ACT CIVIL & ADMINISTRATIVE TRIBUNAL

THE HURST-MEYERS CHARITY LTD ABN 696 111 166 119 v WELLINGS & ANOR (Residential Tenancies) [2020] ACAT 102

RT 626/2018
RT 762/2018

Catchwords: **RESIDENTIAL TENANCIES** – whether the second respondent was properly represented in the proceedings – who is the lessor – whether the second respondent had authority to enter into the lease – tenants claim for refund of rent because of the presence of friable asbestos on the property – whether there was an agency agreement – whether the property was uninhabitable – outstanding rent – claim by tenants for compensation for lost property – lessor to pay for asbestos report – lessor's claim for reimbursement of amount claimed for contra work – lessor's claim for cleaning and repairs

Legislation cited: *Corporations Act 2001* (Cth) ss 180, 181
Residential Tenancies Act 1997 ss 12, 15, 29, 30, 83, 87 standard terms 33, 42, 46, 55, 67

Cases cited: *Craig Jewell v J. Godfrey* [1999] NSWRT 94
Maroney v Bullard [2016] ACAT 33
Mousouleas v Vacropoulous [2000] NSWRT 177
The Hurst-Meyers Charity Ltd v Khan & Ors [2020] ACAT 33
Wicks & Anor v The Hurst-Meyers Charity Ltd ABN 696 111 166 119 [2019] ACAT 92

Tribunal: Presidential Member H Robinson

Date of Orders: 7 December 2020
Date of Reasons for Decision: 7 December 2020

AUSTRALIAN CAPITAL TERRITORY
CIVIL & ADMINISTRATIVE TRIBUNAL

BETWEEN:

RT 626/2018

FREJA BLAIDD-NIXON
First Applicant/Tenant

KIMBERLEY WELLINGS
Second Applicant/Tenant

AND:

RALPH GEORGE NOEL NANCY HURST-MEYERS
First Respondent/Lessor

THE HURST-MEYERS CHARITY
Second Respondent/Lessor

RT 762/2018

RALPH GEORGE NOEL NANCY HURST-MEYERS
First Applicant/Lessor

THE HURST-MEYERS CHARITY
Second Applicant/Lessor

AND:

KIMBERLEY WELLINGS
First Respondent/Tenant

FREJA BLAIDD-NIXON
Second Respondent/Tenant

TRIBUNAL: Presidential Member H Robinson

DATE: 7 December 2020

ORDER

The Tribunal orders that:

1. The tenants' claim against the first respondent is dismissed.

2. The second respondent is to pay to the tenants the sum of $3,073.30:

   (a) $753.30, being the cost of the Lancaster and Dickenson asbestos assessment; and

   (b) $2320 compensation for loss of quiet enjoyment.

3. The tenants are to pay to the lessor $3,100:

   (a) the outstanding rent of $2,900; and

   (b) $200 for repair of holes in the walls and make good of the shelving;

   to be offset against the amount at order 2.

4. The Office of Rental Bonds on behalf of the Territory is to release the sum of $36.70 to the lessor and the remainder to the tenants.

……..
Presidential Member H Robinson

REASONS FOR DECISION

1. The applicants[1], Ms Wellings and Ms Blaidd-Nixon (**the tenants**), were the tenants of a residential property (**the Cottage**) located on Caloola Farm, in Tharwa in the Australian Capital Territory (**Caloola**). The second respondent[2], the Hurst-Meyers Charity Ltd (**the Charity/the lessor**) holds that property as a licensee from another entity. The first respondent[3], Mr Hurst-Meyers, is a director and secretary of the Charity. The tenancy broke down and both parties are now seeking various remedies against each other including lost rent, damages, and compensation.

The hearing process

2. The tenants were represented throughout the proceedings by Mr Faulder, a solicitor with the ACT Tenants Union. Both tenants gave evidence and were cross examined. They also called several friends and associates as witnesses.

3. The first respondent was represented during the earlier stages of the lengthy hearing process by Ms Bolas, a solicitor. The first respondent then represented himself from day eight until the completion of the hearing process. He gave evidence and was cross examined. He also called numerous other witnesses, whose evidence I will summarise as relevant below.

4. The second respondent is a corporation limited by guarantee registered under the *Corporations Act 2001* (Cth) (**Corporations Act**). Notwithstanding its name, it is not a registered charity. Its representation during the proceedings was a matter of some contention. Briefly stated, Ms Bolas represented the Charity at the commencement of the hearing, and then Mr Hurst-Meyers purported to represent the Charity from day eight. However, despite several requests, Mr Hurst-Meyers failed to file an Authority to Act on behalf of a Corporation, as

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[1] Ms Wellings and Ms Blaith-Nixon are the applicants in RT626/20 and respondents in RT762/20

[2] The Hurst-Meyers Charity is the second respondent in matter RT 626/2018 and the second applicant in matter RT 762/2018. I have referred to the Charity as the second respondent or 'the lessor' throughout this decision for ease of reference.

[3] Mr Hurst-Meyers is the first respondent in matter RT 626/2018 and the first applicant in matter RT 762/2018. It is unclear in what capacity he is an applicant in RT 762/2018, but I have assumed it is a precaution in the event he is found to be a lessor in RT 626/2018. I have referred to him as the first respondent throughout the decision for ease of reference.

was required by the Tribunal's procedures.[4] Instead, he relied upon reconstruction of minutes from a meeting held several years ago, by which he was purportedly granted authority to deal with legal matters, as the basis for his authority. This situation is the subject of some commentary below. I determined to proceed with the hearing despite the uncertainty as to the Charity's representation. At various times during the proceedings, another director, Mrs Liza Hurst-Meyers, gave evidence. A company extract dated 17 May 2019 lists the other director, at that time, as Mr and Mrs Hurst-Meyers' daughter.[5] I am satisfied that the Charity's directors were aware of the proceedings and acquiesced to such representation as was offered.[6] There was little point in further adjourning the matter to put the basis of representation beyond doubt.

5. The hearing process itself consumed some 10 sitting days, in addition to two directions hearings. The transcripts fill two large A4 binders, the documents eight of the same. Many of the filed documents were duplicates. Some have no apparent source. In the first respondent's case, submissions and evidence were intertwined, despite him being legally represented some of the time. The first respondent also made several attempts to file additional evidence or information during the hearing, some of which was contrary to earlier submissions put on his behalf. The length and complexity of the proceedings was frankly disproportionate to the complexity of the case and the amount of money in dispute. No effort was made by the first respondent to assist with the efficient progress of the case, and it got to the point that, toward the end of the proceedings, I imposed a time limit on witnesses. I am satisfied this was justified by the Tribunal's obligation to ensure the procedures of the tribunal are

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[4] *ACT Civil and Administrative Tribunal Procedural Directions 2010 (No 1)* rule 7.1.2.

[5] Although only one daughter is listed on the company search filed with the Tribunal, there is correspondence from Mr Hurst-Meyers to ASIC of the same date seeking to amend the registration information to reflect that his other daughter is also a director. Other documents suggest an attempt was also made to correct the record to include several other independent directors, but the status of this is not clear.

[6] I note also that Mr Hurst-Meyers confirmed that he was aware of his statutory and fiduciary duties under sections 180 and 181 of the *Corporations Act 2001* to exercise his powers and discharge his duties with care and diligence, in the best interest of the corporation, and for proper purposes, and that he had considered any conflict of interest that arose, and that he was satisfied that his role was not a conflict of interest in breach of those duties. While some evidence in this matter caused me concern about this, it is ultimately a matter beyond the purview of this Tribunal.

as simple, quick, inexpensive and informal as is consistent with achieving justice.[7]

6. Additionally, the hearing process was tainted by an unfortunate degree of rancour between the parties, including allegations of impropriety made, albeit certainly on instructions, by one practitioner against another without any apparent basis. Those allegations were withdrawn by the solicitor, but later pressed by Mr Hurst-Meyers. The allegations amount to nothing more than speculation and I have not given them any weight in these reasons.

The agreement

7. The parties entered into a residential tenancy agreement on 24 June 2017 (**RT Agreement**). A bond of four weeks rent at $350 per week paid. The agreement is stated to be between "Ralph George Noel Nancy Hurst-Meyers", of a stated residential address and the tenants. The signatures were witnessed by another tenant, Mr Joshua Kunkler.

8. The RT Agreement is dated 16 June 2017. However, it appears common ground that this date was not reflective of the date it was signed, but rather of the date the tenants moved into another premises on Caloola farm. The tenants signed the lease and moved into the Cottage on 24 June 2017.

9. The RT Agreement was in the standard form, incorporating the standard residential tenancies terms in Schedule 1 of the *Residential Tenancies Act 1997* (**RT Act**). More unusually, it provided for rent to be $450 week, of which "$100 per week can be contra." It seems to be common ground that the "contra" was to be work performed by the tenants for the Charity or Mr Hurst-Meyers.

The tenants' case

10. The tenants sought orders against Mr Hurst-Meyers, who they alleged was the lessor, or in the alternative against the Charity.

11. The tenants' first argument was that neither Mr Hurst-Meyers nor the Charity had authority to enter into the RT Agreement, by reason of having no authority

[7] ACAT Act section 7(a)

to sublease the premises, and accordingly the tenants were not liable for rent payable under it. They sought a repayment of all rent paid during the tenancy.

12. In the alternative, they argued that Cottage became uninhabitable by reason of the presence of friable asbestos fibres. The fibres, they allege, were released when the Caloola caretaker, Mr Kunkler, drilled into a wall to install shelves in a bedroom in the Cottage. These fibres, the tenants say, fell to the floor, where they drifted under the bed, remaining until they were identified by an asbestos assessment in conducted in June 2018, around a year later, and then removed by way of an environmental clean of the property. They sought orders that the rent abated from the time the shelves were installed.

13. The tenants sought:

    (a) one of:

        (i) a refund of all rent paid during the period of occupation ($16,250) and contra performed ($2,600) on the basis that the lessor did not have authority to sublet the cottage;

        (ii) a refund of all rent paid from when the shelves were installed in August 2017 ($14,150) and contra paid for that same period ($2,600) on the basis that the property was uninhabitable;

    (b) $1,320 for asbestos decontamination of their personal property;

    (c) $753.30, being the cost of the Lancaster and Dickenson asbestos assessment;

    (d) compensation of $5,000 for items destroyed due to asbestos contamination; and

    (e) the bond be released to them.

The first respondent

14. The tenants argued that Mr Hurst-Meyers was, at law, the lessor, being the other party to the RT Agreement. Mr Hurst-Meyers' position may be summarised as a denial that he was the lessor, and hence a denial that he has any personal liability under the RT Act. In his submissions, Mr Hurst-Meyers seeks

"compensation for being incorrectly sued",[8] but this claim does not appear to have been particularised or pressed, beyond an apparent claim for costs under section 48 of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**).

The second respondent

15. The Charity's position, as articulated by Mr Hurst Meyers as its purported representative, is that it is the lessor and it was duly authorised to enter into the RT Agreement.

16. The Charity denies that the Cottage was at any relevant time during the tenancy uninhabitable, or in the alternative, argues that that it became uninhabitable only by reason of the tenants' actions.

