

Upton v Fitzgerald (Tenancy) [2008] NSWCTTT 1125 (7 July 2008)

**CONSUMER, TRADER AND TENANCY TRIBUNAL
Tenancy Division**

APPLICATION NO: RT 08/08531

APPLICANT: Clayton Ernest Upton

RESPONDENT: Malcolm Fitzgerald and Melissa Fitzgerald

HEARING: 11 April 2008 at Gosford

APPLICATION: Tenants application for compensation for breach of Residential Tenancy Agreement

APPEARANCES: The applicant appeared in person
Ms J Gilchrist appeared as agent for the respondents

LEGISLATION *Residential Tenancies Act 1987, Section 16*

CASES CITED: McRae v Commonwealth Disposals Commission (1951) 84 CLR 377
Mullins v Pace (RTT 99/06281)
Warrall v Commissioner of Housing of ACT (2002 FCAFC 172)
Brisbane Area Health Service v Taylor (131 ALR 1)
TC Industrial Plant Pty Ltd v Roberts Queensland Pty Ltd (1963) 180 CLR 130

ORDERS

The landlords, Malcolm Fitzgerald and Melissa Fitzgerald c/- Judy Gilchrist Real Estate Shop 24 Shopping Village, "....." are to pay the tenant Clayton Ernest Upton "....." the sum of \$2,130.00 on or before 11 May 2008.

REASONS FOR DECISIONS

APPLICATION

On 15 February 2008 an application was filed by the tenant against the landlords Malcolm and Melissa Fitzgerald claiming compensation for breach of the Tenancy Agreement and in particular clause 12 thereof relating to cleanliness and repairs and fitness of the premises for occupation. The claim was made in the sum of \$9,481.00 plus medical expenses which were not at that time specified.

APPLICANT'S EVIDENCE

1. On or about the 25 September 2006 the applicant was successful in obtaining a tenancy of the property at "....." for an initial period of six months commencing from 12 October 2007. The weekly rent was \$350.00 and the initial term was to conclude on the 12 April 2007.
2. In his written statement Mr Upton noted that they had a total of six children residing with them from time to time and the property consisted of five bedrooms with sufficient space to accommodate the full family when required. At the time when the tenants moved into the property there were no problems with rain and no mould was evident although it is suggested that at the time of the first regular inspection mould was noted on the curtains. Mr Upton claims that it was not until the end of April or early May 2007, when the rain persisted, that severe mould and dampness problems were noted. These were immediately notified to the agent verbally and the problem was acknowledged through a letter dated the 12 May 2007, wherein, it was suggested that a builder would inspect the property to endeavour to rectify the problem. Based upon these assurances, the tenant entered a new lease for a further six month period to commence from 12 May 2007 until 10 November 2007.
3. Mould and dampness continued to get worse and there was regular contact with the agent concerning the problem. By 29 May 2007 the landlords, through their agent, suggested that a gas point could be installed in an attempt to dry out the residence. The problem continued and there is a significant note in the landlord's agency file dated the 23rd July 2007.

"Spoke with landlord who has arranged for her builder to supply quote "to move air conditioning unit to the outside". Informed tenant of this. Tenants starting to ask for rent reduction to cover their cost for loss of furniture due to mould.

Melissa talking to Mal. If moving the air con unit no good look at dehumidifiers. Slow process."

4. By 2 August 2007, the tenants wrote to the landlord's agent reaffirming that although promises had been made to rectify the mould problem that nothing had been done. It was suggested that on medical advice the tenants should seek to move to avoid further health problems. Within that letter the tenant pointed out that they had thrown out furniture and clothing as a result of the mould and that the situation was getting worse.

5. On 6 August 2007, the agents wrote to the tenant advising that they currently had no alternative accommodation that would be suitable for the tenant and his family. They further advised that the landlord had been endeavouring to find a way to resolve the mould problem and that the moving of the air conditioning unit may assist. By 10 August 2007 based on these assurances the tenants agreed to remain in the property and withdrew their Notice of Intention to Vacate.
6. Following a routine inspection in October of 2007 the landlord's agents noted a mould problem which required rectification and a request was made to a handyman to remove the mould, using sugar soap, from the walls, window sills and screen frames. This request was issued on the 16 October 2007. On 18 October 2007, the tenants replied to the landlord's agent concerning the mould in the following terms.

"You have suggested that we leave a few windows open to ventilate the house. We do leave three windows ajar at the rear of the house which we are sure you would have noticed during your inspection but feel that it would be a security risk to leave others ajar. If you feel this is the answer to the mould problem then maybe we should leave the front door open".

Notwithstanding the assurances that a handyman would be attending to clean the mould embedded in the walls and window sills this work was apparently never done.

