Civil and Administrative Tribunal
New South Wales

Medium Neutral Citation:	**Elsom &Taylor– Parker v Coroneos [2016] NSWCATCD 47**
Hearing dates:	18 April 2016
Decision date:	26 May 2016
Jurisdiction:	Consumer and Commercial Division
Before:	L Wilson, Senior Member
Decision:	The application is dismissed
Catchwords:	RESIDENTIAL TENANCY − application by tenants for rent reduction or compensation – noise from occupant of another unit − noise not caused by landlord − uninhabitable
Legislation Cited:	Residential Tenancies Act 2010 (NSW) ss 43, 45 and 187 Civil and Administrative Tribunal Act 2013 (NSW) s 45
Cases Cited:	Menashi v Ly [1997] NSWRT 162 De Soleil v Palmhide Pty Ltd (Tenancy) [2010] NSWCTTT 464 Cameron, Brian (Tenant) v Pemberton, Phil (Landlord) [1997] NSWRT 264 Finn v Finato (Tenancy) [2004] NSWCTTT 179 Hector and ors v Payne and ors [1997] NSWRT 87 Ebbelid and anor v Qin [2014] NSWCATCD 173
Category:	Principal judgment
Parties:	Timothy Andrew Elsom and Brittany Taylor-Parker (applicants) Gloria Coroneos and Alex Coroneos (respondents)
Representation:	Applicant: by step mother Annelise Tuor Respondent: by agent Yvonne Buckley
File Number(s):	RT 16/08917
Publication restriction:	Nil

REASONS FOR DECISION

1 These proceedings involve a claim by the applicant tenants for compensation in respect of a residential tenancy agreement, which is ongoing, or for a rent reduction. There is no application by either party for the agreement to be terminated.

Leave to be represented

2 I granted leave for the applicants to be represented by Mr Elsom's step mother, Ms Annelise Tuor, due to the applicant's mental health problems. Mr Elsom was present at the bar table throughout the entire proceedings, sitting next to Ms Tuor who spoke on the applicants' behalf. Ms Taylor-Parker gave an authority to the Tribunal stating she authorised Ms Tuor to handle the matter on her behalf.

3 I granted leave for the respondents to be represented by their property manager Yvonne Buckley. Ms Buckley was assisted by one of her colleagues.

4 All four persons present at the hearing took an oath or affirmation to tell the truth.

Issues

5 In the application lodged on 15 February 2016, the applicants sought orders for rent reductions and an order as to compensation, pursuant to sections 43, 45 and 187 of the *Residential Tenancies Act* 2010 (NSW) ("the Act").

6 Under the section headed "What are your reasons for requesting the order/s?" in the application, the applicants wrote "Refer Annexure A". In paragraph [11] of Annexure A the applicants wrote:

> We seek redress through the Tribunal process, taking into account the extended period of our significant suffering – approximately 8 weeks (not 3 weeks). Of course we are not suggesting rent reduction for the whole 8 weeks. But, we would expect 3 weeks 'rent reduction' as minimum compensation and/or rent reduction given the protracted lack of "quiet enjoyment" of our home. For the first 3 weeks, without due notice of the restart of the intolerable noise and disruption, we could not sensibly abide in our rented premises 7:30am – 3:30pm during any business days.

7 During the hearing the applicants confirmed they sought 3 weeks full rent reduction because of the noise caused by the occupant or owner of the Unit above theirs. This totalled $2,400 compensation or rent reduction.

