



## Civil and Administrative Tribunal New South Wales

<b>Medium Neutral Citation:</b>	<b>Strachan v Gabriel [2017] NSWCATCD 18</b>
<b>Hearing dates:</b>	16 January and 14 February 2017
<b>Decision date:</b>	21 March 2017
<b>Jurisdiction:</b>	Consumer and Commercial Division
<b>Before:</b>	Margaret Mary McCue, General Member
<b>Decision:</b>	<ol style="list-style-type: none"><li>1. The applicant is entitled to an order for payment of the whole of the bond. The Rental Bond Board is directed to pay to the tenant the whole of the bond.</li><li>2. The respondents are to pay to the applicant the sum of \$ 1,120.00 on or before 31 March, 2017, in addition to monies payable at order 1.</li></ol>
<b>Catchwords:</b>	Applicants' entitlement to a refund of all monies paid to the respondent; vacant possession of premises at the commencement of the lease
<b>Legislation Cited:</b>	Part 5, Schedule 4, Civil and Administrative Act, 2013; Residential Tenancies Act 2010 ["the Act"];
<b>Cases Cited:</b>	Waterhouse v Waugh [2003] NSWCA 139 (2 June 2003); Cook v Taylor [1942] Ch 349, 352 Cumberland Consolidated Holdings Ltd v Ireland [1946] KB 264 at 270-271
<b>Category:</b>	Principal judgment
<b>Parties:</b>	Rebecca Strachan (applicant) Shane Paul Gabriel and Kerrie Lee Gabriel (respondents)
<b>Representation:</b>	Applicants: In person Respondent: Mr Christopher Storey
<b>File Number(s):</b>	RT 16/46032
<b>Publication restriction:</b>	Nil

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## REASONS FOR DECISION

### Application

- 1 Initially, this matter came before the tribunal for hearing on 16 January 2017.
- 2 On that occasion, Mrs Strachan gave evidence in relation to her application seeking an order for the recovery of the rental bond pursuant to section 175, as well as an order pursuant to section 47, seeking repayment of other rental payments made by the tenant contrary to the Act or the Residential Tenancy Agreement.
- 3 The respondents opposed the application. The respondents seek recovery of a break lease fee pursuant to the terms of the residential tenancy agreement where the tenant has terminated the lease during a fixed term.
- 4 Each party was directed to serve their documents as evidence in support of their respective cases.
- 5 After hearing some initial evidence in the applicant's case on 16 January 2017, the applicant said that she had not been served with the respondents' documents. In those circumstances, Ms Welsh, one of the respondents' agents, gave short evidence regarding the service of the documents.
- 6 The tribunal was satisfied that the documents had been served on Mrs Strachan's current address. Notwithstanding this, in stark contrast to that evidence, Mrs Strachan gave evidence that she had not received the documents.
- 7 The tribunal accepted the truthfulness of both versions of events. Mindful of the underlying sentiments of the Act, the Tribunal was persuaded that the applicant was somewhat disadvantaged; Mrs Strachan had not had an opportunity to consider the respondents' documents prepared to advance its case.
- 8 The matter was stood-over over part-heard to allow Mrs Strachan to be re-served with the documents and for her to consider the documents prior to the next hearing date scheduled for 14 February 2017.

#### **APPEARANCES**

- 9 The applicant appeared in person.
- 10 The agent, Mr Christopher Storey, appeared for the respondents.

#### **JURISDICTION**

- 11 On the establishment date, 1 January 2014, the Civil and Administrative Legislation (Repeal and Amendment) Act 2013 amended certain statutes which previously conferred jurisdiction on now "abolished" tribunals. NCAT has jurisdiction to hear and determine relevant matters in place of the "abolished" tribunals.
- 12 From 1 January 2014, the Residential Tenancies Act was amended. The definition of "Tribunal" was changed in that Act from the CTTT to NCAT - see cl 4.34 item [2] in Schedule 4 to the Civil and Administrative Legislation (Repeal and Amendment) Act.
- 13 I am satisfied that NCAT has jurisdiction to hear the application made pursuant to the provisions of the Residential Tenancies Act 2010 ["the Act"].

