ACT CIVIL & ADMINISTRATIVE TRIBUNAL

FAULDER v TRAN (Residential Tenancies) [2018] ACAT 2

RT 729/2017

Catchwords: **RESIDENTIAL TENANCIES** – compensation for delay in carrying out non-urgent repairs – rejection of claim for inconvenience of attending premises for repair work – onus of proof in making claims for compensation

Legislation cited: *Residential Tenancies Act 1997* s 83; standard terms 52, 54, 55, 63

Cases cited: *Baltic Shipping Co v Dillon* (1993) 176 CLR 344
But v Baldwin [2016] ACAT 9
Fawzi El-Saidy v NSW Land and Housing Corporation [2011] NSWSC 820
Strahan v Residential Tenancies Tribunal NSWSC 30008 of 1998
Salem & Gizgeez v Abeygunasekara & Jeevanthan [2011] ACAT 9
Shadid v Australasian College of Dermatologists [2008] FCAFC 72
Withers-Norris v Pastrello [2016] ACAT 95
Woolfe v Albekka [2011] ACAT 22

Texts/Papers cited: Anforth, Christensen and Bentwood, *Residential Tenancies Law and Practice New South Wales* (6th edition)

Tribunal: Presidential Member G McCarthy

Date of Orders: 9 January 2018
Date of Reasons for Decision: 9 January 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) RT 729/2017

BETWEEN:

CHARLIE FAULDER
Applicant

AND:

VINCENT TRAN
Respondent

TRIBUNAL: Presidential Member G McCarthy

DATE: 9 January 2018

ORDER

The Tribunal orders that:

1. Within 28 days from the date of this order, the respondent pay the applicant $154.50 comprised of:
   (a) $16.50 for delay in repairing a blind;
   (b) $80.00 for delay in repairing an alarm;
   (c) $38.00 for delay in providing a key; and
   (d) $20.00 for delay in servicing a vacuum cleaner.

……..
Presidential Member G McCarthy

REASONS FOR DECISION

1. On 31 August 2016, the applicant leased a residential property in Palmerston, ACT, from the respondent for a fixed term of 52 weeks. The rent was set at $420 per week, meaning $60 per day.

2. On 26 April 2017, the applicant served a notice to remedy on the respondent alleging that the respondent had failed to maintain the premises in a reasonable state of repair regarding the ducted heating, contrary to clause 55 of the Schedule to the *Residential Tenancies Act 1997* (**the RT Act**) and failed to make repairs within the time frame required under clause 57 of the RT Act.

3. On 5 June 2017, the applicant served a notice of intention to vacate the premises on 20 June 2017 on the ground that the respondent had failed to remedy the alleged breach identified in the notice to remedy. However it was not necessary to determine whether the respondent was in breach, or the applicant was entitled to terminate the lease, because the respondent accepted the applicant's termination of the lease.

4. Under the lease, the applicant had permission to keep three cats at the premises. Subsequent to the termination of the lease, the respondent sought to retain $120 from the bond to cover the cost of pest fumigation. The respondent relied on clause 2 of the additional pet clauses in the lease, which provided:

> *The tenant/s are responsible for the property to be professionally cleaned, pest treated/fumigated internally and externally and the carpets steam cleaned and treated for fleas upon vacation of the property.*

5. Although the clause was unconditional, the applicant disputed liability to pay for pest fumigation on the grounds that her cats did not have fleas and flea infestation was not reported in the respondent's final inspection report.

6. On 18 July 2017, the Office of Rental Bonds referred the dispute to the Tribunal. However, it was not necessary to determine whether the applicant was liable under clause 2 of the pet clauses for pest fumigation because the respondent did not press the claim. On 18 August 2017, the Tribunal ordered by

consent that the Office of Rental Bonds release the disputed sum ($120) to the applicant.

7. However the matter did not end there because, on 28 August 2017, the applicant made an application against the respondent seeking compensation totalling $4,822.50 on six grounds, plus the application filing fee ($150). The respondent disputed liability in relation to each ground, and the applicant's compensation claim proceeded to hearing. I have dealt with each ground in turn.