The law

8 Sections 43 and 45 of the Act relevantly provide:

> **43 Rent reductions**
>
> **(1) Reduction in goods, services or facilities**
>
> The tenant may make a written request to the landlord at any time for a reduction in rent if the landlord reduces or withdraws any goods, services or facilities provided with the residential premises, even if those goods, services or facilities are provided under a separate or a previous contract, agreement or arrangement.
>
> **(2) Premises unusable**
>
> The rent payable under a residential tenancy agreement abates if residential premises under a residential tenancy agreement are:
>
> (a) otherwise than as a result of a breach of an agreement, destroyed or become wholly or partly uninhabitable, …

> **(4) Effect of section**
>
> This section does not limit the rights of landlords and tenants to agree to reduce the rent payable under a residential tenancy agreement.
>
> (5) This section is a term of every residential tenancy agreement.
>
> **45 Remedies for reduction of rent on frustration of residential tenancy agreement**
>
> (1) The Tribunal may, on application by the landlord or tenant, make an order determining the amount of rent payable if the rent is abated under section 43 (2).
>
> (2) The Tribunal may order that:
>
> (a) from a specified day, the rent for the residential premises must not exceed a specified amount, and
>
> (b) the landlord must repay to the tenant any rent paid by the tenant since the specified day that is in excess of the specified amount

9 A tenant also made a claim for compensation under s 187(1)(d) of the Act.

10 Section 187 sets out the orders the Tribunal can make once it has determined a party is entitled to relief. Section 187 does not stand alone; the Tribunal cannot simply order a party pay an amount for compensation without any basis to do so.

11 There was no allegation that the landlords breached the residential tenancy agreement. For example the landlords did not breach her obligation to keep the premises in a reasonable state of repair (s 63), nor breach the tenants' right to quiet enjoyment of the premises (s 50), nor any other breach (s 190).

12 Given there was no breach by the landlady which gave rise to the applicants' claim for compensation, the only provision which could apply to this dispute is s 43(2)(a). As set out above that subsection specifies that the 'rent payable under a residential tenancy agreement abates if residential premises under a residential tenancy agreement are, otherwise than as a result of a breach of an agreement … wholly or partly uninhabitable'.

13 The crucial question in this case is whether Unit 23 became wholly or partly uninhabitable because of the renovations which occurred in the Unit above Unit 23.

What does it mean to be uninhabitable?

14 In a decision of an earlier Tribunal, the Residential Tribunal of New South Wales, the Member considered the term 'fit for habitation' which was contained in s 23 of the earlier *Residential Tenancies Act 1987*: *Menashi v Ly* [1997] NSWRT 162. The following remains instructive today:

> The term fit for habitation is not new to the *Residential Tenancies Act 1987.* It is the form of one of the covenants implied by the common law in all leases of furnished premises. Notwithstanding this, there seems to have been little actual consideration of its meaning by the courts or this Tribunal. A perusal of a number of legal dictionaries reveals few indicators of the scope of the term:
>
> (a) that the term is one which "imports some reference to what we call humanity or humaneness" and is of "wide and elastic" meaning to take account of "the needs and circumstances of poor people living in confined quarters" (*Sumers -v- Salford Corp 1943 AC 283 at 292*)
>
> (b) that the state of the premises does not represent a threat to the life, limb or health of the tenant (*Morgan -v- Liverpool Corp* 1927 2 KB 131 at 145)

…

> The habitability standard would be concerned with the minimum safety standards echoed in the above cases, going to both structural and health issues.

15 In the most recent predecessor to this Tribunal, the CTTT, the case of *De Soleil v Palmhide Pty Ltd (Tenancy)* [2010] NSWCTTT 464 considered a claim by a tenant for, *inter alia*, termination based on s.61 of the 1987 Act. Section 61 of the 1987 Act was as follows (emphasis added):

> (1) If residential premises under a residential tenancy agreement are, otherwise than as a result of a breach of the agreement, destroyed or rendered wholly or partly uninhabitable or cease to be lawfully usable for the purpose of a residence or are appropriated or acquired by any authority by compulsory process:
>
> (a) the rent abates accordingly, and
>
> (b) the landlord or the tenant may give immediate notice of termination to the other party

16 It can be seen that s 61 of the old Act contains similar terms to s 43(2) under consideration in the present case. Therefore the following passage from *De Soleil v Palmhide* is useful:

> The Tribunal has considered the term “fit for habitation” in a number of cases. It is sometimes viewed as meaning that the state of the premises does not represent a threat to the life, limb or health of the tenant. (*Morgan v Liverpool Corporation* 1927 2 KB131 at 145). To find that the premises are not habitable the Tribunal would have to be satisfied that there is a threat to the tenant’s safety, going to both structural and health issues. The Tribunal in *Jex and Jex v Struk* (2000) held that “Fit for habitation meant at least that the premises may be lived in without risk of personal injury to life or limb or injury to health. Fit for habitation sets an objective standard”. The decision of the *South Australian District Court in Hampel v South Australian Housing Trust* [2007] SADC 64 relying on the Queensland Supreme Court in *Gray v Queensland Housing Commission* [2004] QSC276 concluded that premises are not fit for habitation if “the state of repair is such than injury is to be expected, or will naturally occur from the ordinary use of the premises they cannot be regarded as fit for human habitations”. The test is a very high test. In this matter the tenant has provided evidence of mould on a number of clothing items, furniture and on the window sill. There is little evidence before the Tribunal to indicate that the presence of the mould in the premises is such that injury is to be expected or will naturally occur from the ordinary use of the premises. The obligation to prove the above rests with the tenant. There is simply insufficient evidence to satisfy the Tribunal that the premises have become uninhabitable and the Tribunal is unable to make an order terminating the tenancy.

17 A most salient consideration when determining whether premises ‘become wholly or partly uninhabitable’ is the purpose for which they were occupied. If it is only one room which is claimed to be uninhabitable (i.e. partly uninhabitable) then it is the intended use of that room which is relevant. In *Cameron, Brian (Tenant) v Pemberton, Phil (Landlord)* [1997] NSWRT 264, the tenant had stored items in an underground ‘vault’, purpose built to store guns and wine. Torrential rain caused flooding to the vault and damaged the tenant’s property that he had stored there. In dismissing the tenant’s claim that the landlord breached the residential tenancy agreement, and thereby dismissing the tenant’s claim for compensation, the Tribunal held (emphasis added):

> The Tribunal does not think that it is important whether the order is referred to as a room, a storeroom or a vault. Nor does the Tribunal think it is particularly relevant whether the area had Council consent or not. What is more important, is what in fact to a reasonable person was the area and what reasonable use could it be put to as it appears to the eye. It is noted that there is no allegation that the landlord or his agent made any specific representations concerning the room.

> It would appear that the area is a subfloor room which happened to be carpeted. It is located adjacent to the garage and under the front stairs of the property. The room has no ventilation (apart from the open door) and it had a musty smell, indicating that it was damp.
>
> Clearly the room was not habitable as such but nor was the garage a habitable room. The Tribunal does not think that this in itself means that the landlord is in breach of the agreement. The question is whether the room was fit for its purpose.
>
> Could the room be used for storage? Yes. What sort of items could be stored there? Wine, guns, bicycles? Certainly all these things.
>
> Would a reasonable person store items made of leather, evening clothing, suits, a wedding album, in a room that was on the tenants own submission musty? The Tribunal does not think so. One would have thought that all of these items would have experienced some mould growth whether the area had flooded or not. Even cardboard boxes, mattresses and bags would be expected to collect mould and dampness being in an unventilated room for over two years.

18 In *Finn v Finato (Tenancy)* [2004] NSWCTTT 179 the learned Member recited the relevant principles under the heading “The Law”. Within this section of the decision was paragraph [19] which explained as follows (emphasis added):

> In Mc Leish v FT Eastment & Sons Pty. Ltd (1970) 91 WN (NSW) 268 CA the Court in reliance upon *Proudfoot v Hart* (1890) 25 QBD 42 considered the words “fit for habitation” and “tenantable repair “ and whether there was a difference.
>
> … The Court stated:
>
> “must both import such a state as to repair that the premises might be used and dwelt in, not only for safety , but for reasonable comfort, by the class of persons by whom and for the sort of purpose for which, they were to be occupied.....