17. The Charity says that the tenants were specifically instructed that the Cottage contained asbestos sheeting prior to commencing the lease. It says it never authorised Mr Kunkler to act as its agent and would not have authorised any work be done on the Cottage walls. Further, or in the alternative, it says that the presence of the friable asbestos in the cottage was the result of the tenants, or an associate of the tenants, placing it there to avoid liability to pay rent.

18. Briefly stated, the Charity argued that in early June 2018, the tenants fell behind in their rent and sought to end the lease. At that time, they were advised that they were in arrears of rent and had large outstanding electricity bills that they would need to make good as well. After this, the tenants, or other allied tenants of the property, planted friable asbestos in the Cottage, perhaps while attending the property to remove their horses on 19 July 2019. This may have been done as part of a co-ordinated effort with other tenants to have the property found to be uninhabitable.

19. The Charity also made a counterclaim against the tenants for damage to the Cottage. The quantum of this claim was something of a moving feast, changing with each amended document. However, I take as the final claim the matters set out in a document filed and exhibited as R16. This document contains a claim

[8] Page 50

for $27,898.05, which exceeds the Tribunal's jurisdiction. I take the excess to be waived.

20. On this basis, I understand the second respondent to be seeking orders for:

(a) unpaid rent from 16 June 2018 to the date the property was ready for re-rental on 5 October 2018, in the sum of $15,750;

(b) unperformed contra work of $2,600;

(c) electricity owed $2,720.90;

(d) asbestos report by prepared by Peter Hengst for $715;

(e) several professional invoices:

(i) cleaning - $800;

(ii) plumbing - $502.15;

(iii) labour by Mr Pizania - $2,800;

(iv) bathroom repair - $1,188;

(v) painting house and laying carpet - $1,000;

(vi) repair of broken window - $543;

(vii) replacement carpets - $200;

(f) plumbing repair to a broken water pipe and water system - $1,500;

(g) asbestos removal - $2,079; and

(h) animal agistment - $1,300.

Credibility

21. The credibility of most of the witnesses was an issue in this matter, with some witnesses at times giving contradictory or irreconcilable evidence and accusing each other of not telling the truth. While I do not find that any party was outright fabricating evidence, I had concerns about the evidence of both Mr Hurst-Meyers and the tenants.

22. The evidence of both tenants was, from time to time, inconsistent with each other, and with some of the documentation. Their witness statements were nearly identical, including the same errors, and their use of language during their oral testimony had a rehearsed quality to it, particularly their insistence, for

example, that they understood Mr Kunkler to be Mr Hurst-Meyers's "agent". Ms Wellings was evasive in some of her answers, although when pressed under cross examination she readily conceded that some of her evidence was wrong. I am prepared to accept that most of the inconsistencies in the tenants' evidence was due to the effluxion of time, but not all. Where possible, I prefer contemporaneous documentary evidence. I largely accept the evidence of the other witnesses called by the tenants, although the passage of time may have affected its reliability.

23. The evidence of Mr Hurst-Meyers was also of concern. It was at times inconsistent, both with his earlier evidence and with that of other witnesses. It was also self-serving and prone to an evident degree of exaggeration and self-aggrandisement that was unhelpful, particularly as much of this elaboration was unrelated to the issues of the case. I found him a poor historian of past events. I do not accept his un-corroborated testimony where it is contrary to that of another party, or to the documentary evidence. Other than in relation to some evidence given by Mrs Hurst-Meyers, discussed later, I otherwise accept the evidence of Mr Hurst-Meyers's other witnesses as being credible, although again the passage of time has affected the recollections of some witnesses.

Findings of fact

24. My findings of fact, whether contested or otherwise, are as follows.

25. Around 1 June 2017 the tenants met Mr Hurst-Meyers at an open inspection of a property in Queanbeyan. That property was not suitable, but Mr Hurst-Meyers advised them that he had a more appropriate property, and took their contact details.

26. On 2 June 2017, Mr Hurst-Meyers texted the Caloola address to one of the tenants and advised them to "ask for Joshy and he'll show you the 2 bedroom cottage." "Joshy" was Mr Kunkler, an existing resident who the tenants contend was the acting caretaker at Caloola.

27. On or around 3 June 2017 the tenants attended Caloola and inspected the outside of the Cottage. They could not inspect it inside, as another tenant, Mr Margerison, was still residing there. The tenants evidence is that they would

accept the tenancy for $350 per week and consideration in the form of work to be performed on the property (**contra**) in lieu of the additional $100 per week.

28. On 7 June 2017 the tenants attended Mr Hurst-Meyers's home, seemingly to sign the bond loan form. What happened on this occasion is discussed below.

29. The tenants moved to Caloola on 16 June 2017, but not into the Cottage. They initially moved first into Mr Kunkler's house, as the Cottage was still leased to Mr Margerison. Mr Margerison moved out on the morning of 23 June 2017 and the tenants moved into the Cottage that afternoon. This was the first time they inspected the inside of the property. No ingoing or outgoing inspection was conducted at this time. This is unfortunate, as the state of the property when it was handed over to the tenants was the subject of contradictory evidence during the proceedings.

30. Mr Hurst-Meyers's oral evidence was that he had a meeting with Ms Wellings at Caloola on 16 June 2017,[9] where Ms Wellings asked about the presence of asbestos, and he advised her that the walls contained asbestos and instructed her not to penetrate them. Again, there was no reference to a meeting of this date in any of the material filed by Mr Hurst-Meyers prior to the hearing, or indeed prior to the tenants giving their evidence. The only apparent reference is in the filed chronology, which (incorrectly) asserts that the RT Agreement was executed on this date. Mrs Hurst-Meyers's oral evidence partially corroborates that the meeting took place on 16 June 2017, but she did not mention the discussion about asbestos, and indeed she gave conflicting evidence about when the tenants were told about the presence of the asbestos at all.[10] The tenants deny the 16 June 2017 meeting took place at all. On balance, I am satisfied that Mr Hurst-Meyers, at least, must have mistaken the alleged meeting on 16 June 2017 for the meeting that certainly occurred on 24 June 2017.

31. It is not in dispute that on 24 June 2017 Mr Hurst-Meyers did attend the property and met with the tenants. Also present at this meeting were Mr

[9] Transcript of proceedings 27 November 2018 page 280
[10] Transcript of proceedings 27 November 2018 pages 133, 134

Kunkler and a resident of another house at Caloola, Ms Anastasia Utesheva. The tenants signed the RT Agreement and backdated it to 16 June 2017.

32. For reasons set out below, I am satisfied that at this meeting, the tenants were advised that Mr Kunkler was the caretaker for the property. The tenants considered that this meant they should take any requests for maintenance to him. Other discussions that took place on this day are discussed further below.

33. After moving into the Cottage, the tenants found they needed more storage. They approached Mr Kunkler and asked if they could install shelving, in the form of what appears to be old fencing. I am satisfied that Mr Kunkler assisted the tenants with the installation of the shelves in the main bedroom, drilling holes in the walls in order to install them. The consequences of this are considered further below.

34. From 6 September 2017 to 16 October 2017 there were problems with the water supply to Caloola. The tenants were provided with about 10 litres of water but were required to buy more from Woolworths and to shower and wash elsewhere. The tenants were offered one weeks rent reduction as compensation, and they accepted that as compensation. They notified other maintenance issues to Mr Kunkler, but he does not appear to have been overly responsive and issues remained unaddressed.

35. In early October 2017 Mr Kunkler advised the tenants that an asbestos assessor was attending Caloola to undertake assessments on other houses.[11] The tenants said that they anticipated an inspection of the Cottage as well, but no assessor attended. Their evidence was that from this time they began to grow concerned about the presence of asbestos in the Cottage, particularly in light of the holes made in the walls. However, it does not appear that they took any steps or made any complaints or otherwise brought their concerns to the lessor's attention.

36. The tenants fell behind in rent over the course of 2018. Text messages before the Tribunal suggest that Mr Hurst-Meyers was initially quite understanding

[11] Transcript of proceedings 20 November 2018 page 209

about this, and Ms Wellings thanks him for "not harassing us for the money"[12], but the relationship thereafter deteriorated. The tenants ceased paying rent on 23 May 2018. On 30 May 2018 Mr Hurst-Meyers asked the tenants by SMS if they are moving out.[13] On 2 June 2018 he sent a further text that stated that the lease "expired" on 16 June 2018 and suggested the lease may not be "renewed".[14] It is unclear what Mr Hurst-Meyers meant by this, as under the Standard Terms, clauses 4 and 5, where a fixed term lease expires it becomes a periodic lease, it does not cease unless terminated in accordance with the RT Act.

37. It appears to be common ground that on or about 6 June 2018, there was a telephone call between the tenants and Mr Hurst-Meyers during which they intended to vacate the premises, perhaps by 13 June 2018, but if not sometime shortly thereafter.

38. The events from this date on are the subject of some dispute. Briefly, the tenants say that they became increasingly concerned about the safety of the premises, while the lessor says, in effect, that the tenants manufactured that concern to avoid liability for outstanding rent and electricity.

39. On or about 7 June 2018, the tenants arranged for an assessor named "Diego" from Canberra Asbestos Removal to attend the property to take samples from the hole in the spare bedroom, the loungeroom ceiling where a light had been installed by an electrician, and an outside wall. They did not tell the lessor about this. When asked why, Ms Blaidd-Nixon said that they acted on their own initiative because the assessment was "urgent".[15] The tenants did not have the money for the sample to be analysed, but "Diego" advised he would hold the samples, and that they should contact "Peter" to have them tested when they could pay.

40. On 9 June 2018 Mr Hurst-Meyers sent a text to the tenants stating:

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[12] SMS Message, 27 April 2018, Exhibit R1, Tab 31 and A1 page 137
[13] Exhibit R1, Tab 31, A1 page 138
[14] Exhibit R1, Tab 32, A1 page 138
[15] Transcript of proceedings 20 November 2018 at page 219

> *I'm happy to accept your notice but you can't stop paying rent while your living there. You have to pay last week's rent and this week's rent and part of the back rent as a minimum.*[16]

41. The tenants had not given the lessor written notice of a termination date, nor nominated one orally, and therefore these was no agreement that the RT Agreement would come to an end on a particular date. In relation to the rental debt, it is unclear whether this text was intended to be a notice to remedy for the purposes of clause 92(a) of the Standard Terms, but in any case it does not comply with the requirements of one, as it does not contain a statement, as required by subparagraph (ii) of that section, that if the tenant pays the rent outstanding to the date of payment within 7 days of the date of service of the notice to remedy, no further action must be taken and the tenancy continues.

42. On or around 11 June 2018 Ms Blaidd-Nixon contacted Peter, who I understand to be Mr Peter Hengst, of Asbestos Assessments ACT, and asked that he collect the samples from Diego and test them. Ms Blaidd-Nixon's evidence was to the effect that Mr Hengst advised them he would charge a delivery fee for doing so, or alternatively they could collect samples themselves. Mr Hengst was not called by any party to give evidence.

