement that the party who has suffered loss must take reasonable steps to mitigate (i.e. reduce) their loss. That fundamental common law principle is replicated in s 78 of the *Residential Tenancies Act* (and also in s 94 in relation to abandoned premises).

19. The obligation to compensate the landlord continues until the new tenant is granted vacant possession and accepts the obligation to pay rent. I have noted that the letter sent to the tenants by the agent on 2 May 2016 stated that the obligation to pay rent continued until the date the new tenant was "approved". That is not correct. While it did not occur in this case, in some instances there may potentially be several days after "approval" (which I take to mean execution of a tenancy agreement) before new tenants are granted possession and thereby assume the legal obligation to pay rent. The landlords have claimed compensation for the period up until the new tenants were granted possession. They were entitled to do so. The imprecise wording of the agent's letter does not operate to create an estoppel (ie a legal bar) against the landlords that would prevent them

from enforcing their right to be compensated until new tenants began to accrue a liability to pay rent.

20. It is important to recognise that a party who has breached a contract carries the onus of proving that the other party has not taken reasonable steps to mitigate their loss.[4] Thus, if a tenant does not prove that the landlord failed to take reasonable steps to find another tenant they will be liable to compensate the landlord in full for their loss. The ordinary civil standard of proof will apply, i.e. the balance of probabilities.

21. I emphasise that the duty is to take <u>reasonable</u> steps to mitigate loss. A party is not required to take extraordinary steps, nor are they required to do what is unreasonable, so as to reduce the loss occasioned by the breach of contract.

22. The starting position is always that the person who has breached the contract will be liable to compensate the other party for the loss they have suffered as a result of the contract not being performed as they had agreed. For that reason persons who are party to contracts, including residential tenancy agreements, need to be very mindful of their prima facie obligation to pay compensation before deciding not to honour their contractual commitment. They will only avoid the obligation to pay compensation if they can prove that the other party has not done what is reasonable to reduce their loss.

23. I now turn to the question of what action will constitute reasonable steps to mitigate loss. In *Sacher Investments Pty Ltd-v- Forma Stereo Consultants Pty Ltd*[5] Justice Yeldham of the Supreme Court of New South Wales made the following observations about mitigation:

> "The plaintiff is not under any obligation to do anything other than in the ordinary course of business, and the standard it is not a high one, since the defendant is a wrongdoer."[6]

24. In considering what action will constitute reasonable steps to mitigate loss two principle issues arise. They are, first, should the landlord reduce the rent that is being sought and, second, how extensive should be the steps taken to find a new tenant.

25. During the course of the hearing Ms Sudano referred to a view that may possibly have been held in the former Residential Tenancies Tribunal and by some SACAT members that the landlord will be taken not to have acted reasonably to mitigate their loss if they have not reduced the rent that they are seeking three weeks after the tenant repudiated their agreement. However, Ms Sudano did not suggest in her published reasons that she was deciding the matter on that basis. In any event, for the reasons that follow, I do not regard such an approach as being correct.

26. As I have already said, a landlord must take reasonable steps to mitigate their loss. What is or is not reasonable cannot be determined by some hard and fast mathematical formula. That is just as true in this area as in any other legal field where the question of reasonableness needs to be determined.

27. The reasonableness of a landlord's efforts to mitigate their loss needs to be decided in light of the facts and circumstances established by the evidence in each individual case. That will require consideration of the steps taken by the landlord to secure another tenant and whether those steps

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4 *TC Industrial Plant Pty Ltd -v- Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 138 (while the judgment was delivered by the High Court in 1963, it was not reported until 1994 when significant previously unreported judgments were published in volume 180 of the Commonwealth law Reports).

5 [1976] 1 NSWLR 5 at 9.

6 See also *NRMA Ltd -v- Morgan* [1999] NSWSC 407, Giles J at [1289]; *Dunkirk Colliery Co v Lever* (1878) 9 Ch D 20 at 25*; British Westinghouse Electric Co Ltd -v- Underground Electric Railways* [1912] AC 673, Lord Haldane at 689; *Cheshire and Fifoot Law of Contract (10th Australian ed) at [23.43]; Chitty on Contracts - General Principles* (24th ed) at [1593].

were reasonable in the particular circumstances. Those matters will need to be carefully assessed having regard to the state of the market for rental accommodation at that time in the particular locality and any other matters that may be relevant in the circumstances of a particular case.