19 A case which had some factual similarities to the present case was *Hector and ors v Payne and ors* [1997] NSWRT 87. That case applied s 61 of the 1987 Act which is set out above, and whose terms are similar to the current s 43:

> The tenants' say that the premises were rendered wholly uninhabitable as a result of building works that commenced next door in the construction of a whole new wing of a local Primary School.
>
> Uncontroverted evidence was produced to show that construction using heavy machinery took place at all hours, including early mornings and weekends and on at least one occasion in the very early hours of the morning of the 19th of December 1996.
>
> Windows and doors could not be opened because of noise and dust; washing could not be hung out to dry due to the dirt in the air; and access to the back yard was impossible due to noise and dust and the fact that it was from time to time flooded with chemicals flowing into it from the construction site next door.
>
> Attempts to negotiate with the builders proved fruitless with the response to the tenants' pleas ranging from the negative to the abusive…

20 The tenants in *Hector v Payne* moved in on 9 November 1996 but because of the problems described in the exert above, served a notice to terminate on 11 February 1997. The Tribunal held that ‘the premises were rendered either wholly or partly uninhabitable due to the construction activity taking place in the adjoining property. As a consequence of this finding the Tribunal determined rent would abate from the date of the notice of termination given by the tenants i.e. the 11th of February 1997’ until the tenants vacated the property on 1 March 1997.

21 The decision in *Hector v Payne* is problematic in several respects; firstly is unsatisfactory for the Tribunal to make a finding that premises are ‘wholly or partly

uninhabitable' without specifying which. Secondly, the Member did not address the fact that the tenants did live in the premises, not without discomfort, but without any risk to their life or limb, for a period of several months before serving the termination notice. Thirdly, it is entirely unclear why the Tribunal, having found that 'the premises were rendered either wholly or partly uninhabitable due to the construction activity taking place in the adjoining property' only abated the rent for the final three weeks of the tenancy, when the construction activity had clearly been underway for several months. A significant difference between this case and the present case is that the Tribunal found that the landlords knew of the construction works in the adjoining property and did not inform the tenants before they moved in.

22 The Tribunal is not obliged to follow decisions of single Members of the Tribunal. However decisions applying the same legislation, to similar facts, should be followed for consistency unless the Member does not agree with the reasoning or conclusions of the Member making the earlier decision. The Tribunal is obliged to follow principles of law set down by the Appeal Panel and the higher courts.

23 Some examples of premises held to be uninhabitable include windows and doors painted shut preventing escape in a fire, dangerous linoleum on the kitchen floor, dangerously high lead levels: see 'Residential Tenancies Law and Practice New South Wales' (2014 edition 6th) at page 137.

24 Some examples of premises held not to be uninhabitable, or rather, to be habitable, include small holes in the fly screen, a balcony door which could not be locked, a house lacking privacy: see 'Residential Tenancies Law and Practice New South Wales' (2014 edition 6th) at page 138.

25 There are more recent decisions of NCAT that address the issue of habitability of rental premises. One such case is *Ebbelid and anor v Qin* [2014] NSWCATCD 173. In that case, Senior Member Boyce found that the premises were uninhabitable [paragraph [62]] which is relevant to whether a tenant can give the landlord a termination notice pursuant to s.109 of the Act. The relevant terms in s 109(1) are the same as s 43(2). The following sets out the basis for Senior Member Boyce's conclusion that the premises were uninhabitable:

> 55 The tenants' evidence is that condition of the house was that they were unable to use the first floor of the house. That floor contained 4 bedrooms, a television/lounge room and two bathrooms. The ground floor was mouldy and cold. The kitchen was in such a condition that it could not be used.
>
> 56 The landlord relied on the negotiated rent being *"reduced from $730.00 pw to $670 per week due to the condition"* … to justify the condition of the premises.
>
> 57 The Tribunal is satisfied on the evidence adduced by the tenants that the premises were in such poor condition that they should not have been let in the first place. The reduction of rent negotiated was manifestly inadequate compensation for the tenants having to live in premises of such poor repair. The tenants' circumstances at the time of entering into the residential tenancy agreement resulted in an urgency to obtain accommodation for themselves and their children, the consequence of which they found themselves in premises that were totally inadequate.
>
> 58 S 109 of the Act provides that a tenant may give a landlord a termination notice and the residential tenancy agreement will end on the date specified in the notice if the