Cleaning

8. The applicant alleged that the property was not reasonably clean when the tenancy commenced, and that she spent two days cleaning the property. She referred to the ingoing condition report in which she reported that it took her "2 days to clean". She also relied on photographs of the property at commencement of the tenancy. She claimed 7.5 hours for her time at $39 per hour to a total of $292.50.

9. The applicant relied on clause 54(1)(b) of the Schedule to the RT Act, which provides:

> *At the start of the tenancy, the lessor must ensure that the premises … are … reasonably clean.*

10. The applicant then relied on section 83(d) of the RT Act, which permits the Tribunal to make an order requiring the payment of compensation for any loss caused by the breach of a residential tenancy agreement.

11. I am satisfied that the Tribunal has jurisdiction to award compensation in relation to a terminated lease. In *Withers-Norris v Pastrello*[1] the Tribunal noted with approval an earlier decision of the Tribunal in *Salem & Gizgeez v Abeygunasekara & Jeevanthan*[2] where the Tribunal stated that compensation by way of rent reduction under section 71 of the RT Act can be considered while a tenancy is still in existence, and that a lump sum compensation payment under section 83(d) of the RT Act can be considered when a tenancy has terminated.

---

[1] *Withers-Norris v Pastrello* [2016] ACAT 95 at [48]
[2] *Salem & Gizgeez and Abeygunasekara & Jeevanthan* [2011] ACAT 9 at [8]

12. Whilst the Tribunal has jurisdiction, in my view the claim for cleaning must fail.

13. What constitutes ‘reasonably clean’ will vary significantly according to the nature, age, proposed rent and circumstances of the subject premises. Opinions upon whether a property is ‘reasonably clean’ will invariably and reasonably differ. Like any other prospective tenant, the applicant was able to inspect the premises and decide for herself whether the premises were sufficiently clean for her purposes. If not, she was able to look elsewhere or to request the respondent to improve the cleanliness as a pre-condition to her renting the premises.

14. Sometimes a prospective tenant will not have had an opportunity to inspect the property before renting it, or will have received assurances that the property will be ‘professionally cleaned’ before commencement of the tenancy, and arrive to find it (in the tenant’s opinion) in need of cleaning. In situations of this kind, if a tenant believes that a lessor is in breach of clause 54(1)(b) of the Schedule and wishes the lessor to rectify the breach, it is incumbent upon the tenant to say as much. Where clause 54(1)(b) is directed to cleanliness “at the start of the tenancy”, a lessor must be given the opportunity to remedy the breach or to dispute it. If the alleged breach cannot be resolved, the Tribunal can hear the matter and (if satisfied that the property was not reasonably clean at the start of the tenancy) make an order under section 83(b) of the RT Act requiring performance of clause 54(1)(b) by reference to the facts.

15. In this case, there is no evidence that the applicant requested the respondent to improve the cleanliness of the premises either as a pre-condition of her renting the premises, or following her commencement of the tenancy or at all. It also appears that the applicant did not make a claim in relation to cleaning or allege a breach of clause54(1)(b) until after her termination of the tenancy.

16. I reject the proposition that a tenant can rent premises and then, after termination of the lease, become entitled to compensation arising from the tenant choosing to clean the premises (either themselves or by engaging a third party) to a higher standard that the tenant prefers without having given the lessor an opportunity to rectify or deny the alleged breach.

17. In this regard, I draw upon the Tribunal's decision in *Woolfe v Albekka*[3] where the Tribunal accepted on the evidence that the house was "extremely dirty at the commencement of the lease" but "was not however of a mind to reimburse [the tenant] for her own time spent on cleaning the house to a standard she found acceptable." The Tribunal found the tenants' claims regarding cleaning to be "unreasonable in view of the age of the house and the fact that the tenants were prepared to lease the premises notwithstanding its general state of disrepair and uncleanliness."

18. In my view, if a tenant chooses to rent premises without requesting the lessor to address any perceived lack of cleanliness, they take the cleanliness of the premises as they find it. That proposition is built into the tenant's reciprocal obligation under clause 64 of the Schedule at the conclusion of the tenancy to "leave the premises … in substantially the same state of cleanliness" as it was presented at the commencement of the tenancy.