7. By letter dated 10 January 2008, the tenant gave notice to the landlords that following previous correspondence regarding mould and dampness the tenant and his family could no longer reside in the premises due to health reasons. Accordingly, the property would be vacated on the 24th January 2008. Vacant possession was delivered up on that date and at the time all rental was fully paid and there were no claims relevant to cleaning or other matters following the final inspection.
8. In support of the claim for the loss or damage the tenant produced a schedule of items described as lost or damaged together with quotes for the replacement of these items with new products. Numerous photographs were produced depicting clothing, goods and items of furniture which were affected by mould to various degrees and it is to be observed that the presence of mould on these items was obvious in the various photographs tendered. The mould was principally affecting the main bedroom and bedroom five and it was noted that the agent was shown the mould and damp on occasions. Attempts were made to dry the house out and damp-rid containers were placed strategically around the premises to sop up moisture.
9. A number of items were thrown out in a clean-up in July. These included a three seat sofa bed together with a futon, plastic tables and other rubbish. The tenant contended that the agent was shown the items

before they were thrown out but on the part of the landlord there was no file note to suggest this had occurred. Evidence was given concerning the age and state of repair of various items the subject of a claim. This evidence is set out in more detail in the findings which are set-out below.

RESPONDENT'S EVIDENCE

1. The correspondence referred to in the evidence of the applicants was included. There were some additional letters after the 10 January 2008 when the tenant gave notice of an intention to vacate the property. It is relevant to note that the tenants purported to give a fourteen day notice of intention to vacate based on the fact that the landlords were in breach under the lease. Although the landlords denied that they were in breach they agreed to vacation of the property on the 24 January 2008 noting further the property was now to be listed for sale.
2. The respondents also sought to rely on an undated letter from a plumber (Greg Evans) who stated that upon his inspection there was no evidence of leaking pipes in the cavity area and that appropriate ventilation brides had been installed in accordance with the building code. He noted however that inspection of the garage showed that the condenser and motor of the reverse cycle air conditioner had been enclosed since the renovation and he suggested that it should be installed outside the dwelling. He advised further that the installation of a gas point to the main bedroom was not possible in accordance with the relevant Australian Standards.
3. A letter was produced from Andrew Paddison (builder/carpenter) dated 24 February 2008. That letter referred to an inspection of the premises in early July of 2007 relating to complaints of mould. When Mr Paddison inspected the property he could see no issues with the building but suggested that the base unit of the air conditioner could be repositioned. He noted the presence of mould on the property and suggested that in his opinion the house was not well aired.
4. In a letter dated 26 February 2008, Melissa Fitzgerald stated that the property was purchased in 2002 and that she and her husband had lived in the home until June 2006. She stated that during that period they had experienced no major mould issues within the home.
5. Mrs Fitzgerald pointed out that a plumber/gasfitter had been arranged to look at the property with a view to install an initial gas point but that this was not possible. She also indicated that a carpenter/builder had been requested to attend and inspect the property and the air conditioning technicians were to look into the repositioning of the base unit of the air conditioner.
6. She observed that a notice of intention to break the lease was withdrawn in August 2007, and referred to a discussion on the 12 August 2007 wherein the tenants suggested that the relocation of the air conditioner

had at that time solved the problem. She stated although at that time her private phone numbers were given to the tenants, they did not seek to contact her at any time prior to the lodgement of a claim with the Tribunal.

7. By letter dated 31 March 2008 Ms Judy Gilchrist as agent for the landlords noted the following matters.
 - a. From 2002 to 2006 whilst Mr and Mrs Fitzgerald were resident in the property they were not aware of the severe mould and dampness problems.
 - b. Clothing and furniture thrown out due to mould and dampness in July 2007 would have been picked up by a council contractor in a compactor truck. The type of vehicle depicted in the photograph submitted by the tenant was never used for council pick-up work.
 - c. At no time was the landlord given an opportunity to view or assess the value of the furniture and clothing damaged.
 - d. When routine inspections were undertaken the mould did not look 'as bad' and the tenants had indicated that mould problems had improved by 9th August 2007.
 - e. The state of the furniture shown in photographs indicated that cleaning had not taken place.
 - f. The landlords through the agent had done all things possible to endeavour to rectify the problems.

