AUSTRALIAN CAPITAL TERRITORY RESIDENTIAL TENANCIES TRIBUNAL

CITATION: **Julian Moufarrige and Shane McNamee v Peter Vickers and Susan Vickers [2008] ACTRTT (15)**

RT of 319 of 2008

Catchwords: **Compensation for breach of quiet enjoyment and failure to repair by landlord.**

Tribunal: A. Anforth, Member

Date: 26 September 2008

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 319 of 2008

Julian Moufarrige and Shane McNamee
(Applicant/Tenant)

AND:

Peter Vickers and Susan Vickers
(Respondent/Landlord)

DECISION

Tribunal **:A. Anforth**, Member

Date **:4 July 2008**

Decision **:**

The Respondent is to pay the Applicant the sum of $4700.00 being compensation for failure to repair defects arising during the tenancy; failure to deliver premises in a reasonable state of repair at the commencement of the tenancy; and breach of quiet enjoyment.

The above amount is to be paid on or before 3rd day of August 2008.

…….
Member

AUSTRALIAN CAPITAL TERRITORY)
RESIDENTIAL TENANCIES TRIBUNAL) NO: RT 319 of 2008

Julian Moufarrige and Shane McNamee
(Applicant/Tenant)

AND

Peter Vickers and Susan Vickers
(Respondent/Landlord)

REASONS FOR DECISION

1. The present dispute concerns a tenancy at unit 50 Waterfront, 9 Eastlake Parade Kingston Act. The premises are new luxury premises and the Applicant was the first occupant of those premises.

2. The tenancy commenced on 7 December 2007 at a rent of $1250 per week and a bond of $5000.00 was paid.

3. By way of brief overview, the premises suffered a range of significant defects from the start of the tenancy which required repairs. The landlords authorised those repairs to be carried out over the period from the commencement of the tenancy and some of these repairs were ongoing when the tenants filed their application in the Tribunal on 15 April 2008. The defects themselves caused the tenants substantial loss of amenity and loss of quiet enjoyment over this period. This loss was exacerbated by the fact that tradesmen were at the premises carrying out the various repairs for 51 days in this period. The tenants lodged a claim with the Tribunal on 15 April 2008 in which they sought an order to terminate the fixed term lease on the basis of this loss of amenity and quiet enjoyment and to be relevantly compensated.

4. Annexed to the application was an attachment which set out the relevant chronology of events. The attachment read:

> We the tenants of 50/9 Eastlake Pde believe the Landlord to be in breach of the lease. Below is a list of activities and maintenance that have significantly impeded our use and enjoyment of this property.
> The main issues being
> *Oven reported as faulty in first week of tenancy. (Oven non operational). Oven not replaced for another 13 weeks. Owner waited on replacement under warranty
> *Floorboards in Dining, lounge, and corridor significantly bowed. Issue reported on ingoing inventory. They were removed by the builder in the latter part of December and not re-laid until the end of February.
> *Whole row of tiles ripped up on the balcony in the first week of March. This was done to test for leaks into apartments below. Tiles still not replaced.
> *Fly screens missing for sliding doors in the West facing living area, reported on ingoing inspection. Not replaced until the last week of January. There are serious heat issues with the living area. Sheer curtains have little impact on screening the sun, as a result of not being able to open our sliding doors to circulate air we had to run our air-conditioning 24 hours during a very mild summer

*Water poured out of the air-conditioning unit in the ceiling flooding the kitchen. This required a piece of gyprock 1 metre by 1.5 metres adjacent to the kitchen be removed. Builder has said that everything will be fixed by Wednesday next week. Approx 6 weeks for work to be completed. We denied access this week to work men for personal reasons.

I believe all of the five above mentioned maintenance issues to be in breach of the standard residential tenancy terms, clause 57, under the heading Lessor to make repairs.

All of these repairs have or are taking well over 4 weeks without any agreement with us the tenant to extend the period of maintenance.