43. On 12 June 2018, Ms Blaidd-Nixon decided to take the second option, and obtain her own samples to take to the assessor for analysis. Again, she did not tell the lessor. Instead, she donned gloves and a mask and took the samples from the bedroom and one from a pre-existing hole outside the house. This seems like an extraordinary foolish thing to do, but I accept her evidence that she did it. The tenants then took samples to another asbestos company, Robson Environmental Pty Ltd (**Robson's**) for analysis.

44. Meanwhile, also on 12 June 2018, Mr Hurst-Meyers sent a text to the tenants that stated:

> *...as per our conversation just then I am confirming that your lease expires on the 16th of June 2018 and that this is the final day that you can stay at Caloola.*

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[16] A1, page 139

> *I'm concerned that you brought up asbestos contamination just today, inside the actual property and so that for the next few days you can stay at the conference room, not in that property.*
>
> *I will call qualified people to have a look at what your concerns are, but for the record, I never authorised* [Mr Kunkler] *or anyone to put any shelving up in your property.*
>
> *If you can vacate the property as soon as possible that would be sincerely appreciated.*
>
> *I will compile a ledger showing the amount of lease payments that are due. If you can pay for last week's and this week's lease payments and all lease payment's not paid since 2017, that would be appreciated.*
>
> *We wish to part on good terms and your cooperation would be appreciated.*[17]

45. The text message has the appearance of a termination notice. However, as noted above, the Standard Terms do not permit the lessor to terminate a residential tenancy agreement simply because the fixed term period has expired. Accordingly, the lessor did not identify any lawful basis for issuing this statement. Alternatively, if this was intended to be a notice of termination for unpaid rent, it does not meet the requirements for a notice to vacate under clauses 83 or 92 of the Standard Terms.

46. On 13 June 2018 Robson's provided an analysis of the samples. The results showed the presence of bonded (ie. non-friable) asbestos sheeting. The tenants then physically vacated the Cottage but left their personal possessions within it. They advised Mr Hurst-Meyers of the outcome of the testing.

47. On 13 June 2018, Mr Hurst-Meyers wrote to Ms Wellings purporting to accept her "notice to vacate". It is not clear what notice he was referring to, but on 15 June 2018 Ms Wellings responded to Mr Hurst-Meyers advising that they had neither received notice to vacate nor given it.[18] They confirmed that they would no longer pay rent and would be seeking to recover rent paid on the basis that the property was uninhabitable:

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[17] A1 page 139
[18] A1 at 144

> *As you are aware the premises you have leased to us are contaminated with asbestos contrary to the advice of your property manager when we moved into the property at the beginning of our lease this time last year.*
>
> *Our belongings remain in the property because they have been contaminated by asbestos…*
>
> *Please note that we intend to remove out belongings as soon as we know it is safe to do so but advise that if you remove or damage our belongings we will be seeking compensation through ACAT for any losses.*
>
> *We also advise we do not intend to pay further rental payments. Further we have received legal advice that we are entitled to recover rental payments already made to you because the property is not fit for residential occupation …*

48. Once advised of the presence of the asbestos sheeting, Mr Hurst-Meyers promptly organised for another assessment by Mr Hengst, who he organised to attend the property on 16 June 2018. Mr Hengst tested the walls and ceiling and, according to his report, collected dust from the dining room TV, the bedroom drawers and the lounge room storage box. The tenants were not advised of his attendance until that morning, and were not present for the inspection as they were viewing another property.

49. On 17 June 2018, Mr Hurst-Meyers texted the tenants setting out agistment costs for any animals that remains on the property after that date.[19] These costs amounted to $545 per week.

50. On 26 June 2018 the tenants attended the Cottage and found that their belongings had been moved and some were missing. They reported this to the police.

51. On 28 June 2018, the lessor obtained a full report from the Asbestos Assessments ACT (**the AA Report**). This report confirmed the presence of sheet asbestos in the walls, roof and cladding, but found that it presented a low risk. Mr Hengst did not find asbestos in the dust that he tested. A copy of the AA report was provided to the tenants.

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[19] A1 at 142

52. The tenants' evidence is that the AA Report did not put their minds at ease. Ms Blaidd-Nixon frankly stated that she did not believe it,[20] at least in part because they did not believe Mr Hengst tested the correct areas of the Cottage.

53. The tenants determined to source their own report, and arranged for L&D Consulting (**L&D**) to attend the Cottage and undertake testing on 19 July 2018. It appears that L&D was also engaged by other tenants to assess their properties at Caloola on that day.

54. Ms Blaidd-Nixon and Ms Wellings attended this inspection. L&D took samples as directed by the tenants, including from under the bed in the main bedroom and from a pile of dust on the kitchen bench. Ms Blaidd-Nixon explained that: "I asked him to test samples under the bed because the bed is low lying and hard to vacuum under."[21] Ms Wellings directed the assessor to test a small pile of dust on the kitchen bench, amongst other places.

55. The L&D Report, provided to the tenants on 23 July 2019, identified the dust sampled from the kitchen bench and under the bed as containing friable asbestos.

56. At this point, the evidence gets particularly contentious. The lessor says that the tenants planted the asbestos containing material (**ACM**) dust in the Cottage. The lessor suggests this happened on 19 July 2018, when Ms Blaidd-Nixon and her friend, Ms Tabitha Wilde, attended the property to collect her horses. The lessor alleges that while on the property, Ms Blaidd-Nixon entered the Cottage and placed a small pile of dust on the kitchen bench and under the bed. I have considered this in more detail below. In summary, I am satisfied that somebody entered the Cottage and placed the ACM on the kitchen bench sometime between inspection by Asbestos Assessments ACT and the inspection by L&D. I am not convinced it was Ms Blaidd-Nixon.

57. Following the results of the L&D report, the Cottage was sealed. The Glade Group later attended and undertook an environmental clean. Some of the tenants' property was cleaned but some was bagged and disposed of.

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[20] Transcript of proceedings 20 November 2018 at page 224
[21] Transcript of proceedings 20 November 2018 at 221

58. The tenants removed the remainder of their property from the premises on 10 August 2018. A succession of other tradespeople, considered below, then attended to clean or restore the premises.

Consideration of the issues

Who is the lessor?

59. The first question in this case is: is the lessor Mr Hurst-Meyers or the Charity?

60. The tenants argued that the lessor was Mr Hurst-Meyers. Mr Hurst-Meyers argued that the lessor was the Charity. The Charity, to the extent that it was represented at all, agreed that it was the lessor.

61. As I understand the tenants' position, it is that they negotiated with Mr Hurst-Meyers, understood that they entered into a residential tenancy agreement with him, and always considered that he was the lessor. This is an entirely reasonable assumption. It is apparent that Mr Hurst-Meyers signed the lease in his own name. He did not annotate that he signed it on behalf of the Charity. Most of the invoices submitted in evidence were in Mr Hurst-Meyers' name. The tenants dealings were with him.

62. On 7 June 2017 the tenants appear to have attended Mr Hurst-Meyers house to sign a bond loan form. During the course of the hearing, Mr Hurst-Meyers gave detailed oral evidence as to how he laid out all the documentation relating to the corporate structure of the Charity, including its Constitution, its management company, his role, that of the Board, and various other details. This oral evidence was lead after the tenants had given their evidence, during which they were not questioned about it. No mention was made of these events in Mr Hurst-Meyers's previous, extensive, written documentation.

63. The only partial corroboration of this incident is from Mrs Hurst-Meyers, who subsequently gave evidence that she was also present for this meeting. The evidence of Mr and Mrs Hurst-Meyers was largely consistent. The tenants declined an offer to be recalled to address questions about the incident.

64. Nonetheless, the evidence of Mr and Mrs Hurst-Meyers has a degree of incredulity about it. All parties agree that the only document signed on this

occasion was the bond form. The RT Agreement was not. No explanation was offered for why not. Mr Hurst-Meyers says that he showed the tenants a copy of the company search for the Charity, and another company that acted as the management company, in order to advise them of the corporate structure. However, despite stating that he had all the documents in folders, Mr Hurst-Meyers was unable to produce a company search from 2017 to the Tribunal. Additionally, documentation before the Tribunal suggests that Mr Hurst-Meyers only became aware of a discrepancy in ASIC's records as to the identity of appointed directors on about 17 May 2019[22], when that he wrote to ASIC to correct the corporate register and ensure his daughter was appropriately recorded as a director. 17 May 2019 is the date of a company extract provided to the Tribunal.[23] It would be very surprising if Mr Hurst-Meyers has not noticed this discrepancy on any company extract he showed the tenants in 2017. At best, if he showed this document to the tenants, he had not reviewed it himself first.

65. Moreover, having heard the evidence of Mr Hurst-Meyers, I am satisfied that Mr Hurst-Meyers did not have a sophisticated understanding of the legal distinction between himself, the second respondent or other associated legal entities. I am satisfied that he would not have been, in 2017, in a position to explain the distinction to the tenants. I do not accept the evidence of Mr Hurst-Meyers, or that of Mrs Liza Hurst-Meyers, that Mr Hurst-Meyers explained his corporate structure to the tenants in any degree of detail when he met them on 7 June 2017. He is far from the only lessor to neglect to do this. I am prepared to accept, however, that he may have discussed arrangements in broad terms, and that he and Mrs Hurst-Meyers now have an established explanation process and may have been confused as to when they introduced it.

66. Of greater concern to me is Mr Hurst-Meyers' reliance on the documents exhibited in these proceedings at Exhibit R16. The document is headed:

> *Minutes of meeting Accepting new roles for the Hurst-Meyers Charity LTD Board.*

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[22] Exhibit R17
[23] Exhibit R21

ACCEPTANCE OF NEW ROLES FOR the Hurst-Meyers Charity LTD.

MINUTES OF MEETING OF THE BOARD OF DIRECTORS…
Held at: Tilley's Café at Brigalow St & Wattle St, Lyneham, ACT 2602
At: 6:00pm On: 19 September 2016. **(authorising minutes)**[24]

67. The document proceeds to list who was in attendance, that a quorum was present, and to assign various roles to various board members. Amongst other things, it provided:

> *5. Ralph Hurst-Meyers was authorised to act as a primary contact for all Government business and create leases on behalf of the Hurst-Meyers Charity Limited.*

68. The document was signed by Mr Hurst-Meyers, and "Justin James" was cited as the minute taker. It is undated.

69. In his oral evidence, Mr Hurst-Meyers explained that this document was signed on 21 May 2019. That is, it was created and signed nearly three years after the meeting, after the commencement of these proceedings, and after he had received legal advice about the issues.

70. Mr Hurst-Meyers produced an email purporting to be from Mr Justin James, the minute taker. In that email, Mr James asserted that the reconstructed document was an accurate reflection of what happened at the meeting, three years previously. Mr James was not available for cross examination.

71. This 'reconstructed' minutes are completely inappropriate document to put before a tribunal. It is of no weight. I do not regard it as confirming anything about the corporate arrangements in effect on 19 September 2016 or at any time since. Mr Hurst-Meyers's reliance upon it only adds to my concerns about his record-keeping and management practices.