19. I reject the claim.

Dining room blind

20. On 2 September 2016 the applicant reported that the dining room blind was faulty. She contended that the lack of a working blind meant her neighbours could see directly into the living area of the property. She said the faulty blind also created difficulty in keeping the property warm.

21. The blind was not repaired until 11 October 2016, when a tradesman supplied and installed a new rod and curtain. The applicant claimed compensation of $2.50 per day for a period of 41 days (2 September to 11 October 2016) to a total of $102.50.

22. In my view, the repair of the blind was a non-urgent repair. It follows that the respondent was required under clause 57 of the Schedule to make the repair "within 4 weeks of being notified of the need for the repair", meaning by 30 September 2016. Also, the applicant's compensable loss was minimal because, as stated in her email to the respondent's agent sent on 15 September

[3] *Woolfe v Albekka* [2011] ACAT 22 at [21], [29] and [44]

2016, the applicant addressed her concern about lack of privacy by hanging her own curtain from the curtain rail as an "interim measure". Compensation should also be in proportion to the daily rent.

23. I regard the breach as minor. I allow 11 days (1 October to 11 October 2016) at $1.50 per day: $16.50.

Alarm

24. On 2 September 2016 the applicant reported that the security alarm was not functioning. She contended that the alarm was not usable until 9 November 2016 when Chubb Home Security attended the premises, reset the alarm codes and showed her how to use the system. She contended that as a single person, living alone, the security alarm was an important aspect of the premises and that she should be compensated for the lesser security. The applicant claimed $5 per day for a period of 68 days (2 September to 9 November 2016) to a total of $340.

25. The alarm rang, if activated, but was not a "back to base" alarm system. The respondent's agent explained that the alarm system was not faulty: the problem was that neither they, nor the respondent nor the previous tenants had used the alarm system or knew the codes in order to use it. The respondent's agent, my view, attended to the issue with reasonable diligence (speaking with the owner and then locating a company that could re-set the codes) but it was not until 9 November 2016 that the alarm was re-coded. However, the reasonableness of the agent's actions to rectify the breach does not excuse the breach.[4] The applicant was continuing to pay full rent, but without the benefit of the alarm that formed part of the rented premises.

26. I am not persuaded that re-coding the alarm was an urgent repair. There is no evidence that the applicant enquired about the alarm system before renting the premises or how to use it upon renting the premises. The alarm, if activated, might have served as a further deterrent to potential thieves but the locks on the doors and windows meant that the premises could still be made secure. Many residential premises do not have an alarm system at all.

---

[4] *Withers-Norris v Pastrello* [2016] ACAT 95 at [90] – [91]

27. I accept nevertheless that the alarm, as part of the rented premises, needed to be repaired under clause 57 of the Schedule, meaning by 30 September 2016. However I am not persuaded that the absence of the alarm was a significant detriment to the applicant's use and enjoyment of the premises.

28. I allow 40 days (1 October to 9 November 2016) at $2.00 per day: $80.00.

Keys

29. On 2 September 2016 the applicant reported that she did not have keys for the front or rear security screen doors or to some of the window locks. The respondent's agent lent the applicant the agent's "office set" of keys to see whether any of them fitted the security doors. On 8 September 2016, the applicant advised the respondent's agent that one of the keys fitted the rear screen door.

30. Over several weeks, the agent liaised with the respondent in an effort to locate a key to the front screen door. It was not until 26 October 2016 that the respondent sent an email to his agent advising that he thought he had found the keys and asked if he could drop them in one evening. Meanwhile, the applicant was unable to lock the front screen door.

31. The respondent proposed attending the property on 7 November 2016 with possible keys, but this was postponed to 11 November 2016 at the applicant's (reasonable) request. On that day, the respondent's agent provided a key to the front screen door.

