

AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: OSUCHOWSKI & SCOULLER V RADOJEVIC [2008] ACTRTT (13)

RT 618 of 2007

Catchwords: Lessor's obligation to repair.
Notice to vacate clause 96(b)
Compensation

Issues: Meaning of 'genuine intention'
Failure to repair

Legislation: *Residential Tenancies Act 1997 (ACT)*
Sections 104;
Prescribed terms: 54(b) & (c); 55; 57; 96(b)

Tribunal: J Lennard, Member

Date: 26 September 2008

AUSTRALIAN CAPITAL TERRITORY
RESIDENTIAL TENANCIES TRIBUNAL

))
) NO: RT 618 of 2007

RE: Monica OSUCHOWSKI &
Rebecca SCOULLER
(Applicants/Tenants)

AND: Budimir RADOJEVIC &
Slavka RADOJEVIC
(Respondents/Lessor)

DECISION

Tribunal :J. Lennard, Member

Date :9 January 2008 – **IN-CHAMBERS ORDER**

Decision

1. The Residential Tenancies Tribunal finds that the lessor has:
 - Breached the Residential Tenancy Agreement between the parties by failing to comply with the obligation to repair;
 - Issued a notice to vacate under clause 96(b) of the Residential Tenancies Act 1997, in circumstances where there was no established genuine intention that an immediate relative would reside in the premises and where the lessor engaged in deceptive and deliberately misleading conduct; and
 - Has unlawfully demanded, and withheld, monies relating to lessors' costs from the tenants.
2. The lessor shall pay an amount of **\$11,677.86** to the tenants within 14 days of the date of this Order. This amount consists of **\$7,828.20** compensation for failure to repair; **\$3,841.49**, compensation for the invalid termination of the tenancy and **\$8.17**, refund of water abstraction charge.

.....
J Lennard
Member
25 September 2008

AUSTRALIAN CAPITAL TERRITORY
RESIDENTIAL TENANCIES TRIBUNAL

))
) NO: RT 618 of 2007

RE: Monica OSUCHOWSKI &
Rebecca SCOULLER
(Applicants/Tenants)

AND: Budimir RADOJEVIC & Slavka
RADOJEVIC
(Respondents/Lessors)

REASONS FOR DECISION

J Lennard, Member

Re: Premises at 105 Matina Street NARRABUNDAH ACT 2604

1. The Applicant tenants and the Respondent lessor entered into a Residential Tenancy Agreement in relation to premises at 105 Matina Street Narrabundah for a fixed term of twelve months commencing 9 September 2005. The weekly rent was \$320 and OZ Property Services Pty Ltd acted as the lessors' agent.
2. On 29 December 2006 a severe hailstorm hit the Canberra region. This hailstorm caused extensive flooding in the premises. The flooding caused water damage to the ceilings, walls and carpets throughout the premises as well as damage to the personal property of the tenants. These facts were acknowledged by both parties, and were not in dispute before the tribunal.
3. On 31 December 2006 the tenants reported the damage to the lessors' agent. The lessor and the agent inspected the damage to the premises on 4 January 2007. The lessor made a claim for the cost of the repairs on his insurance policy, which was held by the NRMA.
4. On 16 March 2007 the rent was increased in accordance with the residential tenancy agreement from \$320 to \$350 per week.
5. The repairs to the premises commenced on 28 March 2007 and were completed on 10 June 2007.
6. On 7 September 2007, the lessors' agent served the tenants with a termination notice. The notice stated that the grounds on which the notice was issued were *As per clause 96. (b) The owners [sic] immediate relative intends to reside in the above property at 105 Matina Street Narrabundah and will require vacant possession.* In the letter attached to the termination notice the lessors' agent states *Regretfully, we have been instructed by the Landlords that their son wishes to move into the above property and therefore are giving 4 (four) weeks notice for you to vacate the property under clause 96(b) of your signed tenancy agreement.*

7. The tenants vacated the premises on 7 October 2007.
8. On 11 October 2007 the premises were advertised for rent on allhomes internet site.
9. On 26 October 2007 the tenants made an application to the Residential Tenancies Tribunal for compensation for loss of quiet enjoyment and use of the premises caused by the lessors' breach of the tenancy agreement. This breach was said to be constituted by the extraordinary delay by the lessor in repairing the storm damage. The tenants also claimed compensation for the cost of vacating the premises and finding other accommodation as a result of an unlawful termination of the tenancy by the lessor. This was said to be constituted by the serving of a termination notice upon grounds that were false.
10. The Residential Tenancies Tribunal heard the matter on 20 November 2007. The applicants appeared before the Tribunal, the respondents did not personally appear but were represented by Mr Andreas Hass of OZ Property.
11. The tenants gave evidence in relation to the causes of the delay in affecting the repairs. The tenants' oral evidence was supported by copies of correspondence between the parties and between the lessors' agent and NRMA.
12. The evidence before the Residential Tenancies Tribunal indicated that the delay was caused by a combination of factors:
 - a. the storms which damaged these premise had caused extensive damage throughout the Canberra region and there was necessarily delay caused by a shortage of tradesmen;
 - b. the lessor chose not to be directly involved in the repairs and regarded their duty to repair as fulfilled once they had made the claim with the NRMA;
 - c. the tenants were left by the lessors and their agent to do the majority of work chasing up tradesman, making arrangements for access by the tradesmen and cleaning up after the tradesmen;
 - d. the NRMA insisted that MasterHomes, as their 'preferred' repairer undertake the work;
 - e. MasterHomes did not attend to the work in a professional or diligent manner;
 - f. the NRMA did not pursue complaints from the lessors or the tenants and failed to ensure that the repairs were undertaken in a timely or professional manner. Neither the NRMA nor MasterHomes appears to have approached the repairs to the premises in a sensible, professional or organised manner.
13. The lessors' agent indicated to the Residential Tenancies Tribunal that he had endeavoured to assist the tenants in their dealings with the NRMA but was not able to speed things up. The Residential Tenancies Tribunal found Mr Haas to be a reliable witness, and appreciated his candour and honesty.

