

**Adams & Ors v Gayval Investments Pty Ltd (Tenancy) [2008]
NSWCTTT 1157 (30 July 2008)**

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

APPLICATION NO: RT 08/29860

APPLICANTS: Emily Joy ADAMS, Michael John NEGUS &
Melinda NEGUS

RESPONDENT: Gayval Investments Pty Ltd

HEARING: 3 July 2008

APPEARANCES: The Applicants appear in person
The Respondent appears by agent, Peter Natoli

LEGISLATION *Residential Tenancies Act 1987*

ORDERS

That the Landlord pays to the Tenants the sum of \$2,297.00 on or before 14 August 2008.

REASONS FOR DECISIONS

APPLICATION

The Tenants, by their application filed 4 June 2008, seek an order for compensation pursuant to their claim that the Landlord breached the residential tenancy agreement.

APPLICANT'S EVIDENCE

Ms. Adams, one of the Tenants in these proceedings, gave evidence that she inspected the subject premises on 10 March 2008. At that time, she noticed

that there was a piece of carpet cut out in the main bedroom. The agent advised that the carpet would be shortly replaced.

The Tenants entered into a residential tenancy agreement on 14 March 2008, in respect of the premises at “.....”Kensington, for a period of 52 weeks at a weekly rental of \$540.00, from 22 March 2008. The Tenants commenced occupation of the premises on 22nd March 2008, and the carpet was replaced on 25 March 2008.

On 26 April 2008, Ms. Adams sent an email to the Landlord's agent seeking the installation of fans in the bathrooms to remove steam which has caused mould to grow on the ceiling and on the mattress. She had also noticed mould growing on her shoes. After cleaning the ceiling of her room and her bed base, Ms. Adams moved out of the flat for two weeks until she could afford to purchase a new mattress.

During the next week, an electrician attended the premises to provide a quote for the installation of fans, at the request of the Landlord's agent, but the fans were not installed.

The Tenants gave detailed evidence as to the series of events which occurred during late April and May 2008, during which time, Ms. Adams' new mattress was affected with mould, as well several items of clothes and shoes, and items belonging to the other tenants in their rooms. Further emails were sent to the agent. On 27 May 2008, the agent replied by email that she was not previously aware of the mould problem, and that it had only now been brought to her attention. She stated that she would arrange for a builder to attend immediately. On the same day, a tradesman named “Barry” attended the subject premises. The Tenants gave evidence that Barry advised them that the mould problem was caused by moisture seeping through the cement slab and coming up through the carpet.

The Landlord's agents inspected the property on 27 May 2008 after apparently speaking to the builder. The Tenants gave evidence that the agents denied that there was a problem with moisture in the slab, as stated by the builder. The agents advised that there had been a previous problem with the shower which a plumber had fixed. Discussions were had between the Tenants and the agents as to finding alternative accommodation, and resolving these issues, but the parties were unable to reach agreement.

The Tenants also gave evidence that they had all suffered health problems which they allege are caused by the mould growing in the property. In particular, Melinda Negus suffers from asthma, and sought medical attention.

The Tenants gave evidence that they spoke to the previous tenant, Christine Cole, who lived at the premises for 3 years prior to this tenancy. Ms. Cole stated that she had made the Landlord's agent aware of the mould problem several times during the course of her tenancy, and no action was ever taken to remedy the problem. In support, the Tenants produced a statutory declaration signed by Ms. Cole, together with copies of emails that Ms. Cole

had sent to the Landlord's agent regarding damp and water leakage. The Tenants have also produced into evidence many photographs of the premises and their possessions.

On 29 May 2008, cleaners attended the premises and removed mould from the bedroom ceiling and all windows and door frames. The blinds were cleaned on 12 June 2008. The Tenants stated that they left the unit on 29 May 2008, because of the ongoing mould problems, and paid rent up to 21 June 2008. Since 29 May, the Tenants have been living in alternative accommodation.

In support of their application, the Tenants submitted a report from Civilspan Antidamp, described as remedial engineers and specialists in curing and preventing damp and moisture in buildings. The report is dated 30 May 2008, and states, inter alia:

“A brief inspection ... has revealed a number of factors ...contributing to high levels of dampness. These include (but is not limited to);-

We understand there had been water damaged carpet in the main bedroom. This may well be the source of the mould/mildew contamination...