72. Nonetheless, while I am unconvinced by Mr Hurst-Meyers's evidence as to either his authorisation to enter into leases or his explanation to the tenants as to the capacity in which he did so, I do not consider either matter to be determinative of the issue.

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[24] Exhibit R16

73. I am satisfied that Mr Hurst-Meyers was acting as the Charity's agent at all relevant times.

74. An agency arrangement can arise in two circumstances.

    (a) Where a person (the first person) has represented to another person (the second person) that a third person (the agent) has authority to enter into contracts on their behalf; or

    (b) The first person ratifies a contract made by the agent, even if the agent did not have the authority to enter into the contract.

75. At no time did Mr Hurst-Meyers have the legal capacity to enter into a lease in relation to Caloola in his individual capacity. Whether or not he was properly authorised to enter into the lease on behalf of the Charity, the Charity clearly ratified it and has assumed responsibility for it as lessor. Where an agent has no authority, the lessor will be bound by the agent's representation if the lessor subsequently ratified those representations. The Charity has done that. The Charity has accepted responsibility for his actions.

76. For completeness, I note that Mr Hurst-Meyers may have been an undisclosed agent of the Charity. An undisclosed agent may incur personal liability, as well as liability on behalf of their principal. However, the applicants did not suggest this, or pursue that line of argument when the question was raised by the Tribunal, and therefore I do not make any findings to this regard.

77. I am satisfied that the Charity is the lessor.

The second preliminary issue: did the Charity have authority to enter into the RT Agreement?

78. The second issue in this case is whether the Chairty even has the authority to enter into the residential tenancy agreement.

79. It appears that Caloola was originally owned by another company that went into administration. The administrator, Deloitte, took possession of the property and entered into a sale agreement with the Charity. A licence agreement was executed between Deloitte and the Charity on 20 September 2016.

80. The licence agreement provides that the premises may used for the "operations of the licensee" (clause 3.1), with 'Operations' defined in clause 1.1 to mean "…the business operations of the Licensee being that of a charity for disadvantaged persons." There is no general authority to enter into residential tenancies, although the respondents appeared to argue that providing accommodation to disadvantaged persons would fall within clause 1.1. No person associated with Deloitte was called as a witness. There is no evidence before me, nor any submissions, that suggest that the lease to the tenants was part of a 'charity for disadvantaged persons'.

81. Nonetheless, the licensor has taken no issue with the proceedings, and has agreed in writing that:

> *The licence agreement entitled the Licensee to full use of the Licensed Area of the Property. The Licensed Area includes the entire property and all building contained therein. As such, I confirm that Hurst-Meyers Charity Ltd had the right, pursuant to the licence agreement, to enter into rental agreements.*[25]

82. In relation to this passage, and the agreement, Senior Member Mulligan observed in *The Hurst-Meyers Charity Ltd v Khan & Ors* [2020] ACAT 33 (***Khan***) that:

> *Mr Faulder argues that the act of the Charity entering into a residential tenancy agreement with the tenant's breaches sub clause 11.1.*
>
> *With respect, I do not agree with Mr Faulder's analysis for the following reasons:*
>
> *(a) Clause 3.1 of the licence agreement deals with the way in which the licensee can use the property. It provides "the Licensed Area and equipment may only be used for the operations of the licensee and related activities;"*
>
> *(b) The property contained a number of dwellings, including the White House. In my opinion it would be one of the reasonable operations of the licensee to lease out those dwellings;*
>
> *(c) My finding in this regard is supported by the view taken by the licensor who expressly addressed the issue as to whether it was a permissible use of the property for the licensee to lease the dwellings to tenants. He said:[19]*

[25] Tenant's submissions in reply, annexure M, email from David Mansfield (Deloitte) to Mr Faulder, dated 16 July 2018

> *"The license agreement entitled the Licensee full use of the Licensed Area of the Property. The Licensed Area include the entire property and all buildings contained therein. As such confirmed that Hurst- Meyers Charities Ltd have the right, pursuant to the license agreement, to enter into rental agreements."*
>
> *(d) The Charity's act of entering into a residential tenancy agreement, with the tenants, in relation to the White House was a permissible act under the licence agreement and did not "assign, transfer or otherwise dispose of the Licence or any right under the deed;"*
>
> *(e) The licence for the property remained wholly in the hands of the Charity. They operated in accordance with the licence agreement and leased a portion of the licensed property, the White House, to the tenants.*[26]

83. I adopt these observations. The lease was entered into by the Charity and the Charity is the lessor and it was duly authorised to enter into a lease in respect of the Cottage with the tenants.

84. That being decided, I now turn to the tenants' and the lessors' substantive cases.

Tenants' first claim: refund of rent paid

85. The first basis for the tenants' claim for a refund of rent is that neither of the respondents had the requisite authority to enter into the lease. For the reasons set out above, that claim is dismissed.

86. The second basis upon which the tenants are seeking to have the rent remitted is that the property was uninhabitable from the period August 2017 to the end of the tenancy due to the presence of friable asbestos.

87. The basis for this claim may be summarised as follows:

(a) The tenants were unaware that the Cottage was constructed from ACM.

(b) The tenants wished to install additional shelving in the main bedroom and the second bedroom in the property.

(c) The tenants understood from representations made by Mr Hurst-Meyers that Mr Kunkler was the caretaker and an agent of the Charity. They

[26] *The Hurst-Meyers Charity Ltd v Khan & Ors* [2020] ACAT 33 at [63]-[64]

sought his permission, on behalf of the lessor, to install the shelving, and he gave it.

(d) Mr Kunkler installed the shelving, and while doing so he drilled into the wall of the cottage, causing the bonded asbestos sheeting to become friable asbestos, some of which fell to the floor of the bedroom, where it remained until it was identified by testing undertaken by an asbestos assessor.

88. Both parties provided little in the way of expert evidence about the effect of asbestos, or the magnitude of the risk of exposure. However, the following basic facts do not appear to be in dispute. The historical use of asbestos is a recognised problem in the ACT, and Australia, and many older properties in the Territory contain asbestos. ACM are materials that contain bonded (non-friable) asbestos. An example of such material is the asbestos sheeting used to construct some of the walls of the Cottage. The mere presence of ACM material does not render a residence uninhabitable, provided the material is well maintained and handled appropriately, but ACM can be dangerous if it is damaged or degraded in such a way that fibres come loose and the asbestos becomes friable.

89. ACM is different to loose-fill asbestos (such as "Mr Fluffy"), which is subject to a different regulatory scheme. It is possible the distinction was also the cause of some confusion in this matter.

90. Section 12(3)(e) of the RT Act provides that where a property has an asbestos assessment report, this must be provided to any tenant. However, there is no requirement that the owners of a residential property obtain an asbestos report. Where there is no asbestos assessment report for a property, section 12(3)(f) of the RT Act provides that the lessor must instead provide a copy of the generic asbestos advice **(asbestos advice)** with any RT Agreement. I am satisfied that the tenants were not provided with either an asbestos report or an asbestos advice. That amounts to a breach of the lessor's obligations under the RT Act.

91. Mr Hurst-Meyers's evidence is that rather than providing the asbestos advice, he instead advised the parties orally about the presence of asbestos on the property during a meeting at Caloola on 16 June 2017, when he claims he told

Ms Wellings: "it's got fibro. It's got asbestos inside and out, so you can't penetrate the walls."[27] The tenants deny this. They deny ever speaking to Mr Hurst-Meyers about the presence of asbestos on the property.

92. I make several observations about this.

93. First, for reasons set out at paragraph 30, I am not satisfied that the conversation of 16 June 2017 happened at all. If there was a discussion, it was more likely on another occasion.

94. Second, I am not convinced that Mr Hurst-Meyers knew about the presence of bonded asbestos in the property in June 2017.

95. Mr Hurst-Meyers's evidence as to how he came to know about the presence of bonded asbestos at the Cottage is problematic. He said that one of his contractors, Mr Shepherd, told him about the presence of the asbestos prior to the tenants moving in in June 2017. However, Mr Shepherd's evidence during the hearing appears to have been that he advised Mr Hurst-Meyers of the presence of asbestos around the time the tenants vacated,[28] or perhaps around when they moved in in June 2017.[29] On balance, I think it most likely that any discussion between Mr Hurst-Meyers and Mr Shepherd took place after the tenants vacated and Mr Shepherd had inspected the Cottage.[30] I note that while Mrs Hurst-Meyers first suggested that Mr Shepherd gave them a report in 2016,[31] she later conceded she did not know when he was at the property.[32]

96. Mr Hurst-Meyers's asserted knowledge of the existence of bonded asbestos on the property in or before 2017 would also be problematic for the Charity. If Mrs Hurst-Meyers were correct, and Mr Shepherd had provided a report in 2016, that would mean that the lessor was in possession of an asbestos report that they failed to provide to the tenants at the commencement of the tenancy. It would also mean that Mr Hurst-Meyers, even if not in possession of a report,

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[27] Transcript of proceedings 27 November 2018 page 280
[28] Transcript of proceedings 14 August 2019 page 145, lines 45-47
[29] Transcript of proceedings 14 August 2019 page 145, line 44
[30] See, transcript of proceedings 14 August 2019 page 145, lines 26-27
[31] Transcript of proceedings 14 August 2019 pages 111–114, lines 21-28
[32] Transcript of proceedings 14 August 2019 page 135

had been advised of the risk and taken no action to investigate it. Facebook pages tendered in evidence suggest that in 2017 Mr Hurst-Meyers asked Mr Kunkler to work on materials that were very likely ACM.[33] This would be an unlikely or irresponsible instruction if Mr Hurst-Meyers was aware of the risk at the time of making that request. The more likely explanation is that he was confused about the dates and did not know about the presence of ACM until late in 2017.

97. Third, Mr Margerison's evidence was that in 2017 he had raised the issue of asbestos with Mr Hurst-Meyers, and Mr Hurst-Meyers said he would look at his records and get back to him.[34] His evidence was that "[t]*here was never any confirmation that there was but I also believe that there wasn't any confirmation that there wasn't*."[35] It would be remarkably irresponsible for Mr Hurst-Meyers to know about asbestos on the property at this time and yet not advise Mr Margerison when asked.

98. Fourth, at no stage in the correspondence between the parties in June 2017, when the allegations of asbestos contamination first surface, does Mr Hurst-Meyers claim to have told the tenants about the asbestos or indicate that he was aware of the presence of a report. He did not respond to Ms Wellings' claim, in an email, that she had earlier in the tenancy been advised by Mr Kunkler that the property did not contain asbestos.[36] Nor did Mr Hurst-Meyers assert, in the text message quoted at paragraph 44 above (in which he denied giving any authority to Mr Kunkler) that he had advised the tenants of the presence of asbestos in 2017.

99. Mrs Hurst-Meyers gave evidence that representatives of the Charity now warn tenants about the presence of asbestos, much as they do about its corporate structure. No doubt this is now the practice. However, I am not satisfied that this was the practice at the time the parties entered into the RT Agreement, and I am not satisfied that Mr Hurst-Meyers gave any such warning, or even that he knew

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[33] Exhibit A1, page 216 and 237
[34] Transcript of proceedings 14 August 2019 page 82, line 38
[35] Transcript of proceedings 14 August 2019 page 83 lines 3-4
[36] Exhibit A1 page 14

about the presence of bonded asbestos. Indeed, I am satisfied he gave no warning.