28. The most that can be said about any "three weeks principle" is that it may be prudent for the landlord to consider reducing the rent after a few weeks if they have not secured a new tenant despite taking adequate steps to advertise the property. However, as I have already said, what is reasonable will depend upon the state of the rental market in that locality at that time and any other relevant considerations. Thus, for example, if a particular locality has recently suffered substantial economic downturn (e.g. because a major local employer has closed down or greatly reduced its workforce) then it may be necessary to reduce the rent immediately. The corollary is that if there is high demand for rental accommodation in the local area there is likely to be no obligation upon the landlord to consider a rent reduction. Seasonal factors may also be relevant in some instances. Of course, if it is necessary for the landlord to reduce the rent so as to mitigate their loss, the tenant will be liable for the shortfall for the balance of the term of the tenancy agreement.

29. It will be highly relevant when assessing reasonableness to take into account evidence about difficulties in attracting a suitable tenant for similar properties in the area. It will also be essential to consider carefully the extent of the efforts made by the agent or landlord to find a new tenant.

30. A landlord is not required to accept new tenants who can properly be regarded as unsuitable, whether that is due to a poor rental history, lack of a history or references, lack of stable employment or insufficient income to meet the rent, poor presentation or other relevant considerations. When assessing the suitability of prospective tenants it is relevant to take into account the nature of the property and the rent being sought. While a landlord cannot be unreasonably selective about prospective tenants, for the reasons given by Justice Yeldham in *Sacher Investments,* they are entitled to apply their usual and ordinary standards when they decide suitability.

31. The effect of the views I have expressed about the relevant legal principles is that there is no "black and white" or "hard and fast" answer as to the facts that a tenant will need to establish so as to prove that the landlord has not acted reasonably to mitigate their loss. For that reason before deciding to break a lease, tenants need to take into account the very significant risk that they will be required to compensate the landlord in full for losses arising from their breach. If a tenant believes that there is a compelling reason to bring the tenancy to an early end then they ought to apply to the Tribunal under the specific provisions in the *Residential Tenancies Act* which, in certain limited circumstances, permit an application by the tenant for early termination, eg a serious breach of the agreement by the landlord (s 88), hardship (s 89) or domestic abuse (s 89A). In the present case the tenants did not purport to rely upon any of those provisions and simply repudiated the agreement because they had purchased a house of their own.

32. I also stress that landlords must be diligent in taking action to mitigate their loss by actively advertising for a new tenant and not being unreasonably selective about their choice of a new tenant. A landlord cannot make desultory efforts to find a new tenant nor can they be unduly pedantic about the suitability of prospective tenants while expecting that the outgoing tenant will be required to pay out the balance of the lease in full.

Allegation of incorrect advice

33. During the course of the hearing the agents complained that the tenants claimed to have been advised by the Tenancy Advice Service (TAS) conducted by the Commissioner for Consumer and Business Services that they were entitled to stop paying rent when they did. It is unnecessary for me to make a finding about that matter as, for the reasons that follow, it cannot affect my decision.

34. I repeat the observation I made during the course of the hearing that the TAS, and also the Commissioner, are entirely separate organisations from this Tribunal. Regrettably, some agents, landlords and tenants seem not to be aware of the complete independence of SACAT from the TAS and from the Commissioner. The SACAT Act makes it manifestly clear that the Tribunal is a completely independent decision maker. It is not subject to direction or control by any government minister or department. That high degree of statutory independence has been reinforced by the appointment of a judge of the Supreme Court as President of the Tribunal and of a District Court judge as Deputy President. The Tribunal must decide disputes, including tenancy disputes, in accordance with the law, the evidence and the relevant submissions of the parties. The Tribunal is not, and cannot be, required to decide matters in accordance with the advice given by the TAS.

35. Nevertheless, tenants and landlords are entitled to expect that the advice they receive from TAS is correct. If it can be proven on the balance of probabilities that incorrect advice was given, and if each of the elements of the tort of negligence can also be proven in the particular case, then the State may potentially be liable for damages. The question of liability for incorrect advice is beyond the jurisdiction of the Tribunal. However, I do take the opportunity to note that in this case the evidence before me appears to fall far short of what would be required to establish that incorrect advice had been given and resulted in economic loss. I also note that even if it could be proved that the tenants had been given incorrect advice, it is not apparent that they have suffered any loss. That is because the effect of my decision is that they will be ordered to pay what they should have paid in the first place.

36. I also note that the information published by the Commissioner on his website about a tenant's duty to compensate the landlord for losses occasioned by breach of a tenancy agreement does not mention the likely liability of the tenant for unpaid rent for the balance of the term of the agreement nor is the landlord's duty to mitigate their loss mentioned. I suggest that the Commissioner should consider publishing information for the benefit of tenants, agents and landlords that is consistent with the views I have expressed in these reasons. That may also assist TAS staff.

Analysis

37. I take into account the further evidence received at the internal review hearing. However, as I have already noted, the evidence supplied by Mr Thapa about rent sought for other units or flats in Glandore provides no assistance because there is no evidence that these properties were truly comparable with Unit 4, 40 Clark Avenue.