The aspect of the unit is conducive to damp and mould problems...

The mechanical ventilation in the laundry does not appear to be operating adequately...

Mechanical ventilation in the bathrooms was not present...

A moisture meter was used... and the ensuite bathroom wall adjacent to the bedroom did register a reading...

There are many ways moisture can build up...it is difficult to attribute much of the cause to the way the unit is used...

I would suggest that the spores were already in the unit when you moved in (predominantly caused by the alleged flooding in the main bedroom) and these have spread rapidly. It is fair to say that you may have contributed to higher moisture levels naturally, but I am not aware of a unit becoming so heavily contaminated in only a 2 month occupation...”

The Tenants are alleging that the Landlord breached the Residential Tenancy Agreement, and that they suffered loss and damage, for which they are entitled to be compensated. They seek compensation for personal items which they claim were damaged by mould, repayment of 8 weeks rent,

expenses incurred for alternative accommodation, and additional expenses incurred for cancellation of services and removals.

RESPONDENT'S EVIDENCE

The Landlord's agent gave evidence that, prior to the Tenants moving in to the premises, a shower leak had been rectified, and subsequently carpet in the main bedroom had been replaced.

The Landlord, by its agent, submitted that, apart from the shower which was fixed, there are no waterproofing issues arising in respect of these premises. When the agent was first notified in regard to the Tenants' issues, she stated the request purely centred on the installation of exhaust fans. According to the agent, exhaust fans were not easy to install. In any event, the agent submitted that there are windows in every room, except the laundry, and that the cause of the mould problem related to the lack of ventilation. That is, the agent believes that the Tenants have not allowed adequate ventilation into the premises in that they failed to open the windows, allowing moisture to build up on the walls.

The Landlord has produced a report from Acclaimed Building Consultancy dated 27 June 2008, which is also the date that the inspection was carried out. This report provides, inter alia:

"...the condition of the ceilings is generally fairly good...Minor mould damage found. Mould is normally as a result of poor ventilation and high humidity levels. The cause of the mould needs to be identified and the ceilings cleaned and repainted as necessary... the walls were noted to be generally dry when tested with our electronic moisture meter... on the day of inspection..

Showers: ...There was no visible water penetration...IMPORTANT NOTE: This test may not reveal water leaks until the shower is put into constant use..."

A report was also provided by Trancon Services, who does not provide evidence of the nature of its expertise. Further, a report has been produced from Barry Faithful, Builder, undated, which states:

"I inspected the above unit for any building defects and water damage on 22 May 2008 and found nothing no (sic) obvious water leaks or evidence of the bathroom leaking."

The Landlord's agent denies that there has been any breach of the residential tenancy agreement by the Landlord. Since the unit was cleaned on 29 May 2008, and the blinds cleaned on 12 June, the agent states that no mould has reappeared. The agent asserts that the mould problem was caused by the Tenants failing to adequately ventilate the premises.

Finally, the Landlord's agent states that the evidence of the previous tenant should not be taken into account, as the tenancy ended badly, as a consequence of a dispute relating to the previous tenant keeping a pet.

FINDINGS

The Tribunal has jurisdiction to determine this matter pursuant to the *Residential Tenancies Act 1987* ("the Act"). Section 16 of the Act provides:

- (1) If a landlord or a tenant under a residential tenancy agreement claims that a breach of a term of the agreement has occurred, the landlord or the tenant may, not later than 30 days after becoming aware of the breach, apply to the Tribunal for an order in respect of the breach. ...
- (2) The Tribunal may, on application by a person under this section, make one or more of the following orders:
 - (a) an order that:
 - (i) restrains any action in breach of the residential tenancy agreement, or
 - (ii) requires an action in performance of the agreement,
 - (b) an order for the payment of an amount of money,
 - (c) an order that a party to the residential tenancy agreement perform such work or take such other steps as the order specifies to remedy a breach of the agreement,
 - (d) an order as to compensation, including (without limiting the Tribunal's power to make such an order):
 - (i) compensation for loss of rent, and
 - (ii) compensation where a landlord withholds or refuses consent to the removal of a tenant's fixture, and
 - (iii) compensation for any other breach of the residential tenancy agreement,
 - (e) an order that requires payment of part or all of the rent under the residential tenancy agreement into the Tribunal until the whole or part of the agreement has been performed or any application for compensation has been determined,
 - (f) an order that requires payment (out of rent paid into the Tribunal) towards the cost of remedying a breach of the residential tenancy agreement or towards the amount of any compensation.
- (3) ...
- (4) An application under this section may be made during the currency of or after the termination of a residential tenancy agreement and may be made whether or not notice of termination has been given or an order for termination has been made by the Tribunal.