14. The Residential Tenancy Agreements between the parties provides:

Lessor to make repairs

55. (1) The lessor must maintain the premises in a reasonable state of repair having regard to their condition at the commencement of the tenancy agreement.

(2) The tenant must notify the lessor of the need for repairs.

...

57. Subject to clause 55, the lessor must make repairs, other than urgent repairs, within 4 weeks of being notified of the need for repairs (unless otherwise agreed).

Urgent repairs

59. The tenant must notify the lessor (or the lessor's nominee) of the need for urgent repairs as soon as practicable, and the lessor must, subject to clause 82, carry out those repairs, as soon as necessary, having regard to the nature of the problem.

60. The following are urgent repairs in relation to the premises, or services or fixtures supplied by the lessor:

...

(f) flooding or serious flood damage

(g) serious storm or fire damage

...

The extent of the need for repairs or damage.

The tenants gave detailed evidence of the damage caused by the storm, this evidence was accepted by the lessor's agent as giving a true picture of the events and the damage. The tenants written submissions stated:

The 29 December 2006 storm caused water damage to four rooms – two bedrooms, the living room and kitchen area. A hole, approximately 2 cm in diameter resulting from the storm was indicative of the volume of water entering one bedroom.

Further evidence before the Residential Tenancies Tribunal was that the curtains and carpets were wet, the water had leaked over the light cabling, furniture and personal property of the tenants was set and damaged. The damage was promptly reported to the lessor and inspected by the lessor and his agent on 4 January 2007. Despite the extensive damage to the premises, and the smell emanating from the wet the carpet, the lessor's only response was to refer the matter to his insurer, the NRMA. The lessor refused to undertaken interim measures such as having the carpet professionally cleaned and dried. The lessor denied any further responsibility for ensuring repairs were undertaken in a timely manner; he took the view that referring the claim to the NRMA was sufficient. A lessor cannot discharge his duty to repair in this manner. *Northern Sandblasting v Harris* (1997) 188 CLR 313 The un contradicted evidence was the repairs to the premises were not commenced until 28 March 2007 and not completed until 10 June 2007.

The Residential Tenancies Tribunal finds that the lessor has breached the residential tenancy agreement by failing to cause necessary repairs to be completed in accordance with clauses 55, 57 and 60. Section 104(d) provides that the Tribunal may make an order requiring the payment of compensation for loss of rent or any other loss caused by the breach of a residential tenancy agreement. The Residential Tenancies Tribunal finds that this failure to repair caused significant reduction in the tenants' use and enjoyment of the premises. In reaching this finding the tribunal takes the following factors into account:

- 1 No attempt was made to undertake interim repairs;
- 2 During the 65 day repair period the tenants were not able to use all rooms in the premises;
- 3 One tenant was obliged to move out for a period of four weeks, due to the lack of useable space in the premises;
- 4 As a result the tenants were not able to invite guests to the premises;
- 5 There was an unpleasant odour coming from the wet carpet for several months;
- 6 The tenants spent a considerable amount of time liaising with tradesmen and repairers;
- 7 The NRMA refused to assist the tenants;
- 8 Masterhomes workmen threatened to delay the repairs if the tenants continued to complain;
- 9 Workmen visiting the premises caused further damage to the personal property of the tenants and failed to cleanup after repairs had been completed.

In calculating the amount of compensation payable by the lessor to the tenants the Residential Tenancies Tribunal notes and takes into account the following factors:

- 1 The damage caused by the storms in the Canberra area in late 2006 and early 2007 was extensive. As a result it was difficult to engage tradesmen and the lessor's insurance company would have experienced some delays. Nevertheless the lessor made no attempt to expedite the repairs and chose to leave the entire matter in the control of the NRMA. No effort was made to make temporary repairs or to alleviate the discomfort of the tenants.
- 2 The NRMA chose to use a "preferred repairer" and this contributed to the delay in completing the repairs.
- 3 The tenants have a duty to mitigate and given the extensive nature of the damage and the extraordinary delay in repair, could have chosen to terminate the tenancy for breach by the lessor. The tenants explained, and the tribunal accepts, that they rejected this avenue on the basis that they were promised repairs would be completed in one week in March of 2007. They were hampered by lack of information and a refusal by the NRMA to provide them with information or support.