32. The applicant claimed $5 per day for a period of 70 days (2 September to 11 November 2016) to a total of $350.

33. I accept that the respondent was required under clause 54(1)(d) Schedule to ensure at the start of the tenancy that the premises are "reasonably secure", but I am not persuaded that provision of a key to the front or rear security screen doors was necessary for that purpose. There is no suggestion that the main front and rear doors were not lockable or that keys to the main doors were not provided from the outset.

34. Regarding inconvenience, it appears that the screen doors were functional to the extent that they could be opened and closed for access and to enable breezes to move through the premises with the main doors open.

35. I accept nevertheless that the screen doors were (with a key) lockable and so the applicant was reasonably entitled to have a key or keys in order to lock them, as part of the rented premises. However I am not persuaded that the absence of a key to a screen door was a significant detriment to the applicant's use and enjoyment of the premises. Many premises have screen doors that are not lockable or do not have screen doors at all. The front screen door could, I presume, also be locked from the inside using the manual catch. Compensation should also be in proportion to the daily rent. The applicant reasonably requested a date after 7 November 2016 for the agent to attend with keys, but cannot then seek compensation for the delay.

36. I allow 38 days (1 October to 7 November 2016) at $1.00 per day: $38.00.

Ducted vacuum system

37. By email sent on 15 September 2016 (not 2 September 2016 as the applicant claimed), the applicant reported that the ducted vacuum system in the premises was not working effectively. She contended that she had cleaned the filter as instructed but there was still "an issue with the capacity of the vacuum to suck up dirt, etc".

38. The respondent's agent attended to the request in a timely manner, but there was still an unreasonable delay before a tradesperson attended to inspect and (if necessary) rectify the fault. Valet Canberra attended the premises on 2 November 2016, at which time it cleaned a secondary filter and replaced the hose handle.

39. The applicant accepted that the rectification work involved a non-urgent repair, but contended that compensation is payable because of the respondent's failure to make the repair within four weeks of being notified of the fault. The applicant claimed $2.50 per day for a period of 33 days to a total of $82.50.

40. Allowing for the four weeks within which the repairs needed to be made, the applicant was required under clause 57 of the Schedule to have made the repair by 13 October 2016. On the evidence, despite replacement of the hose handle, the vacuum system was working but not to capacity consequent upon a need to clean a secondary filter. The defect, in my view, was minor. Also, it is not clear why the respondent needed to incur a cost of $180 for a tradesperson to attend to carry out routine maintenance that would appear to be a tenant's responsibility. Compensation should also be in proportion to the daily rent.

41. I allow 20 days (14 October to 2 November 2016) at $1.00 per day: $20.00.

Birds entering premises

42. By text message sent on 25 September 2016, the applicant reported her "shock" at finding a bird in the dining room of the premises. She was understandably concerned about the prospect of a dead bird courtesy of her cats. However, the applicant reported that the bird "easily accepted being picked up" and that it flew to a tree after she put it outside.

43. By text message sent on 2 October 2016, the applicant reported a second bird inside the premises. Again, the applicant was able to 'rescue' the bird and release it outside.

44. On 4 October 2016, the applicant sent an email to the respondent's agent suggesting that the birds had accessed the roof space of the property and then the inside of the premises via the ducted heating vents. At the hearing, the applicant explained her assumption, or suggestion, on the basis that she found the birds below a ceiling heating duct.

45. The applicant stated that she had then chosen not to use the heating during the day to minimise the chance of a further bird (or birds) accessing the inside of the premises via a ceiling heating duct. She requested a tradesperson attend the premises to carry out rectification work in order to prevent birds entering the roof space.

46. Over the following months, the respondent's agent dealt with four different tradespersons in an endeavour to investigate how the birds entered the premises.

Three of the tradespersons attended the premises, one of whom attended the premises on 24 April 2017 and repaired two holes in the gable end lead flashing of the house, which had possibly enabled the birds to access the roof space. The tradesperson also repaired some cracked and chipped tiles. In May 2017, Air Turners attended the property. They inspected the ductwork for the heating and found there to be no damage, meaning (they said) that the birds could not have entered the ducted heating system and by that means entered the premises. They also reported that the vents are too small for a bird to escape through them into the room, although the applicant disputed that opinion.