Further issues that have had a cumulative negative effect on the tenancy
*2nd week in March, Feature insert on wall collapses and breaks ornamental vase. Repaired within 1 week
*Second week of tenancy, laundry floods as a result of a concrete slab blocking the air-conditioner overflow, repaired straight away.
*February, Builder conducts acoustic tests on our air-conditioning system due to noise complaints from other residents
*Concierge organizes acoustic tests for our unit. Asks us to put felt on the bottom of our dining room chairs and on our chairs on the balcony to dampen noise transference to apartments below.
*March, We become fully aware of noise transference issues within the development when the vacant unit next to us is occupied. They can clearly hear my television and stereo when played at a normal level and we can clearly hear their piano as if we were in the same room. I can also clearly hear them walking up and down the stairs and walking in their bedroom. This is highly disruptive as the noise from next door is heard at its loudest from my bedroom.

March, Both my car and my flat mate's car are broken into, with windows being smashed. Not the fault of the Landlord but a poor reflection on security. There have been three occasions and many cars broken into since our tenancy commenced.

On the 6th March after being told the Landlord wishes to place the apartment on the market I sent Gabrielle Hume of PRO an email. I requested that we be let out of the lease or be compensated.. Our tenancy to that point had been a revolving door for trades people. 1 was frustrated and informed her that we would not pay any further rent until we had a reply. We actually have continued to pay rent. The request to sell was seen as provocative given the floorboards had just been replaced, after approximately 13 weeks of being in ill repair.

March 7 Gabrielle replies to my letter and informs me she is waiting on a report from the concierge (concierge organizes maintenance in this development)

Sat March 29 Frustrated at not receiving a response from PRD in relation to the maintenance report from the concierge I meet with the Landlord at our mutual agreement in the apartment.

The landlord offers us a generous rent reduction from $l,250p/w to $950 p/w for three months. The only catch is we are to provide unrestricted access to the selling agent.

We respond by asking for the offered rent reduction for four months, the equivalent of how long we had been in the apartment and that we provide access every Saturday for several hours. I state that it is our preference however, to be released from the lease.

I don't receive a response from the owner, so I email him letting him know that I would appreciate a response in the next two days, as our rent is due.

An email from the landlord is received on Monday April 7th saying that he will be unable to have an answer that quickly as he is busy with work and I will hear from either the selling agent or the managing agent.

Time keeps ticking and, we have paid a further $10,864.00 since our initial request to be released or compensated. We now want to be compensated for the disgraceful condition the apartment has

been in and the continued interruptions throughout our tenancy, as well as being released from the lease. We had an option of renting far cheaper properties but our expectation was that for the weekly rental of $1,250.00 per week this apartment would be an amazing place to live.... It has been a horror story and more significant maintenance will be required to rectify the acoustic issues.

Finally I would like to conclude by saying I think the managing agent primarily has been fine during our tenancy. The main issue I have with them is that they have not responded to us since March 7 in Relation to a maintenance report.

5. The tenancy agreement and the emails of 6, 11, 31 March 2008 and 2, 7 April 2008 referred to above were annexed to the application.

6. The landlord's agent response on 7 March 2008 referred to above read in full:

I refer to your email to me of Thursday 6 March 2008 with the subject 50/9 Eastlake Parade and our previous conversations in relation to your tenancy.

Unfortunately new developments can bring some initial teething problems and as you commented these have been out of the lessors control.

Whilst I understand that you have had a number of tradespeople attend to your property, it is my understanding that these repairs have been undertaken within Clause 82 of The Schedule: Standard Residential Tenancy Terms. The lessor and this office have worked endlessly to have all repairs undertaken within a timely manner, unfortunately some do take time when we are locked into warranty bookings etc. It is my understanding that there are no maintenance items outstanding with the exception of the light fitting that you have just reported. This has been logged with the concierge for repair.

I have spoken with Adam Johnston from the concierge's office who claims that at no time have they entered your apartment without your approval. He will supply a log from the alarm company to verify this. I have also asked him for a detailed list of all works carried out on your unit for the Lessors reference. As I told you in our last conversation the lessor and this office have not been made aware of the tradespeople entering your unit for testing etc. I will ask the concierge to contact me in the first instance should it be necessary in the future so that I can monitor this more closely.

The approval for a spa bath is the Body Corporates'. We forwarded on your request, but as yet have not has a response. This office has followed this request up with the Body Corporate on a number of occasions, I have been told that the executive committee are still in discussions on this matter we will advise you as soon as the Body Corporate makes a decision on the request.