38. I attach particular weight to the letter from Neale Realty about the difficulty they experienced in finding new tenants for Unit 1, 40 Clark Avenue. While the property was not vacated until 20 August 2016, Neale Realty had commenced an advertising campaign on 7 July 2016 and conducted the first open inspection on 11 July 2016. A new tenancy did not commence until 4 November 2016, i.e. almost four months after the property was first advertised.

39. The first open inspection for Unit 4 was held on 6 May 2016, i.e. nearly three weeks before the tenants vacated the property. The landlord was not under any legal obligation to commence advertising for new tenants until the existing tenants actually breached their lease by moving out on 24 May 2016.[7] Prior to them vacating the premises there was no actual breach of the tenancy agreement. The breach had simply been foreshadowed. The tenants might potentially have changed their mind and decided to adhere to the tenancy agreement with the result that any steps taken to advertise would have been wasted. Nevertheless, the fact that the landlords commenced advertising for new tenants before they were legally obliged to do so does count in their favour when assessing the reasonableness of their efforts to mitigate their loss.

[7] *Jones -v- Edwards* (1994) 3 Tas R 350.

40. Even though advertisements were placed on nine websites and 12 open inspections were conducted, new tenants did not enter into possession until 24 August 2016. That was precisely three months after the repudiation had occurred and some three months and three weeks after the first open inspection. That period was a little shorter than that taken to secure new tenants for Unit 1.

41. I consider that the efforts made by the agents on behalf of the landlords to secure new tenants were sufficient to meet the latters' obligation to mitigate their loss. I regard an advertising campaign conducted continuously across nine websites as clearly being reasonable. While the agent for Unit 1 conducted twice weekly open inspections, in my view it was sufficient to conduct one open inspection each week at different times and on different days.

42. I now turn to the contention that the landlords should have reduced the rent that they were seeking. Unit 1 had been advertised at a rental of $310 per week but was ultimately let for $295 per week. However, the landlords of Unit 4 continued to seek $300 per week and ultimately secured a new tenant for that figure in a slightly shorter time.

43. While the agents suggested on several occasions that the landlords should consider reducing the rent, the landlords were not bound by that advice. Nevertheless, that advice lends some support to the tenants' contention that a rent reduction was necessary to secure a tenant in a reasonable time.

44. On the other hand, it cannot be ignored that Mr and Mrs Thapa had been willing to pay $300 per week from September 2015 for Unit 4 and a new tenant was ultimately secured for the same figure.

45. I also find that the minor repairs undertaken at the property after it was vacated would have made it marginally more attractive to new tenants. To some small degree that lessened the possible need to reduce the rent so as to attract a new tenant. Moreover, while recognising that the evidence does not enable an accurate comparison of the rental value of Unit 4 and Unit 1, I note that the rent sought for the two properties was fairly close and the ultimate reduction in rent for Unit 1 was not great.

46. For these reasons I have not been persuaded by the tenants that the decision of the landlords to not reduce the rent establishes that they had not taken reasonable steps to mitigate their loss.

47. As I have already indicated, the evidence does not establish that the landlords acted unreasonably in refusing to accept the prospective tenants referred to the agents by Mr and Mrs Thapa. They carried the onus of persuading the Tribunal that those they introduced were suitable tenants. The agents gave reasons for rejecting those tenants and the mere denial by Mr Thapa without any supporting information was not sufficient to discharge his onus of proof on that point.

48. For these reasons I consider the correct and preferable decision to be that the landlords had taken reasonable steps to mitigate their loss. I will set aside the orders made by Ms Sudano and substitute orders that the tenants are required to compensate the landlords for the unpaid rent. The tenants paid rent until 4 July 2016. The new tenants entered into possession on 24 August 2016. Thus, the tenants are required to compensate the landlord by payment of a sum equivalent to the rent that would have been paid in the period from 5 July 2016 until 23 August 2016. That amounts to 7 weeks and one day at $300 per week, being $2,142.85.

49. The agents have claimed compensation in the sum of $2,112.85 rather than $2,142.85. It was not immediately apparent from the rent record whether that claim fully recognised the five additional payments of $15.00 made by the tenants in the period from 23 September 2016 to 29 October 2016, ie there appeared to be a possible discrepancy of $45.00. My associate asked the agent to clarify the position. She was advised that the landlord had credited $30.00 against rent and a further $45.00 against water charges. That has not been disputed by Mr and Mrs Thapa.

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50. For completeness, I note that the findings made by the Tribunal on 28 November 2016 recorded that the tenants had agreed to pay the full amounts claimed by the landlords with respect to reletting and advertising fees and water supply and usage charges, ie a total of $207.44. On 11 January 2017 Ms Sudano made an order to that effect. That order by consent was not challenged in the application for internal review although at one point during the hearing Ms Marshall-Hodson suggested that the landlords had not consented. She was obviously mistaken about that.