FINDINGS

1. The claim arises in respect to premises to which the *Residential Tenancies Act 1987* applies and the Tribunal accordingly has jurisdiction to deal with the matter and if appropriate to award compensation in accordance with Section 16 of the Act.
2. To the extent that the claim had not been made within thirty days of the breach in accordance with the provisions of Section 16(1) of the Residential Tenancies Act 1987, the Tribunal applying the principles in **Brisbane Area Health Service v Taylor (131 ALR 1)** extends the time in which the application can be made to permit the present application to be dealt with. It is clear that the respondent has at all times been aware not only of the alleged breaches but also of the nature of the damages suffered by the tenants for which a claim for compensation is now being brought. (Section 81 *Consumer Trader and Tenancy Tribunal Act 2001*).
3. The parties entered into a residential tenancy agreement in standard form in respect to premises known as "....." at a weekly rental of \$350.00. The tenancy continued from the 12 October 2006 to 24 January 2008 and during that period the tenants were entitled to expect that they would have the benefit of quiet enjoyment of their premises and that the landlord would not permit any interference with reasonable peace, comfort or privacy of the tenant in using the premises. (Section 22 (1)). The tenants were also entitled to expect that the landlord would provide the premises in a reasonable state of cleanliness and repair and that it would be fit for habitation by the tenant.

4. Upon consideration of all of the evidence, the Tribunal is satisfied that by April or May of 2007 there were significant dampness and mould problems apparent in the premises and particularly in the main bedroom and in bedroom five. The mould problems were brought to the attention of the landlords through their agent and promises were then made that the problem would be rectified. It would appear that, on the basis of these promises, the tenants were prepared to enter into a further lease. This course is not unreasonable particularly when one has regards to the fact that it was necessary for six children to live from time to time in the property and there were difficulties obtaining suitable alternative premises.
5. Although the landlord's agents instigated enquiries as to steps which could be taken it would seem that nothing was in fact done to eradicate the mould by July or August 2007 and in that time some of the furniture and other property of the tenants had become so badly affected by mould it was thrown out.
6. In August of 2007 the landlords through their agent undertook to move part of the air conditioning unit outside in the hope that this would remedy the problem. Although the landlords had requested, for health reasons, that they be permitted to vacate the property they again sought to reinstate their tenancy, no doubt in the hope that these steps which were finally being taken by the landlord may overcome the problems.
7. Although the landlords may have felt the problem was then resolved it is clear that by the time of the routine inspection in October, the mould problem was so bad that the landlord's agents sought authority to have a handyman attend for the purposes of cleaning mould which had become embedded in the walls, window sills and screens. The Tribunal accepts that this work was never done between October 2007 and the time the tenants vacated the property on 24 January 2008. The Tribunal accepts the evidence of the tenant that he and his family were compelled to vacate the premises for health reasons and that they moved to a three bedroom house, which although unsatisfactory, was the only remedy then available to them.
8. In **Mullins v Pace (RTT 99/06281)** the Tribunal held that a loss of peace, comfort and privacy by a tenant may arise out of a landlord's failure to carry-out repairs and maintenance required by the Act. That case concerned a loss of use of part of the premises following flooding which the Tribunal found to be due to the landlord's failure to maintain the gutters. Having found that flooding of the subject resulted from the landlord's failure to fulfil the duty imposed by Section 25(1)(b) of the Act and that flooding caused interference with the reasonable peace and comfort of Mrs Mullins in using the subject premises the Tribunal member was satisfied to the required standard that the landlords caused such interference and therefore breached the provisions of Section 22(1)(b) of the Act.

9. In **Warrall v Commission of Housing of ACT (2002 FCAFC 172)** the full bench of the Federal Court held that a landlord was liable to compensate their tenant for breach of quiet enjoyment notwithstanding that the landlord was carrying out repairs required by the landlord under the legislation and notwithstanding that the landlord had carried out repairs in a reasonable manner.
10. Section 16 of the 1987 contains a power to award 'compensation' which embraces *Residential Tenancies Act* more than a power to award damages in respect to breach of contract. The difficulty in assessing damages is not in general a bar to recovery of damages see **McRae v Commonwealth Disposals Commission (1951 84 CLR 377)**. Having heard the evidence and perused the photographs which were produced as exhibits the Tribunal is satisfied that a number of the items referred to in Annexure A to the applicant's claim have been either damaged or rendered useless as a result of mould which was present in the premises. The presence of mould to the extent found by the Tribunal constitutes a breach of Section 22 and a breach of Section 25 of the Act as well as a breach of Clause 12 of the Residential Tenancy Agreement.
11. The evidence of the damages which has been adduced on behalf of the applicant is based upon the replacement cost of each of these items. This claim does not have regard to a claimant's obligation to mitigate damage where cleaning or other treatment is possible. It further does not take into account the discounts which would be applied to recognise the age of various items at the time when they were rendered useless or when they were dumped.
12. Section 15 of the Residential Tenancies Act imposes on parties an obligation to minimise loss from the breach of a residential tenancy agreement. In general, it is the obligation of a plaintiff (or claimant) to take all reasonable steps to mitigate the loss caused by the defendant's (respondents) breach and a party cannot recover damages for any loss which he or she could have avoided but failed through unreasonable action to avoid. The onus is upon the defendant (respondent) to show that the claimant has acted unreasonably in failing to mitigate his or her loss (**TC Industrial Plant Pty Limited v Roberts Queensland Pty Limited**) (1963) 180 CLR 130 at 138.
13. Having regard to the evidence and taking into account the principles enunciated above, the Tribunal makes findings and awards of damages in respect of each item of the tenant's claim as follows:
 - a. Three piece lounge suit including a sofa bed and single wing chair
The new cost claimed for these items is \$1,399.00 and the Tribunal notes that the lounge was approximately seven years old whilst the wing chair was almost eight years old. An allowance of \$300.00 was made for the depreciated value of the sofa together with a sum of \$200.00 for the cleaning or replacement of the material on the wing chair.