> residential premises become partly or wholly uninhabitable.
>
> …
>
> 60 The Tribunal is satisfied on the civil standard of proof that the premises became uninhabitable despite the tenants efforts to bring the premises to a reasonable condition for them to occupy them. It is the landlord that has failed in its duty to provide and maintain the premises in a reasonable condition [s.63(1) of the Act]. The premises became uninhabitable as the problems of water leaks resulted in an inability to use 2 of the 3 bathrooms and the inability to use the bedrooms in a 5 bedroom home.

The importance of prior notice of the alleged cause of the uninhabitability

26 As already noted, this was an important consideration in *Hector v Payne* referred to above.

27 In *Bennett v Thomas* [1995] NSWRT 56 (12 April 1995), the tenants moved into a house which was undergoing significant renovations. They were made fully aware of this, orally, in writing, encapsulated in the lease and by viewing the property which was undergoing renovations. The tenants moved in, complained about the renovation works, and on this basis brought proceedings in the [former] Tribunal that the house was totally or partly uninhabitable in circumstances whereby the lease was effectively frustrated and pursuant to the provisions of section 61 of the [former] *Residential Tenancies Act* 1987 the tenants were entitled to terminate the tenancy agreement, and sought compensation in the form of a refund of the rent and bond already paid as well as reimbursement of removalist and associated expenses.

28 The Member in *Bennett v Thomas* came to the following conclusion:

> Although the premises were not fully habitable, I have regard to the fact that … the tenant was very keen to occupy the premises even though it should have been apparent to him that the house would not be ready. In particular, as I have also observed, the landlord's agent had warned the [tenants] about the risks inherent in moving into the house but the [tenants] were eager to do so.
>
> In those circumstances, I feel that it would be inequitable also to visit upon this landlord liability for payment of compensation to the tenant… Accordingly, I decline to make the orders sought in the tenant's application.

Facts

29 It is agreed the applicants commenced a fixed term tenancy for Unit 23 in a Unit complex in Dee Why on 29 May 2015 for 12 months.

30 The weekly rent for Unit 23 is $800 per week. The Unit is not furnished and is two bedroom.

31 The landlord’s agent received an application to rent Unit 23 from the applicants on 18 May 2015. This application was tendered during the hearing and formed part of Exhibit 2.

32 In their application to rent Unit 23, the applicant Mr Elsom filled out a section under the heading ‘Current Employment’ in the following way:

> I am currently employed. Company name: RB Elsom Nominees Pty Ltd. Manager: Ross Elsom … Company Address: … East Esplanade, Manly NSW 2095. Industry: Real Estate & Property. Occupation/ Position: Investment Analyst. Nature of Employment: Full Time. Length of Employment: 2 Year, 10 M. From Date: Jul-2012. Annual Salary:

$90,000.

33 Along side the typed application the agent had made notes, circled and ticked parts once she had checked the details.

34 Under 'Extra Employment Information' the applicant wrote "I own an online retail business GAMELINE PTY LTD that sells video games and related merchandise. I am the sole owner and manager of this business". No where does Mr Elsom disclose that he intended to run this business from the rental premises; instead he asserted he worked full time at his father's business which was on the East Esplanade in Manly. Mr Elsom even attached a reference from his father/ employer Ross Elsom, to his rental application. In that reference his father/ employer gave details which supported Mr Elsom's details about his role at the family business, the address, his start date and his income.