51. I will set aside the decision made by Ms Sudano and instead order that the tenants pay compensation in the sum of $2,112.85 on account of rent lost by the landlords. I will also order payment of $93.99 with respect to reletting and advertising fees and $113.45 by way of water supply and usage charges. Thus, the tenants will be ordered to pay the agents on behalf of the landlords the gross sum of $2,320.29. I will also order that the bond of $1,800 is to be released to the agents on behalf of the landlords. Thus, the net sum to be paid by the tenants will be $520.29.

Justice Parker
President

1 March 2017

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APPENDIX

Principles to be applied when deciding an internal review

52. When deciding an internal review s 70 of the SACAT Act requires the Tribunal to determine whether the decision made at first instance is the correct or preferable decision. In doing so, appropriate weight must be given to that decision. Because of the use in s 70 of the words "correct and preferable decision" I held in *Re AKS*[8] that when conducting an internal review SACAT is not bound by the long standing principle of appellate restraint expressed by the High Court in *House v The King*[9]. That principle ordinarily requires that an appellate court or tribunal must not set aside the exercise of a judicial discretion or the making of an evaluative judgment unless the matter has been wrongly decided because of either a process or outcome error.

53. The result is that when conducting an internal review SACAT must give appropriate weight to the decision made at first instance but must depart from the decision if it is not considered to be the correct or preferable decision. Thus, SACAT has a greater capacity to intervene when it hears an internal review than generally does a court when hearing an appeal.

54. Prior to the establishment of SACAT appeals against the decisions of the former Residential Tenancies Tribunal were heard by the District Court. The Court was required by s 42E(3) of the *District Court Act 1991* not to depart from the decision under appeal in the absence of cogent reasons. That Court would also have been required to apply the *House v The King* principle. For those two reasons, the District Court was significantly more constrained than SACAT when it determined appeals about tenancy matters.

55. The Tribunal may exercise its discretion to admit further evidence when hearing an internal review. I considered the operation of that discretion at some length in *Re AKS*[10]. I noted in that case that when an appellate court determines whether fresh evidence should be admitted on appeal it considers whether the material was reasonably available if diligent enquiries had been pursued before the first instance hearing. I stated that these considerations will generally have much less weight in SACAT proceedings. My reasons were, first, that SACAT is a tribunal and not a court. Secondly, the rules of evidence do not apply (see s 39(1)(b) of the SACAT Act). Thirdly, proceedings are conducted on a relatively informal basis as required by s 8(1)(f) of the SACAT Act. Fourthly, most parties are not legally represented and, in my observation, often have little idea of how best to go about preparing, advancing and proving their case. Finally, and most importantly, the obligation of the Tribunal to arrive at the correct and preferable decision must not be frustrated by overly strict insistence on compliance with the principles applied by appellate courts to the admission of fresh evidence.

56. I also noted that when the courts consider exercising the discretion to admit further evidence on appeal they consider whether the proposed fresh evidence is apparently credible and may affect the outcome of the proceedings. I regard those two considerations as also being relevant in SACAT.

57. I further noted in *Re AKS* that when determining an appeal involving a challenge to findings of fact an appellate body is required to recognise the advantage that the trial judge or tribunal member had in hearing the witnesses give evidence.[11] Nevertheless, after making due allowance for the advantages possessed by the primary fact finder, the appellate court or tribunal must set aside a

[8] [2016] SACAT 19. That case involved decisions under the *Guardianship and Administration Act.* However, the same principles apply in all internal review hearings before SACAT.
[9] (1936) 55 CLR 449.
[10] Ibid.
[11] *Fox v Percy* (2003) 214 CLR 118 at [23].

finding of fact that is glaringly improbable or contrary to compelling inferences.[12] That principle is entirely compatible with the requirement in s 70(5) of the SACAT Act that when conducting an internal review the Tribunal must have regard to and give appropriate weight to the decision at first instance.

58. A finding that a landlord had not taken reasonable steps to mitigate their loss is an evaluative judgment rather than a finding of fact. Because the *House v The King* principle does not apply in internal review proceedings under s 70 of the SACAT Act, the member deciding an internal review is not required to approach an evaluative judgement with the restraint required of an appellate court. While appropriate weight must be given to the finding made at first instance, it is necessary to determine whether it was the correct and preferable decision.

59. In a case where no findings were made about the credit (i.e. truthfulness) of witnesses it is unnecessary to recognise the advantage that the member who heard the matter at first instance would have had in seeing and hearing the witnesses give evidence.

[12] Ibid at [29].

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