Your statement "We will pay no further rent until we have received a response" contravenes the Schedule: Standard Residential Tenancy Terms, as I am sure you understand as the Director of a Real Estate Agency. Your next rent in the amount of $5,432.00 is due on 10th March 2008. Should your rent not be receipted in this office by the date you will be in breach of Clause 26 and as such may receive a Notice to Remedy, we will then seek Lessors instructions should you not remedy the breach.

Clause 66 of The Schedule: Standard Residential Tenancy Terms states that you are to Observe rules of the body corporate. The House Rules for The Waterfront clearly states the "Residents must not create any noise in an apartment in on Common Property likely to interfere with the peaceful enjoyment of other residents, especially between 9pm and 8am". The Rule goes on to state that "Common sources of noise are music, loud voices, washing machines, dryers, slamming doors, dragging or moving furniture especially on hard surfaces such as on the winter garden etc." If your neighbours feel that you have not adhered to this rule, than they are entitled to make a complaint, no matter what complex

In relation to the request for Bill Lyristakis from Berkley's Real Estate to take a buyer through your unit. Apart from the fact that I discussed this with you and you agreed, the lessor is entitled to sell the property at any time. Whilst timing is unfortunate given the issues you have had I have been instructed by the lessor to organise access for him. The contract is being prepared at present then I will confirm a suitable time with you.

> As you are aware an energy rating is required for the contract. ACTNOW inspect have requested access to prepare the EER. Can you please authorise the release of your mobile number for this to occur.
>
> I will be in contact shortly once I have all information confirmed from the concierge. I will be out of the office this week, should you have any queries please contact Jane Barrett of this office.

7. On 12 May 2008 the landlords filed a statement setting out their defence to the claim made by the tenants. That statement read:

> The maintenance list as supplied by the tenants is a true & correct reflection of the issues that they have faced. These issues have been as a result of a new building project and totally out of the control of Mr & Mrs Vickers.
>
> Following a meeting with Mr Geny McCabe of Stocklands, as at 8th May 2008 all maintenance issues have been deal with and there are no outstanding matters.
>
> Mr Vickers met with Mr McNamee discussing all his issues and immediately offered compensation in the order of $ 300.00 per week. Taking the rent from $ 1250 pw to $950 per week for the next 3 months. At that time Mr Vickers was in a difficult financial situation and needed to place the property on the market. This adjustment of rent was to further compensate them for the ongoing inconvenience.
>
> Since that meeting Mr Vickers has sourced other options and the apartment will not be placed on the market for sale.
>
> With all maintenance complete and the apartment not for sale we request the Tribunal not issue a Termination Order. The owners support compensation being awarded to the tenants as already offered March 29th.
>
> Mr & Mrs Vickers regret the disruption that both tenants have endured and thank them for their co operation with PBS Builders. Through out this period both the owners and this office have liaised with the Concierge, Stocklands & PBS Builders to monitor the works and encourage all parties to have utter respect for the tenants. We trust that now they will be able to enjoy Penthouse living.

8. The matter was listed before the Tribunal on 16 May 2008 before a differently constituted Tribunal. On that day Mr McNamee appeared on behalf of both tenants and Ms Hume, real estate agent appeared on behalf of the landlords. The matter was adjourned to 19 may 2008 for hearing.

9. On 19 May 2008 Mr McNamee appeared for both tenants and Ms Hume appeared for the landlords. Following a hearing of the parties the Tribunal found that the landlords had breached the terms of the residential tenancy agreement by reason of:
   (a) the premises not being in a reasonable state of repairs at the commencement of the tenant (prescribed term 54(1)(b) of the Act)
   (b) the premises not being maintained in a reasonable state of repair during the tenancy (prescribed term 55 of the Act)
   (c) the disturbance to the tenants' quiet enjoyment caused by the various tradesmen carrying out repairs (prescribed term 52 of the Act).

10. The Tribunal was satisfied that the landlords' breaches caused a substantial loss of use of the premises and loss of quiet enjoyment by the tenant that justified the termination of the tenancy and ordered pursuant to section 43 and prescribed term 90(a) of the Act that the tenancy be terminated as of 10am on the 30 June 2008.