35 Before the tenants accepted the rental premises the agent made sure they were aware of, and comfortable with, the fact that part of the Unit complex was to be renovated during their tenancy. Not Unit 23 or Unit 26 but structural renovations to a large part of the common area of the unit complex. The tenants agree they were informed of this and accepted this likely disruption, and furthermore did not say they could not reside there as renovation noise would disturb their day time sleep needs (for the pilates teacher tenant) or plans to work from home (for Mr Elsom).

36 Unit 26 is above Unit 23 and was renovated by its owner daughter from October 2015.

37 The tenants claimed the excessive noise was for the period 26 October to 21 December 2015. The landlord respondents agreed there was some noise from 26 October however submitted it ended on 16 November 2015. It is therefore in dispute whether there was noise during the period 17 November to 21 December 2015. The applicants said that the noise lessened from November onwards and was not every day but said there were often loud noises in the morning during that later period.

38 The applicants claim 3 weeks full rent abatement, being $2,400 compensation for the 8 week period they claim there was unbearable noise from the renovations of Unit 23 above them. It is unclear why they claimed full rent abatement for three weeks and no compensation for the remaining 5 weeks they allege there was noise, but it is clear from their application and submissions that the $2,400 is meant to take account of the whole 8 week period they allege there was noise.

39 The landlord respondent consents to the payment of $800 by way of compensation to the tenants, for noise they did not cause and which they attempted to resolve, by way of goodwill gesture. As can be seen the tenant applicants did not accept this offer of compensation and disputed that the landlords did all they could to resolve the issue in a timely manner.

40 This latter contention, that the landlords did not do all they could to resolve the issue, could be interpreted as an allegation that the landlords breached the residential tenancy agreement in some way. However there is no relevant breach which could be identified by the applicants, or the Tribunal, for the landlords not adequately addressing

the renovations of unrelated occupants of another Unit in the complex, even if the Tribunal made the finding that the landlords did not adequately address the renovations. It is not a failure to provide residential premises which were fit for habitation, as this obligation applies to the time when the tenancy commenced: s 52. It is not a failure to maintain the premises in a reasonable state of repair as there was nothing wrong with Unit 26 itself: s 63. The landlords did not themselves reduce or withdraw services or facilities provided with the premises: s 43(1).

41 The only applicable section that could provide the applicants with compensation in this matter is s 43(2)(1) which applies if the Tribunal finds that the premises became partly or wholly uninhabitable otherwise than as a breach by the landlords.

42 Given no remedies could flow from a finding that the landlords did or did not do enough to stop an unrelated occupant of another Unit from making noise during renovations, I do not need to make a finding on this point. However as it was raised in the hearing and the documentary evidence, I feel it is appropriate to make some points about the issue.

43 Chapter 5 of the *Strata Schemes Management Act* 1996 deals with disputes and orders of adjudicators and Tribunal. An Adjudicator may make an order to settle a dispute or complaint about an exercise of, or failure to exercise, a function conferred or imposed by or under this Act or the by-laws in relation to a strata scheme: s 138(1)(a) Strata Schemes Management Act 1996. An application for an order under this section may be made only by an interested person: s 138(5). An interested person is defined in the Dictionary to that Act, to include ‘an owner of a lot in, a person having an estate or interest in a lot in, or an occupier of a lot in, the strata scheme’.

44 Therefore while there is no doubt that the landlords could have applied to an Adjudicator to settle a dispute, if one existed, about the renovations of Unit 23, so could the applicants as occupiers of a lot in the strata scheme.

45 There is insufficient evidence in any event, that the renovations were contrary to any by-law of the Strata Scheme. If the renovations were in breach of any law or by-law, that has not been proved in these proceedings on the balance of probabilities. It appears from the evidence about the landlords’ efforts to address the noise issue said to be affecting their tenants, that nothing came from those efforts, most probably because the renovations were approved and were able to be carried out by the owner of Unit 23.

Findings

46 I find Unit 23 was habitable throughout the period October, November and December 2015, even during the period both parties agree there was some noise from the renovations of Unit 26.

47 I make this finding for the following reasons:

(1) The state of the premises did not represent a threat to the life, limb or health of the tenants.