The Act sets out various duties of the Landlord and Tenants, including

Section 25 Landlord's responsibility for cleanliness and repairs

- (1) It is a term of every residential tenancy agreement that:
 - (a) the landlord shall provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant, and
 - (b) the landlord shall provide and maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.
- (2) In this section:

"residential premises" includes everything provided with the premises (whether under the residential tenancy agreement or not) for use by the tenant.

The Tenants, who have brought this application, must show that the Landlord has breached its duty to the Tenants, and that breach has led to a claim for compensation pursuant to section 16 of the Act. The standard of proof required is the civil standard. That is, the Tenants must show, on the balance of probabilities, that it is more likely than not that the Landlord breached its duty to the Tenants.

In this situation, the Tenants rely on section 25 of the Act to claim that the Landlord did not provide and maintain the premises in a reasonable state of repair.

The Tenants have provided a report from an engineer which I find fairly convincing to show that the mould spores must have pre-existed the tenancy. Further, evidence has been provided by the previous tenant of a mould problem. The Landlord's agent has admitted a shower leak which damaged carpet prior to the tenancy. The Agent states that the evidence of the previous tenant should not be taken into account because of possible vindictiveness on her part towards the Landlord and/or agent. However, I am satisfied that her statutory declaration and accompanying emails to the agent prove that the agent was aware of the mould issue before the tenancy commenced.

The Landlord's agent has also produced a report from a building consultant which they say disputes the cause of mould being other than that caused by the Tenants. I cannot accept this statement. I note that the report states that mould is present on 27 June 2008, the day of inspection. The Tenants left the premises on 29 May and the agent arranged cleaning on that day, and cleaning of the blinds on 12 June. Therefore, if the Tenants caused the mould problem, there should be no mould after 29 May. However, as previously stated, their own expert reports that there is mould after this date.

Accordingly, I find that the Landlord has breached section 16 of the Act in that it has not provided and maintained the premises in a reasonable state or repair.

In relation to the Tenants' claim for compensation, I will deal with them in turn. Firstly, the claims for specific economic loss in regard to damaged possessions have not been proved by way of production of receipts, and therefore, I cannot make an order in respect of these items. Similarly, I will not make an order in regard to food costs, laundry, cleaning products or petrol, because I am not satisfied that the Tenants have proved that they arise from the breach. Costs of filing proceedings before the Tribunal are usually borne by the parties.

As to the Tenants' claim for a refund of rent for a period of 8 weeks from the date of first notification to the agent of mould damage, I do not intend to deal with this matter as a means of a rent reduction claim, but instead as a claim for compensation pursuant to section 16. Accordingly, I assess that the Tenants should be compensated for their suffering and loss as a result of the Landlord's breach, in the sum of \$2040.

The Tenants have also claimed \$577.00 for alternative accommodation. Of this amount, I only appear to have receipts for \$257.00 in respect of Mr. Negus for the period from 30 May to 2 June 2008. I am satisfied that the Tenants were required to seek alternative accommodation as a result of the Landlord's breach, and I make an order for the payment of \$257.00.

The Tenants have also claimed for transfer or cancellation fees, but have not given me any proof that they have actually incurred either fee. Also there is a claim for truck rental, and I have an invoice dated 21 June 2008 made out to a person who is not a party to these proceedings. I cannot see how this invoice relates to the Landlord's breach of the agreement. Therefore, I do not make any order for these claims.

Accordingly, I order that the Landlord pay to the Tenants the sum of \$2297, on or before 14 August 2008.

L. Williams
Member
Consumer, Trader & Tenancy Tribunal

30 July 2008