A party who suffers damage as a result of a breach of contract by another party is entitled to an amount of damages which will, as far as possible, put the injured party in the same position they would have been in had the breach not occurred. That is that damages for breach of contract are compensation loss. *Robinson v Harman* (1848) 1 Exch 850. The innocent party must establish that the loss complained of was caused by the breach of contract and that the loss was not too remote from the breach. The rule in *Hadley v Baxendale* (1854) 9 Exch 341 is applied to determine which loss is recoverable. An innocent party may recover damages caused by a breach of contract if they are the types of loss that occurs in the usual course of events, or arise naturally from the breach, or where the loss complained of may be reasonably supposed to have been in the contemplation of the parties at the time they made the contract to be likely to result from the breach.

While damages for personal distress or pain and suffering are not usually awarded for a breach of contract, recent decisions indicate that such an award is appropriate and proper where the contract itself promised peace, comfort, enjoyment or relaxation. Damages have been awarded for breach of contracts relating to holidays and weddings. *Jarvis v Swan Tours* [1973] 1 All ER 71; *Baltic Shipping v Dillon* (1993) 111 ALR 289.

The tenants ask for compensation relating to the following loss:

- i) A 30% reduction in use and enjoyment of the premises from the date of the storm until the commencement of repairs;
- ii) A 100% reduction in use and enjoyment of the premises from the date of commencement of repairs until completion of repairs;
- iii) A 10% reduction in use and enjoyment of the premises from the date of completion of repairs for a 10 day period for cleaning and restore the premises to normal condition;
- iv) Compensation for the loss of property destroyed or damaged by the flooding and by the workmen; and
- v) Compensation for loss of work time, stress and distress caused by the delay in repairs and the difficulties of dealing with aggressive workmen and an uncooperative lessor and insurance company.

Each of the items of loss claimed by the tenants fall within the first limb of the rule in *Hadley v Baxendale*. A residential tenancy agreement by its express terms of the, when read with s104 (d) of the Act indicate that where the peace, comfort and privacy of a tenant is interfered with, the breaching party is liable for compensation. The Residential Tenancies Tribunal calculated the compensation by reference to the rental rate and other decisions of this and similar state tribunals. The lessor is liable to compensate the tenants in the amount of \$7828.20.

The claim for unlawful eviction

On 7 September 2007, the lessors' agent served the tenants with a termination notice. The notice stated that the grounds on which the notice was issued were *As per clause 96. (b) The owners [sic] immediate relative intends to reside in the above property at 105 Matina Street Narrabundah and will require vacant possession.* In the letter attached to the termination notice the lessors' agent states *Regretfully, we have been instructed by the Landlords that their son wishes to move into the above property and therefore are giving 4 (four) weeks notice for you to vacate the property under clause 96(b) of your signed tenancy agreement.* In compliance with the notice to vacate the tenants vacated the premises on 7 October 2007. A final inspection was conducted by the lessor's agent on 8 October 2007.

The Residential Tenancies Tribunal received the following evidence:

- 1 The premises were advertised for rent on allhomes.com.au on 11 October 2007 at a rent of \$450 per week, an amount which was \$100 per week more than the tenants had been paying.
- 2 Emails from several persons who had contacted the agent in response to the alhomes.com.au advertisement, and some emails from the agent to the prospective tenants. In each of these a different explanation of how the premises came to be vacant was given.
- 3 The lessor refused to accept the tenants back into the property, despite contact between them and the lessor's agent as early as 12 October, and the premises remained vacant until 21 November 2007.

The Lessor did not appear at the hearing nor did he put forward any explanation as to why his son had not taken up occupation of the premises. The lessor's agent made written submissions to the tribunal, but some of the statements within it were not consistent with other evidence before the tribunal. The tenants argued that given the improvement to the premises by the repairs and the rising rental market, the lessor had decided to give a notice to vacate on false grounds in order to obtain 'market rent' for the premises. In all the circumstances the Residential Tenancies Tribunal finds that it is more likely than not that the lessor had always intended to rent the property at the higher amount. Thus the notice to vacate was not based upon a genuine belief by the lessor that his son was to reside in the premises.

Section 58 (2) of the Residential Tenancies Act provides that the tribunal may make an order for compensation for wrongful eviction. The serving of a notice to vacate in the circumstances constitutes a breach of contract. A failure to act in good faith is a breach of a term implied in fact to most contracts in Australia *Hughes Aircraft*.

The tribunal orders the lessor to pay an amount of \$3841.49 being:

- **\$420 removal costs**
- **\$122.66 for hire of Ute**
- **\$139.83 paid by tenant to internet provider upon termination of agreement**
- **\$95 cleaning costs**
- **\$60 miscellaneous costs**
- **\$1000 for costs of packing and**
- **\$2000 general damages, which takes into account loss of leave and that the tenants had to move to separate premises, so that their household arrangements were unable to continue.**

JANN LENNARD

MEMBER

Residential Tenancies Tribunal

26TH September 2008

