

Lease Break Fees

*Residential Tenancies Act (NSW) 2010
Abdel-Messih v Marshall [2018] NSWSC 648*

As a lawyer I am often approached by tenants who want advice about breaking a lease. This is a difficult area because each case turns on its own facts and it is often not cost effective to pay for legal representation in a dispute over relatively small amounts. This article aims to assist practitioners advising and appearing in tenancy matters at NCAT.

Early Termination Without Compensation

Section 100(1) Residential Tenancies Act (RTA) provides that a tenant may give a termination notice for a fixed term agreement on any of the following grounds:

- (a) that the tenant has been offered, and accepted, accommodation in social housing premises,*
- (b) that the tenant has accepted a place in an aged care facility or requires care in such a facility,*
- (c) that the landlord has notified the tenant of the landlord's intention to sell the residential premises, unless the landlord disclosed the proposed sale of the premises before entering into the residential tenancy agreement as required by section 26,*
- (d) that a co-tenant or occupant or former co-tenant or occupant is prohibited by a final apprehended violence order from having access to the residential premises.*

In these circumstances, the tenant need only serve a termination notice and give 14 days notice¹ and they are not liable to pay any compensation or other additional amount for the early termination of the agreement.²

Undue Hardship

Section 104 RTA gives NCAT power to:

'... make a termination order for a fixed term agreement if it is satisfied that the tenant would, in the special circumstances of the case, suffer undue hardship if the residential tenancy agreement were not terminated'.³

It is up to the tenant to make the application and to persuade the Tribunal that there are 'special circumstances' which will result in 'undue hardship'. This ground is less favourable to the tenant than s100 as the Tribunal has a discretion to order compensation up to the applicable break fee.

¹ s100(2) Residential Tenancies Tribunal (NSW) 2010

² s100(4) Residential Tenancies Tribunal (NSW) 2010

³ s104(1) Residential Tenancies Tribunal (NSW) 2010

Break Fees

Break fees are determined by s107(4) RTA which provides:

*The **break fee** for a fixed term agreement for a fixed term of not more than 3 years is:*

- (a) an amount equal to 6 weeks rent if less than half of the fixed term had expired when the premises were abandoned, or*
- (b) an amount equal to 4 weeks rent in any other case.*

Furthermore, the landlord is entitled to this amount and not required to take reasonable steps to mitigate his loss.⁴ At first glance this appears to be pretty clear cut. However, the Supreme Court has held that the award of compensation to a landlord in these circumstances is discretionary.⁵ So, s107(4) determines the amount of the break fee but s107(1) gives the court discretion as to whether or not to order it be paid.

Abdel-Messih v Marshal

In 2016 Mr Abdel-Messih rented an apartment on Liverpool St in Sydney. He then rented a room in the apartment to Mr Marshall for three months under a standard tenancy agreement. During the term of the agreement, Marshall became aware that the landlord had served three termination notices on Abdel-Messih and there were proceedings at NCAT relating to alleged breaches of the head lease (namely, failure to pay rent and subleasing without consent).

Marshall vacated the room and ceased paying rent 19 days before the end of the term without providing the notice required by the agreement. Abdel-Messih commenced proceedings at NCAT seeking a break fee of four weeks rent as provided by clause 41 and s107 RTA.

The Tribunal accepted Marshall's evidence that he reasonably believed that it was imminent a person having superior title to Abel-Messih (the landlord) was about to become entitled to possession of the premises. It also accepted that Marshall required certainty about his accommodation arrangements and his concerns were not assuaged by Abdel-Messih's assurances that he landlord's claims had no merit.

Ultimately the tribunal exercised its discretion under s107 and found it was not appropriate to order Marshall to pay compensation by way of a break fee or any lesser amount. Abdel-Messih appealed to the Appeals Panel at NCAT and subsequently to the Supreme Court. He lost both appeals and the case is now the leading case on break fees in NSW.

I'm available everyday after 4pm if you have any interesting issues.

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⁴ s107(2) Residential Tenancies Act (NSW) 2010

⁵ Abdel-Messih v Marshal [2018] NSWSC 648