100. For their part, the tenants say that Ms Wellings, who had undertaken an asbestos awareness course, asked Mr Kunkler about asbestos and he replied that the property was "completely clear and it had an asbestos check."[37] There is no verification of this assertion, but I have no evidence contrary to it either. It has no bearing on the ultimate outcome of this matter.

The role of Mr Kunkler

101. The RT Agreement, clause 67(1), required that the tenants obtain the lessor's permission before undertaking any modifications to the premises. It is not in dispute that the tenants never sought the direct consent of Mr Hurst-Meyers or the Charity to undertake modifications to the Cottage. Instead, they asked Mr Kunkler.

102. The tenants say that Mr Hurst-Meyers appointed Mr Kunkler as the caretaker and 'agent' and that they approached him for all matters relating to works or repairs on the premises, including for permission to conduct those works. The respondents and particularly Mr Hurst-Meyers deny that Mr Kunkler was acting as an agent or representative. They say he had no authority on the property and was in the process of negotiating an arrangement whereby he would undertake maintenance tasks for payment.

Was Mr Kunkler the lessor's agent?

103. As set out above, an agency arrangement can arise in two circumstances, including where a person represents to another person (the second person) that a third person has authority to enter into contracts on their behalf.

104. I am satisfied that Mr Hurst-Meyers appointed Mr Kunkler as his agent for the purposes of dealing with the tenants on Caloola in relation to maintenance issues.

105. First, the Tribunal has before it a body of correspondence between Mr Kunkler and Mr Hurst-Meyers. In that correspondence, Mr Kunkler suggests that if

[37] Transcript of proceedings 13 November 2018 page 131

Mr Hurst-Meyers wants him to continue working at Caloola, he will need to be paid an acceptable wage. The language presupposes that the relationship is already established and needs to be regularised and paid appropriately. There is discussion over remuneration. The precise terms of the arrangement are of no matter. Whatever the remuneration, it is apparent that at the time of the discussion, Mr Kunkler was performing general maintenance tasks at Caloola and expected some consideration for doing so.

106. Second, I am satisfied that Mr Hurst-Meyers represented to the tenants that Mr Kunkler was the lessor's agent, and that in practice the tenants treated him as such. This was confirmed by the evidence of Ms Ustesheva when she explained what she saw on the 24 June 2017 as follows:

> *...the girls were already living out at the caretaker's house which is the manager's office. They were there for about a week, I think, before that, and when the tenants' from the white house moved out and we moved in and then* [Mr Hurst-Meyers] *came around before that and we were at the house in the living room area, and basically the girls signed a lease and they got copies and* [Mr Hurst-Myers] *appointed Josh as manager, so explained the girls that if there was anything to be fixed to go through Josh and then he left and the girls started cleaning up...*[38]

107. Similarly, Mr Margerison said that he understood that Mr Kunkler had a "caretaker sort of role"[39] and Ms Kennedy described him as "basically the right hand man and the one who was able to get everything done and orchestrate matters at Caloola".[40]

108. Thirdly, there is evidence that Mr Kunkler did undertake various works on the property. Ms Ustesheva said that Mr Hurst-Meyers asked Mr Kunkler to fix a broken bathroom in her house,[41] and she confirmed that he did most of the repairs at the property at that time.[42] Mr Kunkler also confirmed in writing that he installed the shelves.[43]

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[38] Transcript of proceedings 13 November 2018 page 111, lines 31-38
[39] Transcript of proceedings 14 August 2019 page 95, line 2
[40] Transcript of proceedings 14 August 2019 page 41, lines 41-47
[41] Transcript of proceedings page 14 August 2019 page 112, line 5
[42] Transcript of proceedings 14 August 2019 page 112, lines 21-22
[43] Exhibit R3, Tab 16

109. Mr Hurst-Meyers argues that Mr Kunkler was working outside of his authority, and indeed was actively undermining the Charity at times. However, I am satisfied that the tenants were not aware of this and reasonably believed Mr Kunkler was the agent of the lessor and was authorised to approve requests for maintenance and alterations.

110. I am satisfied that Mr Kunkler approved the tenants request for additional shelving. This took the form of regular shelving in some rooms, and installation of a lattice "fence" in the main bedroom. Ms Ustesheva's evidence was that she witnessed Mr Kunkler install some shelving,[44] although where and what isn't clear. Ms Kennedy heard him installing shelves,[45] although she also gave evidence that another person ultimately helped Ms Wellings to install shelves because Mr Kunkler never followed through on agreement to assist with it.[46] Photographic evidence suggests the only shelving in the property was in the main and second bedrooms and next to the kitchen. Ms Wellings and Mr Blundell installed the kitchen shelving, so, the only shelving Mr Kunkler could have installed was that in the main or second bedrooms. I am satisfied he did this in 2017. Ultimately, though, I am not sure it matters whether Mr Kunkler installed the lattice, or someone else did. At some stage, someone installed it, and they drilled through an asbestos wall to do so.

The consequences for the tenants

111. There is no evidence as to the way Mr Kunkler installed the shelving. The tenants submit that, *res ipsa loquitur*,[47] I should assume that because the installation must have involved drilling, some ACM dust must have fallen to the floor during this process, and that it remained there during the duration of their tenancy, until it was identified by an asbestos assessment undertaken by L&D.

112. The is no evidence before me as to whether the dust was of a kind that could have come from drilling into the bedroom wall.

113. Could the ACM dust have remained beneath the bed for a year?

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[44] Transcript of proceedings 13 November 2018 page 112, lines 18-22

[45] Transcript of proceedings 14 August 2019 page 9 at lines 19-21 (or knew that he did - Transcript of proceedings 14 August 2019 page 50 at lines 19-20)

[46] Transcript of proceedings 14 August 2019 page 15 at 7, 19-21 and page 27 at lines 15-20

[47] Latin, for 'the thing speaks for itself'

114. The tenants' evidence was inconsistent as to whether they vacuumed under the bed during this time, with Ms Wellings saying she did not[48] but later clarifying that she vacuumed the room but not under the bed because it was low lying and she couldn't get under it.[49] I accept that it is possible that the tenants did not vacuum under the bed for the duration of the tenancy.

115. More problematic is that Mr Hengst did not see the dust when he undertook his inspection of the Cottage. He was not called to give evidence, so it is impossible to know with any certainty if he looked. In his report Mr Hengst says only that he tested the television in the dining room, the storage box in the bedroom, the drawers in the main bedroom and a storage box in the loungeroom. He does not mention the bed. Mr Hurst-Meyers gave evidence that when he discussed the L&D report with Mr Hengst, Mr Hengst said "no way did I actually miss the kitchen bench and no way did I miss the actual bed" and "I dust tested that thoroughly."[50] However, I do not accept Mr Hurst-Meyers's evidence in this regard. It is contrary to Hengst's report and it is unlikely that Mr Hengst would have tested underneath the bed and failed to mention that in his report.

116. On balance, I accept it is possible that dust from the installation of the shelves fell to the floor and remained under the bed for a considerable period of time.

117. The difficulty, however, is that the dust may have come from one of several other sources in the meantime, including:

    (a) Diego's collection of samples;

    (b) Ms Blaidd-Nixon's own interference with the walls to collect samples;

    (c) the same source as the dust found on the kitchen bench;

118. The pile of dust found on the kitchen bench is particularly concerning.

119. The lessor asserts that kitchen dust pile was planted by the tenants, who planted the dust under the bed at the same time. In support of this argument, Mr Hurst-Meyers pointed out that when the L&D inspectors came to the property, the

[48] Transcript of proceedings 13 November 2018 page 90;
[49] Transcript of proceedings 13 November 2018 pages 94-95
[50] Transcript of proceedings 15 July 2019 page 238

tenants directed them to where to take samples, suggesting they knew they were there. In reply, Ms Blaidd-Nixon said that she asked L&D to sample an area under the bed because that had been least disturbed in the 12 months they had been there.[51] No reasonable explanation was offered for the dust on the kitchen bench, but on the basis of the evidence I am satisfied it would have been obvious to anyone in the room, including the tenants.

120. The tenants, as best I can discern, claim that the asbestos dust was placed on the table by an electrician who attended the property to undertake work on some lights, including one in the kitchen, during June 2018. In their evidence, they made a variety of accusations against the electrician, some of which border on scurrilous. The electrician denied all these allegations. There is little evidence to support them, beyond personal observation, and they are largely irrelevant. Significantly, the light fitting that the electrician worked on was not located over the bench, so the dust could not have fallen accidentally. I consider it inherently unlikely that a qualified and experienced electrician would collect asbestos dust in the manner that the tenants suggest and leave it lying, on a pile, on the kitchen bench of a client.

121. So how else could the asbestos dust have gotten on the bench?

122. Timing wise, I am confident that the Mr Hengst would have identified the dust if it has been on the bench when he inspected the property on 29 June 2018. Accordingly, I am satisfied that the asbestos dust was not present on the kitchen bench when Mr Hengst inspected the property on 29 June 2018. I am satisfied it was placed in the Cottage, deliberately, sometime thereafter. This was, notably, well after the tenants had ceased to reside at Caloola.

123. I note, for completeness, that the lessor attempted, during the hearing on 27 November 2018, to put into evidence a photograph, extracted from what appears to have been a video or camera recording. The lessor alleged that the video was taken by Mrs Hurst-Meyers on 17 July 2018, and that it showed the dust was not present on the bench on that date. Neither the photograph nor the video were filed prior to the hearing. Despite repeated requests from the tenants'

[51] Transcript of proceedings 13 November 2018 page 90, lines 14-16

solicitor, and a direction from the Tribunal, the original image or recording, with the metadata, was not filed. I can only infer that the metadata would not have assisted the lessor. I give the video no weight.

124. The lessor suggests that Ms Blaidd-Nixon planted the asbestos when she attended on 19 July 2018 to collect her horses. She was, on this occasion, accompanied by Ms Wilde. Ms Blaidd-Nixon denies this. Her denials are supported by Ms Wilde, who filed a witness statement and was cross examined. Ms Blaidd-Nixon and Ms Wilder have consistent evidence that they took about 20 minutes, all up, to load the horses, including collecting them and having a cigarette.[52] They denied entering the house. Video evidence provided by the lessor suggests that there is some discrepancy as to time and the order of events as relayed by Ms Blaidd-Nixon and Ms Wilde, but does not otherwise contradict it. While Ms Blaidd-Nixon arguably had a brief opportunity of time to plant the asbestos dust on 19 July 2018, I accept the evidence of Ms Wilde that she did not.

125. The lessor's alternative suggestion is that the tenants, along with other tenants on the property, were part of a conspiracy to construct evidence of asbestos contamination. Again, the lessor has provided little in the way of direct evidence but has asked the Tribunal to make a finding based on inferences to be drawn from the totality of the circumstances.