- b. Futon bed The sum claimed is \$219.00 and the bed was thrown out in July. It was at the time three years old and an allowance of \$120.00 is made for this item.
- c. Black timber six drawer dresser A claim for replacement at a cost of \$399.00 is made for this item. It was ten years old at the time and no proper attempts were made to clean it and no allowance is made for this item.
- d. Queen size mattress A claim in the sum of \$599.00 for replacement. The mattress was seven years old and it is appropriate to allow one third of the replacement value. A sum of \$200.00 is allowed for this item.
- e. Two double mattresses Claimed at the cost of \$398.00. The mattresses were some five years old and therefore fifty percent of the replacement cost is allowed in the sum of \$200.00.
- f. Plaster base glass top corner table A sum of \$89.00 is claimed for this item but as it could have been cleaned no allowance is made.
- g. One five shelf timber bookcase A claim of \$799.00 is made for this item as a replacement. There is no evidence that it could not have been cleaned and no allowance is made.
- h. One antique timber sideboard A cost of \$450.00 is claimed for restoration. There is no evidence that this item could not have been satisfactorily cleaned and no allowance is made.
- i. One antique timber bench seat A claim of \$450.00 is made for restoration of this item. The evidence obtained was that the item has been cleaned and no allowance will be made under this claim.
- j. Five sets of queen bed sheets Claimed at a cost of \$450.00. It is appropriate to allow forty percent of this claim in the sum of \$180.00.
- k. Four sets of double bed sheets Claimed at a cost of \$200.00 There were varying ages noted for these items. Fifty percent of the claim in the sum of \$100.00 will be allowed.
- l. Three queen bed quilt sets and two double bed quilt sets representing a total claim of \$530.00. Allow cleaning of these quilts only in the sum of \$90.00.
- m. Six single bed sheet sets Claimed at a total cost of \$240.00. In view of varying ages \$80.00 is allowed for this claim.
- n. Two black timber speakers Claim of \$60.00. There is no evidence that the speakers were not working. Allow nil.
- o. One men's leather briefcase Claim \$99.00 for replacement. Allow cleaning only in the sum of \$20.00.
- p. One men's leather wallet Claim of \$50.00. Allow cleaning only in the sum of \$10.00.
- q. Seven pairs of men's shoes Claim of \$450.00 for new shoes. Allow cleaning or part replacement in the total sum of \$100.00.
- r. Six pairs of ladies shoes A claim of \$500.00 is made for replacement. Allow cleaning, repair or replacement in the total sum of \$180.00.
- s. Eleven men's shirts Claim of \$550.00. Allow cleaning or replacement in the sum of \$100.00.
- t. Nine ladies tops/shirts Claim of \$370.00. Allow cleaning or replacement of \$100.00.

- u. Three ladies jackets Claim of \$450.00 for replacement. Allow dry cleaning only of \$50.00.
 - v. Two men's jackets Claim of \$200.00 for replacement. Allow dry cleaning only of \$50.00.
 - w. Seven girls' tops Claim of \$140.00. Allow cleaning or replacement in the sum of \$40.00.
 - x. Undergarments Claim of \$110.00. There is no evidence to support this claim so no allowance is made.
 - y. Twelve towels Claim of \$180.00. Allow cleaning or replacement in the sum of \$40.00.
14. There has been no evidence brought before the Tribunal in relation to a claim for medical expenses, nor has there been any claim for either reduction of rent or for compensation as a result of alleged loss of enjoyment. In the circumstances, the tenants are entitled to recover compensation in the sum of \$2,130.00. At the request of the landlord's agent the payment of that sum is deferred until the 11 May 2008.

John Ringrose
Member
Consumer, Trader & Tenancy Tribunal

7 July 2008