11. In coming to the above conclusion the Tribunal was particular, but not exclusively, influence by the fact that the landlords' tradesmen been present at the premises for 51 days since the commencement of the lease on 7 December 2007 to the filing of the application on 15 April 2008, and the fact that the tradesmen had left the premises with very substantial holes in the floor at two points in the premises in prominent traffic zones, each of which was easily big enough for the tenants to fall into and potentially suffer serious harm. These holes were not covered or guarded in any way. The Tribunal expressed its surprise that any responsible landlords or tradesmen could or would allow such a dangerous situation to exist from mid December 2007 to the end of February 2008.

12. The issue of the quantum of the tenants compensation was adjourned to a later date with orders for the tenants to file and serve statements setting out the extent of the inconvenience and distress they claim to have suffered.

13. The tenants later filed their statements pertaining to the distress and inconvenience suffered. The statement read:

> Further to the ruling made in our favour relating to the Landlord being in breach of the tenancy agreement. We wish to seek compensation for the significant disturbance relating to our capacity for quiet enjoyment of the residence.
>
> The ruling primarily related to maintenance not being completed in a timely manner. The items of maintenance were;
>
> 1) Stove faulty at the beginning of tenancy, 13 weeks to replace (Became aware of this in the first week of tenancy during a dinner party that was duly cancelled). My flatmate uses an oven in normal circumstances regularly so this was a source of great frustration.
>
> 2) Floor boards in dining, lounge and corridor Ripped up in mid December and not replaced until the end of February. Approx 11 weeks to be replaced after being ripped up. This matter had a major impact on our day-to-day activities in the apartment. Both my flat mate and I chose to restrict visits from our younger nephews and nieces. We were concerned for there safety.
>
> 3) Fly screens missing on main living area sliding doors at the start of tenancy and not replaced until last week of January. The apartment is North/West facing, only has sheer curtains and there are no other windows in the room that open to release hot air. Even during a mild summer we were forced to use the air-conditioning continuously otherwise the conditions were stifling.
>
> 4) 1 by 1.5 metre hole in ceiling caused by air conditioning leak. Reported second week in March work substantially completed by the second week in May. Approx 9 weeks to be substantially completed. This made the apartment look like a construction site for an unnecessary long period of time. The location of the work adjacent to the kitchen is prominent.
>
> 5) Row of tiles ripped up on balcony in Early March not replaced until the middle of April. This work added to the feeling that we were residing in a construction site. This maintenance issue mainly impacted on us restricting visits by younger relatives.
>
> There have been a host of other maintenance issues that have negatively affected our private enjoyment that were also noted on our initial application as well.
>
> When considering our claim for compensation we request you consider firstly the weekly rent we are paying of $1,250 per week.. When we selected this property we planned to be able to entertain friends, family and business colleagues in one of Canberra's most sought after locations, a prestigious penthouse apartment overlooking the lake. Items 1,2 and 4 have made it completely out of the question to entertain, impossible to enjoy for personal use and certainly more than stripped away any prestige associated with justifying any where near the paid rent.

We also request you consider that items 1,2,and 3 were not in working condition, over the Christmas period. Both my flat mate and I were anxious to entertain our respective families who were very excited to have Xmas at a 'beautiful' new venue. We were unable to provide the penthouse for either family's Xmas.

Our private enjoyment has also been significantly disrupted not only by the disgraceful state of repair of the property but also by the magnitude and intensity of the days when maintenance has been required.

There have been a total of 51 days of maintenance at the date of the first hearing, more by the time this compensation request is heard.

My flat mate and I are both involved in the running of our own businesses. This allows us in normal circumstances to spend time working from home as well as the freedom to come home during the day to relax during the week, (we both work weekends).

We have found the monotonous regularity of the maintenance overwhelming, highly stressful and have both had to significantly compromise our routines to fit in with trades so we would finally have a habitable residence. This has been the case for the entirety of our lease.

We wish you to consider the cumulative impact of the ongoing maintenance, the poor state of repair of the apartment and the inconvenience and cost of departing early from the lease when making your ruling for compensation.