47. The applicant claimed compensation of $5 per day for a period of 173 days to 24 April 2017, when a tradesperson repaired the two holes, to a total of $865.

48. On the evidence, I am not satisfied on the balance of probabilities that the birds entered the premises via the heating ducts. There is no evidence that the birds entered by this means, and that possibility arose only from the applicant's supposition. There is also the evidence of an independent tradesperson that the ductwork was not damaged and that access to it from the roof space was impossible. How the two birds came to be on the floor of the dining room remains unknown.

49. Turning to the questions of breach and liability, the onus was on the applicant to prove the breach on the balance of probabilities. I am not persuaded on the evidence that birds entered the premises by reason of any part of the premises that needed repair. There is also no evidence to support the applicant's claim that she was unable to use the heating system because of birds entering the premises via the ducting system, or the possibility of that occurring. The applicant was never directed not to use the heating system: she chose not to do so. There is also no suggestion that the heating system was not working during the claim period.

50. I am not persuaded that the respondent should compensate the applicant for her election not to use the heating system because of her concern that birds might enter the premises through the heating ductwork in circumstances where there is no sufficient evidence that a bird entered the premises by that means.

51. I reject the claim.

Heating/ducting

52. The applicant contended that via an email sent on 6 October 2016 she reported a lack of hot air coming from the lounge room heating duct, and that the issue was not resolved before the end of the tenancy on 20 June 2017. The applicant contended that the property was extremely cold and that the heating system was unable to warm the property to a satisfactory temperature. The applicant accepted a 28 day period for the respondent to conduct the necessary repairs as a non-urgent repair, and on that basis claimed compensation of $10 a day for a period of 229 days to a total of $2,290.

53. In my view, the applicant's email sent on 6 October 2016 does not fairly represent notification that the heating system was in need of repair. The email states:

> *Just to let you know that Nick came to measure for the curtain yesterday and we got to discussing the birds coming through the ducted vent. Nick suggested I let you know that the reason there is very little air coming through the vent in the lounge room is likely because there is a hole in the ducting (caused by birds). This means I am effectively heating the ceiling space only. I will mention this to the roofer but suspect it might be an issue that needs attention by ducted heating installers.*

54. The possibility of "a hole in the ducting (caused by birds)" was eliminated by later inspection of the ductwork which found that not to be so.

55. On 2 June 2017, the applicant sent an email advising that she "will shortly be issuing a notice of intention to vacate." The email then stated her "opinion that the property isn't habitable and that, whilst the heating system is working, it is totally inadequate for heating the property to a habitable temperature." The applicant then provided data regarding her testing of the temperature in the premises from time to time in support of her claim.

56. The respondent contended, and the applicant agreed at hearing, that 2 June 2017 was the first time that the applicant had reported that the ducted heating system was not heating up to the set temperature.

57. The respondent's agent engaged Heating and Cooling Services, who attended the premises. Their invoice dated 8 June 2017 states "serviced the burners and injectors, all tested okay, working fine including the thermostat is working fine."

58. The applicant vacated the premises on 20 June 2017.

59. In circumstances where the respondent promptly attended to the applicant's notification of the (perceived) need for repairs and found no evidence of anything in need of repair, and where the applicant vacated the premises 18 days after notifying the respondent of her opinion that the heating system was inadequate.

60. I reject the claim.

General inconvenience/interference with quiet enjoyment

61. The applicant claimed compensation of $500 for the general inconvenience of (i) having to take time off work on multiple occasions to be present at the premises when a tradesperson attended the property; (ii) tradespersons attending the premises without notice; and (iii) the inconvenience of having repeatedly to email the respondent's agent regarding repair issues.

62. The applicant provided, in support of her claim, correspondence from her employer advising of seven days during the tenancy when the applicant needed to arrive at work late or leave work early in order to be present at her premises when tradespersons were attending the property. The applicant agreed that she did not suffer any financial loss in terms of lost wages or any other financial loss from these late arrivals or early departures. However, it was time that she needed to make up.

63. The applicant contended that such inconvenience is compensable under section 83(d) of the RT Act as a "loss caused by the breach of a residential tenancy agreement" but could not refer me to any authority in support of her claim.