#### **BACKGROUND EVIDENCE**

- 14 Mrs Strachan gave evidence that she and her husband had entered into a Residential Tenancy Agreement for premises located [\*\*\*\*] Glenmore Park in the State of New South Wales on 13 September 2016. The rent payable was \$ 550 per week.
- 15 Mrs Strachan had seen the premises two (2) weeks in advance of signing the residential tenancy agreement. Her husband attended at the inspection, as well as her two small children. At the initial inspection, she had been in the house for no more than ten minutes to view the suitability of the Glenmore Park property for the family.
- 16 The applicant gave evidence that she and her husband had sold a property at South Penrith and were in a “mad rush” looking at “lots of places” to relocate the family after the settlement of the sale.
- 17 The applicant recalls that when she inspected Glenmore Park, the lights were switched on. After the inspection, she formed a view that the property was adequate for the family’s needs for the next 12 months or so.
- 18 She approached the agent, took an application and went home to fill it out. She returned the application to the agent the following day. Three or four days later, the application was approved.
- 19 The applicant attended the agent’s offices later in the afternoon of 13 September to sign the lease and pick up the keys. She said that she paid 4 weeks “rent in advance” [presumably for the bond] and 2 weeks’ rent. The applicant conducted no further inspection of the residential premises prior to picking up the keys on 13 September 2016. I recall that she said that this was not possible.
- 20 The applicant had a conversation with the agent prior to moving in about the possibility of using her cleaner to prepare the premises for the “move-in” on 13 September 2016. She was prepared to pay a difference in the cleaning fee, if the agent was agreeable to this proposal. The agent did not agree with the proposal.
- 21 On 13 September 2016, after picking up the keys from the agent and signing the requisite documentation, the applicant said that the family arrived at the residential premises. Minutes after she walked into the premises she said that she was “shocked”.
- 22 She noticed that the lights were off and a number of switches were hanging out of the sockets. Her husband is an electrician. He remarked that this may in fact be a breach of certain safety requirements: his understanding was that the landlord was to provide the premises in a reasonable state of habitation at the commencement of the tenancy.
- 23 The applicant relied upon a number of photographs of the lights switches and other electrical sources. The applicant also provided an electrical report from Thiess Electrical dated 10 November 2016. From the photographs tendered, Thiess formed a view that:

two switch mechanisms for the light switches were damaged and a potential hazard to direct contact with live parts.

.....light requires a cover to prevent exposure of live electrical parts and to keep IP (ingress protection) rating. The report further said:

As a result without repair or replacement, this damage is hazardous and may result in serious injury or death.

24 The applicant emphasised that she has a toddler and a young baby.

### The premises

25 When she attended the premises on the “move in” date, the applicant said that there were problems with a number of dead cockroaches in the bedroom obviously the aftermath of a pesticide spray. As well, she noted that light globes were missing.

26 The applicant said that the main air-conditioning unit was covered in mouldy dust. The applicant’s husband formed a view that the air-conditioning filter may not have been cleaned for about 10 years.

27 The applicant tendered a number of photos supporting some lack of diligence in the cleaning of a certain mirror in the en-suite of the bedroom. The applicant remarked that it was dribbling with a “substance”. The applicant said she did want to touch the mirror. In the main bathroom, the applicant remarked that there was hair “everywhere” and the shower had mould on the floor.

28 The kitchen benches were greasy and she observed bits of food in the cupboards. Close to the air conditioner, the applicant observed water running down the wall near the kitchen. This had caused the paint to peel from water damage. The applicant further observed that the window sills were dusty and there were cobwebs around the area.

29 The applicant said that the outdoor shed, part of the leased premises, was full of the owners or some other person’s belongings. The applicant submitted that her husband was an electrician and he proposed to store his electrical tools of trade in the shed. However, there was little accommodation available given that the shed was full of someone else’s belongings.

30 The applicant walked outside and around to the side of the house on 13 September 2016. The applicant observed that the gate [which was important for the safety of her children [aged 1 and 4½ years] had problems with the latch. The gate and the fence did not align.

31 On the day of the proposed move in, the applicant observed her husband removing the couple’s furniture from the hire truck and storing things in the garage. After expressing her dissatisfaction with the house, the applicant said to her husband:

“Let’s get the stuff back on the truck”.

32 She rang the agent and shortly thereafter said: “the property has not been cleaned”. She further enumerated a number of matters that required work and repairs prior to the family moving into the premises.

33 Shortly thereafter, she sent an e-mail to the agent giving notice terminating the lease founded upon the landlord’s breach on the following grounds:

- failure to make ready the property for occupation on the day of the commencement of the lease; and
- failure to maintain and repair the premises.

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The applicant said that she was able to make arrangements through her solicitor to extend the time of settlement for the couple's South Penrith property, so that she could look around for more suitable housing for the family.