14. In response to the tenants statement immediately above, the landlords' agent filed the following statement:

Response to the Compensation claim for50/9 Eastlake Parade Kingston.

The lessor is extremely disappointed that the Tribunal issued a Termination Order and that he has be cited as in breach of the tenancy agreement due to the fact that all issues were out of his control and attended to by the resident builders. In no way did he not respond immediately to all noted issues.

In light of the Termination Order the Lessor requests the release of the tenancy agreement is ample compensation and no further be issued. It should be noted:

1-The events as listed by the tenants were over a 4 month period and did not occur at the same time. This therefore did not render the property in a 'disgraceful state of repair" as indicated by the tenants.

2-Floorboards in the living room — the Tenant at the hearing said "there were 5 to 6 floorboards lifted. The internal area of the 2 storey Penthouse apartment is 190m2 which therefore is quite insignificant. They were not in a dangerous state as noted by the tenant.

3-Flyscreens were at the property - the railing to the base was missing. This was repaired. To release the hot air one simply needed to open the glass door — Ducted air conditioning is included in the apartment and to be the most effective in all areas you would keep the door closed.

4-Air conditioning leak - repaired promptly allowing for the plaster to dry etc — once again out of the owners control.

5-A row of tiles lifted on the terrace against a wall to check draining - the terrace is 205m2 — quite insignificant given the area, It should be noted the Lessor provided a $50,000 Stainless Steel BBQ unit with sink storage etc for the tenants enjoyment on the 205m2 terrace.

The Lessor was disappointed that his brand new luxury apartment experienced initial teething issues;. With the exception of the flyscreen installation all occurring after the tenancy commenced. An owner surely could only be considered in breach if a maintenance issue was reported and not acted on. Each & every item brought to the Lessors attention was acted upon promptly, as confirmed

> by the tenant at the hearing. It was unfortunate that some took time to remedy with suppliers being shutdown over the Xmas break.
>
> It should be noted that the not installed flyscreen was pointed out to Mr McNamee at the time of his initial inspection of the property prior to signing a tenancy agreement and he was not worried about it, nothing was due t0 the installed. He agreed to occupy before it was repaired…

15. The matter was next listed before the Tribunal on 4 July 2008 to determine the issue of compensation. On that occasion Mr McNamee appeared for both tenants and Ms Hume appeared for the landlords.

16. After hearing the parties the Tribunal awarded the tenants the sum of $4,700.00 in compensation calculated on a comparative verdicts basis as follows:
    (a) For 13 weeks of the faulty stove
    $300.00
    (b) For 10 weeks of the dangerous holes in the floor
    $2000.00
    (c) For 6 weeks of non flyscreen
    $200.00
    (d) For 9 weeks delay in repairing the leading roof
    $100.00
    (e) For 8 weeks of investigations and repairs to terrace
    $100.00
    (f) For the repeated visits from the tradesman and their disturbance
    $2000.00

17. On 9 July 2008 the landlords' agent sought reasons for decision restricted to a "breakdown of the compensation …awarded".

18. During the course of both hearings the Tribunal explained to the parties the relevant statutory provisions and principles of law it relied upon. The relevant statutory provisions are:

> 52. The lessor shall 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.
>
> 54(1) At the start of the tenancy, the lessor must ensure that the premises, including furniture, fittings and appliances (unless excluded from the tenancy agreement), are—
>
> (a) fit for habitation; and
>
> (b) reasonably clean; and
>
> (c) in a reasonable state of repair; and
>
> (d) reasonably secure.
>
> 55.(1) The lessor shall maintain the premises in a reasonable state of repair having regard to their condition at the commencement of the Tenancy Agreement. The tenant shall notify the lessor of any need for repairs.
>
> 57. Subject to clause 55, the lessor shall make repairs, other than urgent repairs, within 4 weeks of being notified of the need for the repairs (unless otherwise agreed).

19. The landlords' duty at the commencement of the tenancy is to hand over the premises in a "reasonable" state of repair (prescribed term 54(1)(c)). The adjective

"reasonable" qualifies the "state of repair of the premises" and does not qualify the nature of the actions or endeavours of the landlord to carry out the repairs (*Moore v Tidy* unreported SASC 13/8/92 Rhodes J; *Dupont v Lawrence* (1997) NSWRT 213). Prescribed term 54(1)(c) imports an objective test concerning the actual state of the premises irrespective of the landlords motivation or efforts.