(2) The minimum safety standards going to both structural and health issues continued to be met throughout the period complained of. Had the noise been unbearable for brief periods, hours not days or weeks, it was reasonable to expect the tenants to go upstairs, ask the owner of the Unit or the tradespeople how long it would be loudly noisy, and to vacate the Unit for that brief period. It is relevant the noise was said to occur only between the hours of 7:30am and 3:30pm on business days, as will be set out below most of this time the tenants would be expected to be at their full time jobs in any event, meaning the only possible disturbance could be before they left for work sometime between say 7:30am and 8:30am.

(3) The state of repair of the premises were not such that injury could have been expected, or naturally occurring from the ordinary use of the premises. Nor do I find that Unit 23 cannot be regarded as fit for human habitations. I accept it would have been noisy on some days between 7:30am and 3:30pm but this did not render the Unit unfit for human habitation, certainly not for more than short periods in the day, and at times when the landlords could be confident the tenants were at their full time jobs at external premises, not working from home. I note the test is a very high test and the onus of proof rests with the tenants and they have not satisfied the Tribunal on the balance of probabilities.

(4) The noise made the premises unpleasant to use, at certain times, however the noise did not result in an inability to use the entire premises or rooms of the Unit. I take into account the evidence of the occupant of the Unit below the applicants' and the evidence of the owner who was renovating Unit 26, in coming to this conclusion. Put simply, the applicants did not satisfy the Tribunal on the balance of probabilities that the premises, or parts thereof, were unable to be used as opposed to unpleasant to use at times.

(5) Concerning the question of whether the Unit was fit for its purpose, I find the purpose of the residential premises was to provide a home and accommodation for the tenants. I do not find that it was to provide a work from home space for Mr Elsom's business. Mr Elsom claims he informed the landlords' agent that he was working from home in October 2015, some 5 months after the parties entered the residential tenancy agreement, by complaining to the property manager that his internet connection had been affected by the renovations to the Unit complex (the agreed renovations not the renovations to Unit 26). This cannot constitute any agreement with the landlord to allow the tenant or tenants to work from home, as it was mentioned by the tenants almost half way through their tenancy, without any recourse for the landlords to say they did not want tenants who had a home office. In fact, the agent gave oral evidence that she would not have approved tenants who worked from home as it would not have been appropriate given the planned renovations to the Unit complex. I find Mr Elsom specifically informed the landlords that he worked full time at his father's business in Manly, and the landlords were entitled to therefore consider that during normal working hours, when most of the renovations to Unit 26 occurred, the tenants would not be at home.

(6) Equally I find that the class of persons whom occupied Unit 23 were normal residential occupants, and the purpose for which they occupied was to live and sleep there, outside of their full time work as disclosed on their rental application. I find the premises were reasonably comfortable for such class of persons, for the purpose of living and sleeping, taking into account that in every high density dwelling there will be some noise (e.g. other occupants coming home late, opening/ shutting doors, walking on the floors above them and in this case, from the scheduled renovations to the common areas), and some noise does not make the premises sufficiently uncomfortable to render them uninhabitable.

(7) This situation is different to *Hector v Payne* as in that case, the comfort and safety of living in the premises was interfered with to a much greater extent, and the landlord knew of the impending construction and did not inform the tenants. In this case the landlords did not know Unit 26 was to be renovated but did know of the other scheduled renovations and informed the tenants accordingly. *Hector v Payne* is a problematic decision in any event, and I decline to follow it for the reasons set out above.

48 There being no allegation, and no basis to find, that the landlords breached the residential tenancy agreement in any respect, the only basis for rent abatement or a rent reduction is pursuant to s 43(2) which relies on a finding that the premises had become partly uninhabitable. There being no such finding, the application is dismissed.

Orders

49 The application is dismissed.

L Wilson

Senior Member

Civil and Administrative Tribunal of New South Wales

26 May 2016

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.
Registrar

Decision last updated: 20 July 2016