35 The applicant seeks a full refund of the bond and the 2 weeks' rent paid in advance, being all the monies paid to the agent.

### The respondents' case

36 There was a hiatus between the commencement of the respondents' evidence and the further hearing date to allow the applicant to consider the respondents' documents.

37 Christopher Storey gave evidence on behalf of the respondents. The agent said that he had **not inspected the premises prior to the applicant** moving in but nonetheless relied upon a condition report that formed the basis of the respondents' evidence.

38 Mr Storey said his understanding was that someone from the agency inspected the property on the day of the "move in", sometime in the morning.

39 The landlord is obliged to provide the premises in a reasonable state of cleanliness at the commencement of the lease. A number of the comments on the condition report reference dustiness and cobwebs in certain parts of the premises. This suggests that the house had not properly cleaned prior to the move in.

40 The condition report was signed by the tenants at the agent's office as the tribunal understands. The tenants added no comments given that they had not attended the premises until after the lease was signed at the agent's office.

41 The respondents' evidence supported the recent pest treatment at the property on 7 September 2016. This may account for the abundance of dead cockroaches at the premises on the "move in" date.

42 A tax invoice confirmed that the carpets had been cleaned in August 2016.

43 Notwithstanding the respondents' view that the light switches were not dangerous, New Generation Solutions had supplied and replaced the following **after the commencement date** of the lease:

3 single switches in the bedrooms and 2 double gang switches and 4 gang switches throughout the entrance living room and ensuite in and around 4 October 2016.

44 The respondent did not share the applicant's view that the switches were in anyway dangerous, notwithstanding their replacement. The respondent said it was cheaper to replace the switches rather than to repair them.

45 There was a tax invoice in the respondent's bundle of documents for work done on 5 October 2016. This included:

- cleaning and patching certain holes in the wall;
- re-fitting screens to the front lounge window;
- re-attaching a lock assembly from the garage to the backyard;
- disposal of an old blind;
- re-attachment of a light fitting;

- removal of rubbish from the back shed;
  - **moving bricks and pavers to down the side of the house;**
  - realigning the vanity doors in the ensuite; and
  - realignment of the kitchen cupboard doors.
- 46 For a moment, I pause to comment regarding the photos that the respondents submitted to the tribunal as part of their evidence. The respondent gave evidence that the photos **were taken prior to the repairs being done**, at the time of the inspection on the morning of the “move in”, 13 September 2016.
- 47 The applicant submitted that when she first attended the premises, she was able to access the side lane and made certain observations about the safety or otherwise of the gate latch.
- 48 The photos of the side access that the respondents submitted had bricks and pavers near the entrance of the side access from the backyard. This was referenced in page 14 of the photos in the respondents’ tender bundle. The applicant said that the bricks and pavers were not there on the “move-in” date on 13 September 2016.
- 49 Given that the bricks and pavers were moved down to the side of the house by the Spot On Property and Maintenance Cleaning Service around 5 October 2016, this seems to lend some support to the applicant’s submission that the photos may not depict the house and the side lane as at the “move in” date. This is a matter that goes to credit.
- 50 The respondent asked me to consider evidence verifying the date the photos were taken by reliance upon non-hardcopy evidence: a USB stick.
- 51 The respondent had an opportunity to provide short evidence to that effect at the time of compiling the documents and photos.
- 52 The tribunal comments on the matter raised by the applicant. Her recollection of the side pathway on or around 13 September was that it clear and allowed the applicant to access the passage to inspect the fatiguing fence and the latch on the gate. The applicant submitted that all the photographs that the respondents relied upon **were taken after the repairs were effected on the house**
- 53 The Spot On tax invoice for work conducted in around October 5 noted that pavers and bricks were moved to the side of the house. The purpose of the exercise was to put the respondents’ credit into issue, as the tribunal understood.
- 54 The respondents relied upon a further invoice dated 23 September 2016 for the supply and installation of a 1800cm high colour bond fence to replace the current fencing.
- 55 I understood from the evidence that there may be some issue with the neighbour contributing to the fencing. There was also a notation about the installation of a retaining wall before the supply of the new fencing could be completed.
- 56 The respondents’ agent formed a different view of the state of readiness of the property for its immediate occupation at the commencement of the lease on 13 September 2016. His view was that the landlords had not breached their obligations under the

terms of the lease in readiness for occupation at **the commencement of the lease.**

**The tribunal finds that the evidence does not support that view.**

57 The lease provided for unfurnished premises otherwise than as set out in any separate list of fittings and furniture. There was no attendant list. The respondents submitted that the items in the shed were minimal, though when itemised on the condition report appeared to be significant:

- 2 metal shelves items in shed;
- 1 pipe;
- 1 wheelbarrow;
- A container of pesticide;
- 9 pieces of timber edging, 3 white and 1 brown ceramic pots;
- 1 black pot;
- 5 plastic pots;
- 1 black garden edging plastic;
- 2 metal and 2 timber stakes;
- 1 tile, 2 mats, 1 bag of compost;
- Metal shelf hangers;
- 1 metal wine rack at the side of the shed;
- Black wrought iron gate for fireplace and wooden round basket.