126. There is some support for the 'conspiracy' proposition from another witness, Ms Kennedy, who the lessor called to give evidence. Ms Kennedy lived at Caloola from October 2017 to January 2018. She was perhaps the most objective party, having not been involved in any of the events of this matter, and having left sometime before the relationships on Caloola truly broke down. She said:

> *...I think* [Mr Kunkler] *planted it but – and if anything the girls may or may not have been aware. If anything, I think they were probably told after the fact, but I don't know if they had anything to do with* it.[53]

127. Unfortunately, the basis upon which she drew this conclusion was not clear.

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[52] Transcript of proceedings 13 November 2020 page 114
[53] Transcript of proceedings 14 August 2019 page 19

128. I understand, from Mr Hurst-Meyers' evidence, that similar events happened in other tenancies. However, those matters were not heard before me. I accept from Mr Hurst-Meyers that several tenants at Caloola were in dispute with him, several tenants were aware of the presence of asbestos by mid-2018, and some of those tenants were angry about it and talking to each other. However, there is no probative evidence before this Tribunal of any individual or individuals having planted asbestos dust in the Cottage or elsewhere.

129. Ultimately, there is insufficient evidence before me to conclude who placed the pile of asbestos dust on the kitchen table. Someone did, as its placement was clearly not accidental.

130. I do not believe that it would be any person associated with the Charity. Placing the asbestos on the bench did not in any way benefit the Charity. I do not accept it was the electrician.

131. It may have been one of the tenants. The tenants had an ostensible motive to place the dust on the bench, being to terminate the RT Agreement and recover rent on the basis the property was uninhabitable, as clearly foreshadowed in their letter to the lessor of 14 June 2018. As well as motive, Ms Blaidd-Nixon also may have had access to asbestos dust, having conceded removing asbestos from a wall of the Cottage on a previous occasion. However timing is an issue. I am not satisfied that Ms Blaidd-Nixon planted the asbestos on 19 July 2018, and it would be pure speculation to suggest she or Ms Wellings did so on another occasion.

132. Both Mr Hurst-Meyers and his witness, Ms Kennedy, suggest others may have been involved. On Mr Hurst-Meyers evidence, there were other residents who were in dispute with him. Asbestos was, by mid-June 2018, known to be present in some if not most of the houses on Caloola. It appears to have been known amongst the tenants that L&D was coming to undertake an inspection on 19 July 2018. It would have been known that the Cottage was empty on this date. It is possible that another tenant planted the dust in the at that time uninhabited, Cottage, in preparation for that inspection.

133. As to its source, the ACM dust in the kitchen appears to be the same composition as that tested in the bedroom. I can conclude no more than that.

134. However, the clear evidence that ACM was planted on the kitchen bench, possibly raises the question in my mind as to whether the dust may have been planted under the bed in the bedroom too. Indeed, in all the circumstances, that the asbestos dust was also placed under the bed, at the same time, is perhaps the most likely of several competing possibilities. This means I cannot be satisfied that it had been there since Mr Kunkler installed the shelves.

135. Whoever placed the ACM dust was an extraordinarily foolish person. That person found ACM, possibly reduced it to dust in such a way that they contained friable asbestos, and then deliberately placed the asbestos dust on the bench. One can only hope they exercised due care.

Was the property uninhabitable?

136. The tenants vacated the property on 13 June 2018 but their property remained in it and they had asserted a right to control entry and inspection that was not consistent with having abandoned the property. Therefore they remained tenants during this time, and remained liable for rent.

137. The tenants seek a full rebate of rent from the date the property became uninhabitable, pursuant to standard term 87(3) in Schedule 1 of the RT Act. Standard Terms 86 and 87, relevantly provide that:

> *86 The lessor or the tenant may, by written notice, terminate the tenancy on a date specified in the notice on the following grounds:*
>
> *(a) the premises are not fit for habitation;*
>
> *(b) ...*
>
> *87 (1)In either case the lessor must give not less than 1 week's notice of termination of the tenancy, and the rent abates from the date that the premises are uninhabitable.*
>
> *(2)The tenant may give 2 days notice of termination of the tenancy.*
>
> *(3)If neither the lessor nor the tenant give notice of termination of the tenancy, the rent abates for the period that the premises are unable to be used for habitation, but the tenancy resumes when they are able to be used again.*

138. The L&D Report of 19 July 2020 recommended that, on the basis of the presence of friable asbestos, access to the Cottage be restricted and an environmental clean be undertaken. Accordingly, I am satisfied that the presence of the dust in the kitchen and the bedroom, as identified in the L&D Report, rendered the property uninhabitable until the premises was appropriately cleaned.

139. I am satisfied that ACM dust was placed on the kitchen bench sometime between the inspection by Mr Hengst on 28 June 2018 and the L&D assessment on 19 July 2018. The property was certainly uninhabitable from this time.

140. I am not satisfied that the property was rendered uninhabitable at an earlier date. The tenants ask that I find that the act of installing the shelving was sufficient to render the property uninhabitable. I appreciate the tenants' concern about the consequences of this act, being the possible presence of friable asbestos dust. However, I do not have the evidence before me to conclude that this alone rendered the property uninhabitable. I do not know how Mr Kunkler installed the shelves, whether dust fell to the ground when he did, whether precautions were taken or whether the property became habitable again later. The evidence about whether the property was vacuumed is inconsistent. Nor can I conclude that the ACM dust collected by L&D from under the bed came from drilling into the walls. While there are several competing scenarios, one of the more likely is that the dust was placed under the bed at the same time as it was placed on the kitchen bench. The tenants bear the onus of proof and must establish, on the balance of probabilities, that the property was uninhabitable as at August 2017.[54] They have not discharged the burden of proof of establishing that the installation of the shelves rendered the Cottage uninhabitable from that date or that ACM dust was present at an earlier time than the dust on the kitchen bench.

141. I note, as an aside, that the RT Act does not clearly deal with a situation, like this, where the premises may be uninhabitable by reason of a hidden risk or danger, but the tenant remains in occupation. It may well have been the legislature's intention that the tenancy continue, but that the rent be liable to be refunded in full, as the premises should not have been let. This is the position

[54] See *Faulder v Tran* [2018] ACAT 2 at [49]

contended by the tenants, and it is not inconsistent with the wording of the legislation. However, the position is not beyond doubt. Clauses 86 and 86(1) refer to a process for terminating the agreement where the premises being 'uninhabitable'. However, clause 86(2) provides that where this process is not followed, "*the rent abates*" for the period that "the premises are unable to be used for habitation," but then somewhat incongruently says that "the *tenancy resumes* when they are able to be used again." Does this suggest that the intention was that both the rent and the tenancy abated for the relevant period? Or merely the rent? The language is rather unclear. If the tenancy abates and the tenant remains in the premises, would an implied tenancy arise? Or an occupancy? A licence? A cessation of the tenancy could have serious consequences both parties, particularly the tenant, yet if only the rent abates, do the parties continue to have obligations under the lease too? Also, is there a distinction to be drawn between a legally 'uninhabitable' property and one "unable to be used for habitation"? The distinction may be splitting hairs, but in this case, the property unquestionably was used for habitation following the work on the walls. The question is whether it should have been. Ultimately, however, these are not matters I need to determine.

142. Turning back to the question at hand: Is it possible to identify a date when the ACM dust was placed on the kitchen bench?

143. While I cannot determine an exact date that the property became uninhabitable, such that rent abated under pursuant to clause 87(3) of the Standard Terms, I am satisfied that the latest date would be 19 July 2018. This is a date I can be positively satisfied that the property was contaminated by friable asbestos and required professional cleaning before it could be lived in again. No party was in doubt as to the situation. Pursuant to Standard Terms 87 of the RT Act, no rent is payable for the Cottage from that date, notwithstanding that the tenants left some personal property in it. The tenants' rent abated in full from 18 July 2018 and they are not liable to pay rent accrued from this date.

The lessor's claim for outstanding rent

144. The lessor calculated rent arrears of $15,570. However, Mr Hurst-Meyers conceded, at hearing, that the rent ledger may be inaccurate.[55] It appears to have been created for the proceedings. The lessor does not appear to have maintained a regular rent ledger or other systematic manner of recording rent received. This is a breach of clause 33 of the Standard Terms, which provides:

> *33 (1) The lessor must keep, or cause to be kept, records of the payment of rent.*
>
> *(2) Those records must be retained for a period of not less than 12 months after the end of the tenancy.*

145. Still, it does not follow that the tenants are relieved from the obligation to pay rent. The obligation remains, notwithstanding the inadequate records. The onus is on the lessor to prove that rent is owed, and how much, and this can be difficult where, as here, the records are not reliable or up to date.

146. It is not in dispute that the tenants did not pay rent for the period 23 May 2018 to the date they vacated and there were inconsistencies with payment prior to that. They removed their belongings on 10 August 2018 and their pets sometime before that. Based on the evidence before it, it appears that arrears of rent, as at this date, were $4,450, assuming a weekly rent of $350. I am satisfied that rent abated, due to the property being uninhabitable, from 19 July 2018. Absent any offset, the tenants owe rent for the period 23 May 2018 to 19 July 2018, a period of eight weeks and two days, which is $2,900 at $350 per week. I deal with the lessor's claim for contra below.

The water issue

147. It is not disputed that for several weeks between September and October 2017, there was 'barely any' water available on the property, for washing, drinking or bathing. The lessor says water was provided to the tenants, but as to how much, the only evidence available is a Facebook conversation between Mr Hurst-Meyers and Mr Kunkler indicating that the tenants were provided with 10 litres of water.[56] This is not an adequate supply for several weeks. A failure of water is an urgent repair pursuant to clause 60 of the Standard Terms and the lessor

[55] Transcript of proceedings 7 December 2018 pages 347-348
[56] Exhibit A1

may be liable for compensation should repairs not be attended to. Indeed, it may well be that the failure of the water supply meant the property was uninhabitable during this period. While I note the lessor's position that water supply may be restricted on a rural property, there is nothing in the documentation to suggest that the lessor advised the tenants of this, and nor did the lessor seek an endorsed term[57] that provided for such contingencies. Nonetheless, the tenants were offered one weeks rent reduction as compensation, and they accepted that as compensation. The Tribunal declines to go behind that now.

The tenants' claim for asbestos decontamination and loss of personal property

148. Some of the tenants' personal property required an environmental clean and some of the rest was disposed of.

149. Clause 55(1) of the Standard Terms imposes an obligation upon a lessor to maintain a property in a reasonable state of repair, having regard to the condition of the premises at the commencement of the tenancy. The lessor is liable for a breach of this section, notwithstanding that they may have used their best endeavours to comply.

150. Clause 52 of the Standard Terms provides that the lessor must not cause or permit any interference with the reasonable peace, comfort or privacy of the tenant in the use by the tenant of the premises.

151. Section 83(1)(d) of the RT Act empowers the Tribunal to make an order requiring the payment of compensation for loss caused by the breach of the residential tenancy agreement, including a breach of the lessor's obligation to maintain the premises.

152. As per the discussion above, I am satisfied that a person other than the lessor, likely maliciously, placed the ACM dust on the kitchen bench. Accordingly, I am not satisfied that the ACM dust in the bedroom or the kitchen was due to the lessor's failure to maintain the premises.

