

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

CLAY v HATALA (Residential Tenancies) [2016] ACAT 128

RT 585/2016

Catchwords: **RESIDENTIAL TENANCIES** – reimbursement of rental bond
– fair wear and tear

Legislation cited: *Residential Tenancies Act 1999* standard term 64

Cases cited: *Abela, Michael Joseph (Landlord) v Walker, Danielle Amanda (Tenant)* [1997] NSWRT 15
Acetelli, Angelo (Landlord), Acitelli, Mirella (Landlord), and Romano, Oriana (Landlord) v Farrant, Anthony Brett (Tenant), and Allan, Jan (Tenant) [1997] NSWRT 191
ACT Housing v Russell [1999] ACTRTT 10
Alamdo Holdings Pty Ltd v Australian Window Furnishings (NSW) Pty Ltd [2006] NSWCA 224
Bell & Bell v Boccola, Campbell and Lawrence (2009) ACAT 26
Burgin v Primrose (2010) NSWCTTT 383
Cooper v Westpac General Insurance Ltd [2007] ACTCA 20
Fitzpatrick v Wu (2001) (unreported NSWRT 01/16425)
Konstantopoulos v R & M Beechey Carriers P/L [2011] NSWCA 388
Maroney v Bullard [2016] ACAT 33
Patmore v Hamilton [2014] VSC 275
Taylor v Webb [1937] 2 KB 282
Westpac General Insurance Ltd v Cooper [2006] ACTSC 91

Tribunal: Senior Member A Anforth

Date of Orders: 10 October 2016
Date of Reasons for Decision: 23 November 2016

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) RT 585/2016

BETWEEN:

JAMES CLAY
Applicant/Tenant

AND:

VLADIMIR HATALA
Respondent/Lessor

TRIBUNAL: Senior Member A Anforth

DATE: 10 October 2016

ORDER

The Tribunal orders that:

1. The applicant is to pay the respondent \$1800.00
2. The respondent is to refund \$280.00 from the bond of \$2080.00 which is already in the respondent's possession.
3. The applicant is to advise the respondent of their bank account details within 7 days and the respondent is to deposit the \$280.00 within a further 7 days.

.....*Signed*.....
Senior Member A Anforth

REASONS FOR DECISION

Summary

1. The above decision was given orally on 10 October 2016. The respondent has sought reasons for that decision.
2. The respondent is the lessor of residential premises in the ACT and the applicant was a tenant of those premises.
3. Initially the landlord entered a tenancy agreement with Wufeng Zhou and Aaron Zibarrah commencing on 1 February 2015 for a term of 12 months finishing on 29 February 2016. The rent was \$2253.00 per month and the bond was \$2080.00. During the term, the tenancy and the right to the bond was assigned to the present applicant as the new sole tenant.

History of proceedings

4. On 20 June 2016 the tenant, Mr Clay, lodged an application with the tribunal seeking a return of the bond except for \$74.30 for one additional day of rent for 1 March 2016. The tenant appointed Mr Zhou as his representative for the purposes of the proceedings.
5. On 14 July 2016 the lessor filed a response. The lessor asserted that the premises had been left unclean and in need of repairs when the tenant vacated. The lessor asserted that the tenant's representative had told the lessor that he could keep the whole of the bond for those cleaning and repairs. The lessor said that the cleaning took three days during which the premises could not be leased.
6. The matter was listed for a preliminary conference on 20 July 2016. Mr Zhou appeared for the applicant/tenant and the landlord appeared in person. The landlord had already made a claim on the bond and received the whole of the bond. The tenant had not filed any opposition to the release of the bond with the Office of Rental Bonds.
7. Procedural orders were made for the filing of the tenancy agreement, the condition reports, witness statements, invoices, photos and an itemisation of the quantum of the claim made. The matter was listed for hearing on 10 October 2016 at 2pm and the parties were notified.

8. On 30 August 2016 the lessor filed:
 - (a) a copy of the tenancy agreement commencing on 1 February 2015;
 - (b) a statement saying that he did not have a copy of the ingoing condition report and no outgoing condition report had been prepared;
 - (c) itemised the claim as:
 - (i) cleaning: 45 hours @ \$25 per hour = \$1125;
 - (ii) repairs to curtains in the hall, bedrooms and living room: 5 hours @ \$50 per hour + materials \$15 = \$265;
 - (iii) patching holes in walls where plaster had come off: 2 hours @ \$50 per hour + materials \$10 = \$110;
 - (iv) repainting of two bedrooms following repairs to walls: 6 hours @ \$50 per hour + materials \$100 = \$400;
 - (v) gardening: 3 hours @ \$35 per hour + tip fee \$28 = \$133; and
 - (vi) one day of rent due to late vacation = \$74.30.
 - (d) a statement by the respondent in which he asserted that the tenant's representative had informed him that he could keep the whole of the bond for the cleaning and repairs; he personally spent fifteen hours cleaning and co-ordinated the other cleaning and repairs;
 - (e) a statement by Branislav Hatala who said he spent fifteen hours cleaning the premises;
 - (f) a statement by Margareta Sugianto who said that she spent fifteen hours cleaning the premises;
 - (g) a statement by Bernard Davis saying that he spent sixteen hours repairing the curtains.
9. On 29 September 2016 Mr Zhou filed a response on behalf of the tenant. Mr Zhou said that he did tell the lessor that he could keep the cost of cleaning from the bond but he did not realise at the time the extent of the claim the lessor

was making. He said that he did not have permission from the tenant, Mr Clay, to make this statement.