20. The landlords' duty at the commencement of the tenancy is to ensure that all defects that are detectable by reasonable inspection ("patent defects") are remedied prior to the premises being handed over. Prior to the commencement of the tenancy the landlords are not required to have the premises inspected by relevant tradesmen in a search for defects, but the landlords are required to remedy any defects which are apparent on a reasonable inspection by them or their agent (*Jones v Bartlett* [2000] HCA 56; *Northern Sandblasting v Harris* (1997) 188 CLR 313; *NSW v Watton* [1998] NSWSC 589; *Gration v C Gillian Investments P/L* [2005] QCA 184; *Francis v Lewis* [2003] NSWCA 152).

21. In the present case three of the five defects of which the tenants complained (see paragraph 16 above) were apparent on a reasonable inspection by the landlords or their agent at the commencement of the tenancy. The flyscreen was not present at all, the floor boards were visibly warped and the stove was non functional. In relation to the stove the defects would have been apparent upon the non-technical act of testing the oven to see if it worked prior to handing over the premises.

22. The landlords' duty to repair defects arising during the tenancy ("latent defects") commences upon the landlords' receiving notice of the development of the defect (*Jones v Bartlett* [2000] HCA 56; *Northern Sandblasting v Harris* (1997) 188 CLR 313; *Ahluwalia v Robinson* [2003] NSWCA 175; *Sakauo v Williams* [2005] NSWCA 405; *Weeks v Bond* [1997] QCA 349). In the present case the defects relating to the airconditioning in the ceiling and the tiles on the balcony fall into this category.

23. Once the landlords are put on notice of the defects arising during the tenancy, prescribed term 57 allows the landlords 4 weeks to carry out the repairs. In the present case neither the repairs to the ceiling arising from the leaking air conditioner nor the tiles on the balcony were repaired within 4 weeks.

24. If the landlords are given the benefit of the doubt to the effect that the defects to the stove, floor boards and flyscreen were not known to the landlord at the commencement of the tenancy and were not apparent to reasonable inspection at that time, then those defects must then be treated as latent defects arising during the tenancy, from the time the tenants put the landlords on notice of the existence of the defects. The landlords then have 4 weeks to carry out the repairs. In the case of each of these defects the landlords took much longer than 4 weeks from the date of notice to carry out the repairs. To this extent not much turns on whether these defects are categorised as "patent" or "latent" because the landlords are still in breach of their contractual obligations.

25. The landlords' case is essentially that defects are to be expected in new premises and once the defects were brought to the landlords' attention they moved as expeditiously as circumstances permitted to carry out the repairs. The landlords

pointed to delays in obtaining approval from warranty insurers for the stove, delays attributable to the tradesmen, delays attributable to Christmas and defective work on the part of the tradesmen. The Tribunal explained to the landlords' representatives that these considerations went only to the reasonableness of the landlords' efforts to carry out the repairs which was not a relevant consideration. The contractual duty to repair is one of strict liability not requiring any element of fault or negligence on the landlords' part (*Robinson v Fretin* [2006] NSWSC 598; *Dupont* (supra)) modified only by such qualifications as are found in the Act and residential tenancy agreement. As indicated above the qualification of "reasonableness" in prescribed term 54(1)(c) does not qualify the landlords conduct or efforts to effect the repairs.

26. In relation to the breach of quiet enjoyment caused by the presence of the tradesmen, the landlords contended that because the tradesmen were attending to repairs that any disturbance caused to the tenants by the tradesmen could not be a breach of prescribed term 52. Unfortunately for the landlords the Full Federal Court in *Worrall v Commissioner for Housing of Act* [2002] FCAFC 127 determined otherwise on the principle that each of the prescribed terms of the tenancy agreement are independent and if the landlords' repairs detracts from the tenants' quiet enjoyment then the tenants have been deprived of the most important right that the tenancy agreement conferred upon them.

A. Anforth
26th September 2008