[57] See section 10 of the RT Act which provide a means by which the parties to a residential tenancy agreement may seek endorsement by the ACAT of a term that is inconsistent with the Standard Terms.

153. However, I am satisfied that the earlier penetration of the walls, which may also have resulted in asbestos contamination of the tenant's property, was due, at least in part, to the lessor's failure to advise the tenants of the presence of asbestos, or to warn them of the risk by providing an asbestos advice. The lessor's agent likely also contributed to the situation by installing shelving and thereby implying it was safe to do so, whether or not he expressly told the tenants as much.

154. The tenants abandoned the Cottage because they became aware on the presence of bonded asbestos in the sheeting used for the walls. They were, rightly, concerned that the installation of the shelves on those walls may have contaminated the Cottage, and their belongings, with friable asbestos dust. The magnitude of the risk was not known, and remains unknown, but it was reasonable that the tenants sought to mitigate whatever risk there was by leaving the premises and leaving their property in it. The tenants would likely have been within their rights to seek to have their personal property tested or cleaned because of this breach.

155. Accordingly, I am satisfied that the lessor's failure to provide either an asbestos report as required by section 12(3)(f) of the RT Act, or to otherwise advise the tenants of the presence of bonded asbestos on the property, led to the tenants vacating the property out of concern for their safety.[58]

156. In the intervening period, the Cottage certainly came to be contaminated. Does it follow that the lessor is responsible for the damage to the tenant's personal property, weeks later, by reason of this event?

157. In *Wicks & Stevens v the Hurst-Meyers Charity* [2019] ACAT 92, a case with some similarities to the present, Senior Member Anforth observed that:

> *The owner had a duty to investigate the existence of asbestos and to notify the occupants, both immediately before and during the tenancy. They did not do so, and this failure caused the train of events that led to the termination of the agreement which is also a breach of the occupants'*

[58] I note that the tenants claim to have been positively advised by Mr Kunkler that the property did *not* contain asbestos, but I do not need to be satisfied that conversation happened, as I am satisfied that the lessor's failure to advise the tenants of the possible presence of asbestos is sufficient to have, in the circumstances, lead to a breach of their right to quiet enjoyment.

> *right to quiet enjoyment. It led to the need for the occupants to pack and move with its attendant costs, stresses and inconveniences.*

158. Much the same happened in this case, albeit rather than packing and moving, the tenants left their belonging *in situ,*[59] and were later unable to recover them.

159. In determining whether a breach of contract causes loss or damage, the 'but for' test is generally applied, but this can be difficult where there are concurrent causes of the damage, or where there is, as here, a sequence of tangled events. 'But for' the lessor's failure to meet its obligations to provide the asbestos advice, would the tenants' property have been contaminated? I am satisfied that if the tenants had been properly warned that the walls were ACM, they would not have drilled into them. I am also satisfied that Mr Kunkler's actions in approving the installation of the shelving, and indeed in assisting it, were also a causative factor. What would have happened had they not drilled into the walls is impossible to know, but it is unlikely they would have abandoned the property or their personal property in the circumstances that they did.

160. The rule in *Hadley v Baxendale* [1854] EngR 296; (1854) 9 Exch 341 provides that damages will not be awarded if the loss is too remote. I am satisfied that the complete loss of the tenant's personal property by reason of the intervention of a third party depositing asbestos dust in the house is too remote. However, the need to temporarily vacate the property while an inspection is undertaken, and the need for an environmental clean or disposal of personal property located in the bedroom and potentially contaminated by asbestos from the drilling of holes in the walls is a foreseeable loss.

161. The tenants' evidence as to the value of the personal property they lost was not convincing. I completely understand that it is impossible to produce receipts of precise descriptions of personal property bought years before, but nonetheless there is a burden of evidence that must be met, and the tenants did not meet it. Moreover, it is not possible, on the evidence before me, to separate what property was lost due to the drilling and early vacation of the property, and what needed to be disposed of because of the malicious contamination later.

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[59] A latin term meaning 'in the original place'

162. The substantiated damage is the stress and inconvenience that flowed from the failure of the lessor to advise or warn of the presence of ACM at the commencement of the lease.

163. I will allow $2,320 compensation for the breach of quiet enjoyment that foreseeably followed from the lessor's failure to provide the required information about the presence of asbestos in the Cottage. This sum reflects the cost and inconvenience of having their personal property decontaminated ($1,320), the subsequent loss of their personal property, including the loss of 'priceless' sentimental items, the stress associated with the discovery of the asbestos, and the inconvenience of having to physically vacate the premises early.

The lessor pay for Lancaster and Dickenson asbestos assessment report - $753.50

164. The L&D report revealed the presence of asbestos in the property. The report was commissioned at the tenants' expense, but it is foreseeable that a tenant who is concerned about asbestos, and not advised about it in breach of the RT Act, would incur such an expense. The lessor is to pay for the report.

The lessor's claims

165. The lessor made a number of claims against the tenants. The lessor's counterclaim for outstanding rent is considered above. I address the other claims below.

The lessor's claim for contra

166. Under the terms of the agreement, the tenants had the option of performing 'contra' in lieu of $100 a week for rent.

167. Neither what the contra was meant to be, nor how it would be valued, was defined in the RT Agreement. There does not appear to have been any clear oral agreement either. Broadly, 'contra' seems to have work as directed, including gardening style activities, transporting, fencing, goods, assisting with campers and guests at events held at Caloola, There was also some discussion during the hearing about the tenants assisting with the establishment of horse riding activities on the farm, apparently using their horses.

168. The tenants say they performed the work, the lessor says they did not.

169. In any case, I agree with the decisions of Senior Member Anforth in *Wicks* and Senior Member Mulligan in *Khan,* asking consideration other than in the form of money is a breach of section 15(1) of the RT Act. A term that provides for contra would be in breach of section 9(2) of the RT Act, which provides:

> *(2) A term of a residential tenancy agreement is void if it is inconsistent with this Act (other than a standard residential tenancy term).*

170. It may be permissible for a lessor to offer or for the parties to agree to (but not require) a rent reduction in exchange for services rendered, particularly on, for example, an *ad hoc* basis. However, there must be some way of recording and assessing the work performed or any agreement reached about that reduction. In this case, there were no timesheets, acknowledgments of work performed or a record of any agreement reached. There was no agreement as to how to value any work performed. In the absence of any rent records and the contra issue, it is not possible to determine whether any rent was owing for unperformed contra, and I disallow the claim. I take the same approach in relation to the tenants' claim for payment in respect of contra allegedly performed. Neither party can establish their case on the balance of probabilities.

The lessor's claims for professional invoices

171. There are two bases upon which a lessor may claim compensation for damage under the RT Act:

(a) The tenants intentionally or negligently damaged the property or permitted such damage[60]; or

(b) The tenants failed to return the property in the condition at the commencement of the tenancy, minus fair wear and tear.[61]

172. Additionally, in the case of cleaning, cleaning costs may be claimed where the tenants failed to return the property in the state of cleanliness it was at the commencement of the tenancy.[62]

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[60] Standard Terms, clause 63.
[61] Section 31(a); Standard Terms clause 64(b)

173. The lessor, as the applicant in relation to these claims, bears the onus of proof.

174. Under the RT Act, the starting position is any consideration of a claim for damage made by a lessor against a tenant is a consideration of the condition report at the start of the tenancy. Section 29 of the RT Act sets out the process for the preparation of such a report, and section 30(1) provides that where the appropriate steps have been complied with, a statement in a condition report about the state of repair or general condition of the premises is evidence of that state of repair or general condition on the day the tenant was given the condition report. There is no ingoing condition report before the Tribunal for the Cottage, nor any outgoing report.

175. In his oral evidence, Mr Hurst-Meyers claimed that he "filled in" a condition report and provided it to the tenants on 7 June 2017.[63] He was not sure that Ms Wellings took a copy with her.[64] Although he suggested in evidence that he might have a copy in a filing cabinet at home, he never provided it to the Tribunal. Even assuming that Mr Hurst-Meyers did give the tenants a copy of the condition report, it would be of little value. As at 7 June 2017, the previous tenant had not vacated the property, and the report would have been of little or no evidentiary weight as to the condition of the house when the tenants moved in over a week later.

176. Section 30(3) of the RT Act provides that in the absence of an ingoing condition report, evidence by the tenant about the state of repair and general condition of the premises is evidence of the general condition of the property on the day the tenant took possession. The exact effect of this provision is not clear, but on balance I consider that at the very least it requires that I give consideration to the tenants' oral evidence, and weigh it against the lessor's evidence.

177. On that basis, I have considered the following claims by the lessor.

Cleaning costs of $800

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[62] Standard Terms, clause 64(a)
[63] Transcript of proceedings 15 July 2019 page 196
[64] Transcript of proceedings 17 July 2019 page 267

178. The lessor seeks recovery of the cost of a contract cleaner, Mr Bahadur, cleaning the property. Mr Bahadur was cleaning at Caloola for four days[65], one day of which was spent cleaning the Cottage.[66]

179. Mr Hurst-Meyers submitted that one of his contractors, Mr Shepherd, cleaned the property on 23 June 2017. Mr Shepherd appears to have recalled vacuuming the carpets after the previous tenants moved out, but there is no invoice or other documentary evidence to support this and Mr Shepherd had no record of having done so.[67] As there is no evidence of professional cleaning being conducted before the tenants moved in, I do not accept that the tenants were required to return it to Mr Hurst-Meyers in a standard commensurate with a professional clean.

180. I accept that the previous tenant cleaned the Cottage to a reasonable standard. I accept the evidence of the tenants that the Cottage was not pristinely clean when they moved in, and that they had to clean it. However, I don't accept the property was not reasonably clean. Individual standards differ. The subjective nature of cleanliness is one reason why it is important that the parties prepare an ingoing condition report.

181. The evidence of Mr Shepherd is that the property was a mess when he attended on 23 June 2018,[68] with clothing on the floor and various other items strewn around, including animal faeces on the floor and empty food containers. However, the question before the Tribunal is not how the property was during the tenancy, but the condition of the property when it was returned to the lessor. This is especially the case given there were no regular inspection reports and there is no evidence that concerns were raised with the tenants.

182. Photographs filed by applicant purport to show the property as at 7 to 10 August 2018.[69] Accepting for present purposes that the dates are accurate, they show a property that is worn and grimy, with calcium build-up in the shower, scuff marks and some damage to doors, blinds and the like. It also shows that the

[65] Transcript of proceedings 19 July 2019 page 400, lines 40-42
[66] Transcript of proceedings 19 July 2019 page 402 lines 34-35
[67] Transcript of proceedings 14 August 2019 page 144, lines 4-9
[68] Transcript of proceedings 14 August 2019 page 141, lines 28-32
[69] Exhibit A1 pages 66-124

carpet was removed from the main bedroom. The photographs are not particularly clear, but the property does not appear to be filthy.