10. The response said that the carpets had been cleaned with a machine the tenant had hired, there were no holes in walls, any deterioration in the state of the walls and curtains were just fair wear and tear, the leaves in the garden were cleared using a blower machine. There were five photos of the gardens attached.
11. At the hearing on 10 October 2016 there was no appearance by, or for the applicant/tenant. The respondent/lessor appeared in person. The respondent said that there had been no contact between the parties since the conference. The Tribunal also had had no contact with the applicant or Mr Zhou about attendance at the hearing. The only contact involved the filing of documents in response to the directions made following the conference.
12. The Tribunal was satisfied, on the basis of the evidence filed by the parties, that plaster had come off walls resulting in “holes”, that plaster had come off walls because of the removal of sticky tape and/or picture hooks, that there were tears to curtains and carpet stains. These things do not constitute fair wear and tear.
13. Further Mr Zhou agreed that he had told the lessor that he could retain the cost of cleaning from the bond and did not otherwise deny that cleaning was required. The fact that he did not have the authority of the tenant to make the statement is not relevant because he clearly acted in his dealings with the lessor, and with the tribunal, as though he did. The Tribunal told the lessor that a claim of \$50 per hour for the time spent by family members to clean would not be allowed. It was not a reasonable assessment of the true cost. Family members are not conducting a business as such, they have no overheads, they pay no tax on the earnings and they are not necessarily trained or skilled cleaners. The Tribunal has traditionally allowed some recompense for the time spent and I was satisfied that a claim of \$25 per hour was reasonable. This gave a total of \$800.00.
14. The cost of the curtain repairs was a fixed cost to the landlord of \$350.00 which he had paid.

15. The carpet spot removal was allowed at the same and came to \$100.00.
16. The painting of three rooms required patching of the walls, the usual preparation, protection of carpets, the time to paint and the cost of the paint. A total of \$450.00 (inclusive of paints) was allowed.
17. Gardening and tip fees were allowed at a total of \$100.00.
18. The above gave a total of \$1800.00.
19. On 20 October 2016 Mr Zhou wrote to the Tribunal saying that he had been sick on 10 October 2016 and unable to attend. He sought reasons for the order made and contended that some of the claims should have been seen as normal wear and tear. Mr Zhou expressed surprise that the Tribunal would take the respondent's word for the state of the premises in the absence of photographs.
20. It is unfortunate that the tenant's representative was sick and did not notify the Tribunal of his unavailability for the hearing. The tribunal was entitled to proceed in his absence. He had been afforded the opportunity to file and serve evidence in support of his case. While a response was filed, he did not file any evidence that went to the issue of the state of the premises beyond merely asserting that there was fair wear and tear and providing photos of the garden which did not show much. There was no evidence filed responding to the respondent's witness statements. The tenant also did not oppose the release of the bond by the Office of Rental Bonds to the lessor. It could not be said that the tenant sought to protect his interest with much diligence.
21. It is true that the Tribunal did not have the benefit of photographs or condition reports which would normally be expected and no doubt would have been helpful. Whilst the absence of these items does make the Tribunal's task more difficult and does not assist the lessor to discharge his evidential onus, it is not the case that their absence necessarily or axiomatically means that the lessor's claim must fail. The lessor's oral evidence is evidence. The written statements from the witnesses are evidence. The tenant's admission that cleaning needed to be done is evidence.

22. In addition to the above forms of evidence, it is also the case that the Tribunal is aware from its general experience of the common level of charging by those who clean and repair residential premises. In this case the Tribunal did not allow commercial rates for the work done by the family members, but allowed only \$25 per hour for the hours substantiated in the oral evidence of the respondent and the written statements of the witness who did the work. The landlord and his family are entitled to something for the work they were put to and \$25 per hour is a modest sum. Some of the costs were for materials (paint and cleaners) and tip fees. The alternative is for lessor to automatically call in commercial cleaners, carpet cleaners, painters and carpenters with the consequence that the cost would increase probably by a factor of five or more. This is not in the interest of either party.
23. In terms of the respondent's submissions concerning 'fair wear and tear' (prescribed term 64 of Schedule to the *Residential Tenancies Act 1997*) the Tribunal notes and at the time of giving the oral decision was aware of the following.
24. In *Westpac General Insurance Ltd v Cooper* [2006] ACTSC 91, Tamberlin J held that the onus of establishing that damage is 'fair wear and tear' rests on the tenant, affirmed on appeal in *Cooper v Westpac General Insurance Ltd* [2007] ACTCA 20. See also *Maroney v Bullard* [2016] ACAT 33 at [29]-[47].
25. In *Abela v Walker* (1997) NSWRT 15 and *Acetelli v Farrant and Allan* (1997) NSWRT 191, the presently constituted Tribunal sitting in the NSW jurisdiction considered the meaning of fair wear and tear and said:

196. I turn now to the issue of the meaning of 'fair wear and tear'. There does not appear to have been much consideration of the boundaries of this concept by the superior courts. The most useful consideration I have been able to locate is the UK Court of Appeal in Taylor v Webb [1937] 2 KB 283 of which the relevant part reads:

The phrase 'wear and tear' is a very old English idiom and the clause 'fair wear and tear excepted' has been common in leases and tenancy agreements for two or three centuries. It is, like many idiomatic expressions, complex in meaning: it implicitly refers to both cause and effect, and in each aspect it covers two classes of disrepair: (a) that brought about by the normal or ordinary operations of natural causes,

such as wind and weather, in contra-distinction to abnormal or extraordinary events in nature such as lightning, hurricane, flood or earthquake; (b) that brought about by the tenant or other person present on the premises with the consent of the tenant, either unintentionally or as a normal incident of a tenant's occupation in the course of the 'fair' ... use of the premises for any purpose for which they were let ...

197. If I correctly understand the court's reasoning, and particularly the reference to fair wear and tear being both the 'cause and effect', the court is construing the phrase in two parts:

(a) the word 'fair' goes to the cause, ie the nature of the use by the tenant which gave rise to the damage concerned (see also Regis Property Co v Dudley [1959] AC 370 to the same effect), and in particular, an intentionally caused damage can never be fair wear and tear.

(b) the words 'wear and tear' go [to] the effect ie how substantial is the damage concerned.

198. The cases on the latter point appear to limit 'wear and tear' to deterioration occurring naturally as a consequence of normal use (Terrell v Murray (1901) 17 TLR 570) and preclude abnormal damage even if it arises from a catastrophe never contemplated by either party (Manchester Bonded Warehouse Co Ltd v Carr (1880) 5 CPD 507).

26. See also *Bell and Bell v Boccola, Campbell and Lawrence* (2009) ACAT 26 where the ACT Tribunal, after considering previous cases, notably *Taylor v Webb* [1937] 2 KB 282, said (at [302]):

Thus it can be said that fair wear and tear generally relates to damage or deterioration that happens through the ordinary day to day use of a place by the tenant (carpet is worn down by walking upon it, plaster cracks as building settles, garden mulch breaks downs over time) and by the operation of natural forces (sunlight fades carpets, rain rusts garden furniture). The tenant is not liable to compensate the lessor for any loss or cost relating to such deterioration or damage. Careless or negligent use of the premises by the tenant, where that negligence causes deterioration of the premises will render the tenant liable for associated cost.

27. In *Patmore v Hamilton* [2014] VSC 275 Digby J held that water damage caused by a leaking roof was not fair wear and tear. His Honour said that fair wear and tear involved damage sustained by ordinary as opposed to extraordinary events. More specifically 'wear' referred to damage caused by the use of the premises and 'tear' referred to damage caused by the impact of ordinary natural causes such as weather.

28. In *Alamdo Holdings Pty Ltd v Australian Window Furnishings (NSW) P/L* [2006] NSWCA 224 and *Konstantopoulos v R & M Beechey Carriers P/L* [2011] NSWCA 388, the NSW Court of Appeal, in commercial leases cases, noted that ‘reasonable wear and tear’ did not include deterioration in the premises that could be prevented by reasonable conduct on the tenant’s part.
29. In *Fitzpatrick v Wu* (2001) (unreported NSWRT 01/16425) the Tribunal said the standard by which ‘fair wear and tear’ is assessed is an objective one. The Tribunal eschewed the endeavours of a fastidious and obsessive lessor to deny that any deterioration was ‘fair wear and tear’. See also *ACT Housing v Russell* [1999] ACTRTT 10; *Burgin v Primrose* (2010) NSWCTTT 383 to the same effect.

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Senior Member A Anforth

HEARING DETAILS

FILE NUMBER:	RT 585/2016
PARTIES, APPLICANT:	James Clay
PARTIES, RESPONDENT:	Vladimir Hatala
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR RESPONDENT	N/A
TRIBUNAL MEMBERS:	Senior Member A Anforth
DATES OF HEARING:	10 October 2016