64. At common law, damages (or compensation) may not be awarded for breach of contract for anxiety, inconvenience or other emotional disturbance[5] unless the detriment arises from a failure to deliver a core contractual entitlement.[6] Under the RT Act, this proposition is qualified by clause 52 of the Schedule which provides:

> *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.*

65. I accept that compensation can be payable to a tenant for non-economic loss arising from a lessor's breach of a tenancy agreement including a breach of clause 52. In *Fawzi El-Saidy v NSW Land and Housing Corporation*,[7] the NSW Supreme Court awarded damages for inconvenience and anxiety arising out of asbestos contamination of the premises, finding that the failure to remove the unsafe asbestos was a breach of its duty to maintain the premises in a reasonable state of repair. The Court had evidence that, arising from the asbestos, the tenant's friends stopped visiting the house and their activities around the house and backyard were curtailed.

66. In *Strahan v Residential Tenancies Tribunal*,[8] the lessor had promised the tenant to seal a road, but had not done so. The unsealed road caused dirt and mud to be walked into the tenant's premises causing the tenant distress from the embarrassment and a constant need to clean. The Supreme Court ordered compensation to be paid for that general inconvenience.

67. In *But v Baldwin*,[9] cited with approval in *Withers-Norris v Pastrello*,[10] I found that compensation was payable for the inconvenience of the tenant being without a usable shower for eight weeks.

---

[5] *Shadid v Australasian College of Dermatologists* [2008] FCAFC 72

[6] *Baltic Shipping Co v Dillon* (1993) 176 CLR 344. Regarding power to grant compensation for non-economic loss, see Anforth, Christensen and Bentwood, *Residential Tenancies Law and Practice New South Wales* (6th edition) at [2.187.5]

[7] *Fawzi El-Saidy v NSW Land and Housing Corporation* [2011] NSWSC 820

[8] *Strahan v Residential Tenancies Tribunal* NSWSC 30008 of 1998

[9] *But v Baldwin* [2016] ACAT 9 at [31] – [32]

[10] *Withers-Norris v Pastrello* [2016] ACAT 95 at [97]

68. In my view, the inconvenience relied upon by the applicant did not arise from the respondent's breach of the tenancy agreement and is not compensable. The applicant's inconvenience of attending her premises to be present when tradesmen came to do work arose from the respondent's efforts to rectify the alleged breaches, not the breaches themselves or a failure to rectify them.

69. Also, clause 52 protects the tenant only from interference with the tenant's "reasonable" peace, comfort or privacy in their use of the premises. I reject the proposition that a lessor acts in breach of clause 52 by arranging for a tradesperson to attend the rented premises to carry out repairs, especially where the tenant has reported the need for the repairs and asked for them to be carried out.

70. In any event, the applicant elected to be present at her premises when tradespersons were attending, but did not need to be. The respondent's agent had keys to the premises, and had confidence in the tradespersons' honesty and competence.

71. I also reject the proposition that a tenant should be compensated for the inconvenience of having to notify a lessor of the need for repairs, even if notification occurs on more than one occasion. Such inconvenience is no more than an incident of a tenant's obligations under clause 63(b) and (c) of the Schedule to notify the lessor of any damage as soon as possible and to take reasonable care of the premises.

72. I reject the claim.

Conclusion

73. For these reasons, I will order that the respondent pay the applicant $154.50 within 28 days. Where the applicant has been largely unsuccessful in her claim, I will not order the respondent to pay the applicant the application filing fee.

……..

Presidential Member G McCarthy

HEARING DETAILS

FILE NUMBER:	RT 729/2017
PARTIES, APPLICANT:	Charlie Faulder
PARTIES, APPLICANT:	Vincent Tran
COUNSEL APPEARING, APPLICANT	N/A
COUNSEL APPEARING, APPLICANT	N/A
SOLICITORS FOR APPLICANT	N/A
SOLICITORS FOR APPLICANT	N/A
TRIBUNAL MEMBERS:	Presidential Member G McCarthy
DATE OF HEARING:	14 November 2017