183. Another of the lessor's contractors, Mr Bahadur, gave evidence that he undertook cleaning at the request of the lessor in early September 2018[70], well after the tenants vacated. He described a property in a very poor condition, with a "black thing on the toilet seat"[71], filthy carpets and mould in the bath, dirt behind the garage door and a fridge that needed wiping out. The tenants' photographs do show a black stain in the toilet. However, the Cottage did not have a bath or a garage, and the tenants also deny that they had a fridge. A comment made by Mr Baradur's that "all of them…they need lots of maintenance before they rent it out"[72] suggests that he may have cleaned several properties. The discrepancies between his evidence and that physical description of the house means I cannot be satisfied he was giving evidence about the Cottage.

184. Moreover, if Mr Bahadur's dates are correct, he attended the property after it had been cleared for entry by L&D Consulting. The clearance certificate issued in the wake of the removal suggests that carpets had been removed from one room and an environmental clean undertaken of the bedroom and the kitchen. Mr Hurst-Meyers's evidence was that the environmental clean removed all of the carpets, the curtains, and basically stripped the entire property.[73] In addition to the asbestos cleaners, other persons also entered the property between 13 June 2018 and 10 August 2018. This may have contributed in some way to the disordered state of the property.

185. In any case, the property was initially vacated because of the tenants' fears about friable asbestos, and then ultimately abandoned because of the presence of it. The presence of that asbestos made it impossible for the tenants to clean the premises and return it to the state they had acquired it in. The property needed to be cleaned in any case. The tenants are not liable for this cost.

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[70] Transcript of proceedings 19 July 2019 page 400 lines 29-33; note the invoice at R16 is misdated.
[71] Transcript of proceedings 19 July 2019 page 402, line 4
[72] Transcript of proceedings 19 July 2019 page 402 lines 8-10
[73] Transcript of proceedings 27 November 2018 page 296

Twin City Plumbing - $502.15

186. The lessor seeks reimbursement for repair work undertaken to the plumbing on 28 June 2018. The invoice is unclear as to the nature of that work. The tenants were not living at the property as this time.

187. The lessor says that the tenants are responsible for this cost because they "sabotaged" the water pipes during the tenancy – in other words, that they negligently or deliberately damaged the water infrastructure. Mr Hurst-Meyers made this allegation, forcefully, on several occasions, but no evidence was offered beyond the assertion. The tenants deny it.

188. Mr McInerney, the director of Twin City Plumbing gave evidence about the leak, stating that "there were leaks everywhere and we did what we could."[74] Mr McInerney was not able to confirm that the leaks were deliberate, only that they had not had leaks like that before mid-2018.[75] There were no other witnesses, and no evidence beyond assertion. It is not even apparent that this alleged act of vandalism was reported to the police. In the circumstances, I cannot be satisfied that the tenants are liable for the plumbing repairs. This claim is dismissed.

Kosta Pizania - $2,800

189. This claim relates to repairs of damage and removal of rubbish the lessor says the tenants left behind when they abandoned the property.

190. The claim is supported by a witness statement from Mr Pizania dated 1 November 2018 and an invoice dated 18 July 2019.[76] The invoice is dated a year after the tenants abandoned the property. It was, on Mr Pinanza's evidence, constructed solely for the purpose of these proceedings. I place minimal weight on the invoice.

191. I accept that the tenants did leave some personal belongings behind on the premises. Some of these items, such as the pig pen, were outside the Cottage.

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[74] Transcript of proceedings 19 July 2019 page 423, lines 17 to 18.
[75] Transcript of proceedings 19 July 2019 page 400, lines 32-36
[76] Exhibit R16 at

Mr Bahadur confirmed he saw some general rubbish.[77] Some of this property the tenants likely had no opportunity to remove before they vacated the property, fearing it uninhabitable. However, other detritus left around the outside of the building could have been collected along with the horses, or the other animal or at some other time after the property had been decontaminated. Mr Hurst-Meyers requested that they do this.[78] I am not satisfied of is what portion of that rubbish was the tenants, and what portion was somebody else's particularly given the numerous tradespersons who had attended by September 2018, but I am not satisfied on the balance of probabilities that the tenants must pay some proportion of the rubbish removal costs. I award $100.

Painting house and laying carpet - $1,000

192. The lessor seeks payment of an invoice from Wayne Barrett for "paint of premises + repair" [79] The receipt was written in July 2019, a long time after the work was completed on 10 August 2018.

193. In the absence on an ingoing condition report, the Tribunal does not know the condition or age the paintwork at the time the tenancy was commenced. I am not able to determine whether the need to repaint the premises was due, whether in part or in whole, to fair wear and tear or to damage.

194. Regular repainting is a matter for the lessor. Repainting to repair negligent or deliberate damage to the property by a tenant may be recoverable. There is no evidence that the tenants negligently damaged the paintwork. I am not satisfied that there is any evidence in support of the contention that the tenants should pay to have the property completely repainted. There in insufficient information on the invoice to consider apportioning the costs. This application is dismissed.

Bathroom repair - $1,188

195. The lessors sought recovery of costs for repairs to the bathroom made by M2M Building Services. The invoice is dated 15 July 2018. The invoice covers sheeting over a wall in the shower invoice with villawood, wet seal, grouting,

[77] Transcript of proceedings 19 July 2019 page 406, lines 15, 22-23
[78] Exhibit R12, Tab 54
[79] Exhibit R16

removing debris and sealing drill holes in the walls to the dwelling. Restoring wet seal and grout are likely maintenance issues.

196. The drill holes are clearly damage, and there appears to have been a hole to a wall in the shower recess as well. There is evidence from Mr Margerison that, while living in the Cottage, he put a piece of cardboard on the shower wall, to cover a hole about the size of a bread plate.[80] The existence of such a hole, in what may be asbestos sheeting, is itself concerning, and suggests that the property was in poor condition and in need of repairs when the tenants moved in. Still, bathroom aside, the walls appear to have been in serviceable condition. The drill holes are clearly damage.

197. In the absence of an ingoing condition report, I am unsure as to the extent of the damage at the time of the commencement of the tenancy. There is no evidence that the tenants negligently or deliberately damaged the bathroom walls. The tenants are, however, required to restore the property to the condition the received it, including removing 'improvements' such as shelves, even if they had the lessor's agreement to make them.[81] I will allow $100 for the sealing of the drill holes in the Cottage.

Broken window - $543

198. The lessor says that the tenants broke the window, and the tenants deny this. Again, there is no ingoing condition report. The tenants provided photographs that showed that a crack existed in the kitchen window prior to the tenancy commencing.[82] This is the only credible evidence before the Tribunal and it suggests the crack predates the tenancy. The lessor must establish, on the balance of probabilities, that the tenants negligently or intentionally damaged the window. There is insufficient evidence to establish this. I dismiss the claim.

199. I note for completeness that it is unclear that the claim has been paid. The only evidence that the lessor could provide was a bank statement indicating that a payment of $543 was made to somebody. There is no other supporting evidence. For reasons I have stated above, I do not accept the uncorroborated

[80] Transcript of proceedings 7 December 2018 page 386, lines 8-43
[81] Maroney v Bullard [2016] ACAT 33
[82] Exhibit A1

evidence of Mr Hurst-Meyers and do not accept that this invoice relates to the window in the Cottage.

Replacement carpets

200. Again, with no incoming condition report, it is difficult to know whether and to what degree the carpets damaged during the tenancy. It is also unclear how old the carpet was before replacement, or whether it had met its life expectancy of 10 years.[83] In the circumstances, I am not satisfied that the carpets are of more than nominal value in any case, and will not award the lessor compensation. I dismiss this claim.

Electricity usage

201. The lessor claims electricity bills of $2,120, stated in the claim at R16 to be $2,720.90 less "$600 for Adam and Justin James"). It is not entirely clear how this amount is calculated. The lessor relies on a "statement of account" dated 22 October 2018 for "cottage & workshop" that shows the outstanding electricity debt as at 22 June 2018 as $2720.90.[84]

202. In most tenancies, the tenants will have the electricity account connected in their own names and be responsible to the utility provider for the bill. Where this does not happen, the tenant is liable for costs for the consumption of electricity,[85] but not the supply. However, a lessor is responsible for the cost of services for which there is not a separate metering device.[86] The Cottage was not separately metered, sharing the connection with another building on the property, the "workshop". Accordingly the tenants are not responsible for the electricity bill.

203. As there was no separate metering for the horse paddocks, the tenants are not responsible for that either.

204. Even if this were not the case, or even if I could accept that no electricity was used at the workshop and therefore the meter was effectively only for the Cottage, the lessor has not put before the Tribunal the relevant electricity bills.

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[83] ATO Depreciation Schedule
[84] R2 at Tab 29
[85] RT Act standard terms clause 46
[86] RT Act standard terms clause 42(c)

There are only two bills of relevance. The first is the email coversheet of a bill for the "cottage and workshop" ending 9 July 2018. It does not separate consumption and supply cost. The second is an update to that bill, titles "final electricity" to 19 June 2018, which does break down supply and consumption for the additional period, but not for the previous one.[87] Other bills filed by the lessor[88] include a bill for "Caloola Farm & Portables" and another is a bill for "Farmhouse Caloola Farmhouse 2". These appear to be irrelevant. I note the lessor says he gave the bills to the Ms Wellings.[89] She denies this, but it is of no consequence whether he gave them to her or not. The matter was in dispute, and replacement bills, which are in the lessors name, could have been obtained from the utility provider, but were not. I dismiss this claim.

Animal agistment

205. There is conflicting evidence about the arrangements for the tenants' animals. Their agistment costs appear to have been included in the original agreement, apparently on the lessor's assumption that the tenants would assist with a riding school or riding activities, a venture that never came to pass. After the tenants vacated, the lessor attempted to unilaterally impose agistment rates. Even if the latter were effective, this not a matter that falls within the ambit of the residential tenancy agreement and it is not a matter that I can adjudicate under the RT Act. I dismiss this claim in its entirety.

Asbestos removal

206. In order to find that the tenants were responsible for the cost of asbestos removal, I would need to be satisfied, on the balance of probabilities, that they placed the ACM dust on the kitchen bench and under the bed in the bedroom. For reasons stated above, I am not so satisfied. I therefore dismiss this claim.

Conclusion

207. The tenants' claim against the first respondent is dismissed.

208. The second respondent is to pay to the tenants the sum of $3073.30:

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[87] Exhibit R1 page 53.
[88], Exhibit R2, document at Tab 46
[89] Transcript of proceedings 14 December 2018 page 564

(a) $753.30, being the cost of the Lancaster and Dickenson asbestos assessment; and

(b) $2,320 compensation for loss occasioned by breach of quiet enjoyment.

209. The tenants are to pay to the lessor $3,100:

(a) the outstanding rent of $2,900; and

(b) $100 for garbage removal; and

(c) $100 for repair of the drill holes;

to be offset against the amount at order 2.

210. The Office of Rental Bonds on behalf of the Territory is directed to release the sum of $36.70 to the lessor and the remainder of the bond to the tenants.

……..
Presidential Member H Robinson

Dates of hearing	6 August 2018, 13 November 2018, 20 November 2018, 27 November 2018, 7 December 2018, 14 December 2018, 21-22 May 2019, 15 July 2019, 19 July 2019, 14 August 2019
Solicitors for the Applicant:	Mr Faulder, ACT Tenants Union