58 On any view, this would suggest a state of congestion that would hinder the applicant's use of the shed for her husband's tools of trade. At the commencement of the lease, the landlords give the tenants an exclusive right of occupation, unhindered by any competing interests of the landlords.

59 The landlords' obligations under the terms of the lease and the Act

Pursuant to clause 13 of the lease, the landlords agree:

To make sure that the residential premises are vacant so that the tenant can move in on the agreed date, and

To take all reasonable steps to ensure that, at the time of signing the agreement, there is no legal reasons why the premises cannot be used as a residence for the term of this agreement.

### **Occupation of residential premises as residence**

60 In addition to clause 13 of the agreement, **section 49 of the Act** provides as follows:

#### **Occupation of residential premises as residence**

(1) A landlord must take all reasonable steps to ensure that, at the time of entering into the residential tenancy agreement, there is no legal impediment to the occupation of the residential premises as a residence for the period of the tenancy.

(2) A landlord must ensure that the tenant has vacant possession of any part of the residential premises to which the tenant has a right of exclusive possession on the day on which the tenant is entitled to occupy those premises under the residential tenancy agreement.

(3) This section is a term of every residential tenancy agreement.

61 In contrast to the provisions of clause 13 of the agreement [the use of the conjunctive “and”] section 49 (2) is a discrete or stand alone obligation, included as a term of every residential tenancy agreement.

62 Relevantly, the Landlord must ensure that the tenant has vacant possession of any part of the premises on the day on which the tenant is entitled to occupy those premises.

### **What is vacant possession?**

63 Some guidance is provided in *Waterhouse –v- Waugh* [2003] NSWCA 139 (2 June 2003). Young C J cited the following authority of *Cook –v- Taylor* [1942] Ch 349, 352

A term in a contract for the sale of land, which requires the vendor to deliver “possession”, will ordinarily be construed as requiring delivery of vacant possession. *Cook v Taylor* [1942] Ch 349, 352. There is no reason for adopting a different construction in agreements between landlord and tenant. The tenant was bound to deliver vacant possession.

64 His Honour also relied upon the following passage in *Cumberland Consolidated Holdings Ltd –v- Ireland* [1946] KB 264 at 270-271

Subject to the rule *de minimis* a vendor who leaves property of his own on the premises on completion cannot ... be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, namely, as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment ... the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment ... should stand in a different position to an impediment caused by the presence of a trespasser ... When we speak of a physical impediment we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property

65 The presence of articles stored in the shed, impeded the applicant’s right to vacant possession of the premises, whilst the landlords were claiming a right to use the premises for their own purpose.

66 The tribunal finds that the landlords of the residential premises the subject of the residential tenancy agreement, failed to deliver vacant possession of the property to the applicant at the commencement date of the lease.

67 The landlords are in breach of their obligations under the terms of the residential tenancy agreement whilst the landlords claimed a right of use of the premises, inconsistent with that right to which the tenant was entitled under the terms of the lease.

68 The breach was such to entitle the applicant to terminate the lease for a fixed term without penalty and payment of break lease costs.

### **Findings and Orders**

69 The applicant was entitled to terminate the lease for a fixed term. The tribunal finds that the respondents breached the agreement for failure to provide vacant possession of the residential premises at the commencement date of the lease. As well, there is a finding that there was a breach to provide the premises in a reasonable state of cleanliness on the “move-in” date.

- 70 The applicant is entitled to an order for payment of the whole of the bond (\$ 2,240.00) pursuant to section 175 of the Act.
- 71 The respondents are to pay to the applicant the sum of \$ 1,120.00 on or before 31 March, 2017, in addition to monies received for payment of the bond.

**Margaret Mary McCue**

**General Member**

**Civil and Administrative Tribunal of NSW**

**21 March 2017**

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

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Decision last updated: 11 May 2017