



Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Marsters v Graham [2016] NSWCATCD 73
Hearing dates:	8 August 2016
Decision date:	14 September 2016
Jurisdiction:	Consumer and Commercial Division
Before:	C R Xuereb, General Member
Decision:	The respondent must pay \$7,822.21 to the applicants on or before 23 September 2016.
Catchwords:	Residential tenancy dispute, residential premises fit for habitation, nature of obligation, events outside control of the landlord, whether breach, mitigation of loss
Legislation Cited:	Residential Tenancies Act 2010
Cases Cited:	Bhandari v Laming [2015] NSWCATAP 224
Category:	Principal judgment
Parties:	Shane Marsters and Amanda Marsters – Applicants Peter Graham - Respondent
Representation:	Amanda Marsters in person for Applicants Warren Gibson and Simon Saadeh for Respondent
File Number(s):	RT 16/20581
Publication restriction:	Nil

REASONS FOR DECISION

APPLICATION

- 1 The applicants seek an order for compensation under section 187(1)(d) of the Residential Tenancies Act 2010 (the Act).
- 2 The orders sought are to compensate the applicants for damage caused to the applicants' belongings when the premises they were occupying as tenants of the respondent were inundated with water during a storm which occurred on 30 January 2016.

JURISDICTION

3 The dispute between the applicant and the respondents arises from their relationship as landlord and tenants under a Residential Tenancy Agreement governed by the Residential Tenancies Act 2010. Part 9 of the Residential Tenancies Act confers jurisdiction on the Tribunal to hear and determine disputes.

BACKGROUND

4 The applicants entered into a Residential Tenancy Agreement (the lease) with the respondent on 28 January 2016, for a term of 12 months commencing on 28 January 2016 in respect of premises known as 50 Axxxxxx Street, Blacktown (the premises).

5 On 30 January 2016 the premises were inundated by water and much of the applicants' belongings were damaged.

6 6 The applicants seek compensation for the damaged articles.

EVIDENCE

7 7 Oral and documentary evidence was given by Mrs Amanda Marsters on behalf of the applicants.

8 Oral and documentary evidence was given by Mr Warren Gibson and by Mr Simon Saadeh on behalf the respondent. Mr Gibson is the Residential Sales and Leasing Director of the landlord's agent. Mr Saadeh is a property manager employed by the landlord's agent.

Applicants' evidence

9 Mrs Marsters affirmed an affidavit dated 7 June 2016. In her affidavit, Mrs Marsters states that when she and her husband, Shane Marsters, inspected the premises with Mr Saadeh on Saturday, 23 January 2016, she raised a number of concerns with Mr Saadeh about the state of repair and general condition of the premises. These matters included the state of cleanliness of the premises, rubbish items in the backyard, overflowing gutters, signs of pests, and the rear fence which had fallen down.

10 Mrs Marsters states that Mr Saadeh told her that all her concerns were scheduled to be fixed in the coming days and would be completed before the lease was signed. Mrs Marsters states the issues raised were not rectified by the landlord prior to the lease commencement. When Mrs Marsters arrived at the premises on 28 January 2016, with the applicants' removalists, the premises were in essentially the same condition as they were on the previous Saturday – 23 January 2016.

11 Nevertheless, the applicants moved into the premises and, not unusually, left their belongings in boxes unpacked and furniture items unassembled to be dealt with as time and opportunity permitted. Mrs Marsters was eight months' pregnant at the time.

12 On Saturday, 30 January 2016, Mrs Marsters was out for the day visiting her parents with her children. She also visited Macquarie Shopping Centre on her own, leaving the

children with her parents. At around 4:45 PM she received a telephone call from her husband, who was ill at home, to tell her that the house was flooding during a storm which had brought heavy rain to the area.

13 In his affidavit, affirmed on 7 June 2016, Mr Shane Marsters states:

“On Saturday 30 January 2016, I was very unwell and had fallen asleep on the couch in the front living room. At around 4:30 PM, I was woken by the sound of electrical cracking, the sound of a fire alarm fizzling and the smell of smoke.

I jumped up and found the back half of the house was flooding. There was water pouring through the light fittings, water had pushed the smoke alarm off the roof, water coming out of the walls, rising out of the floor, running out of various places in the roof, coming out of the door frames and running down the inside of the windows.

The second living room appear to be approximately an inch deep with my bed in the middle of it. Much of our belongings were also in the water as they had been either on the floor or happened to be under places that water poured out of.”

14 Both applicants stated in their affidavits that two SES workers attended the premises at about 9:30 PM on Saturday, 30 January 2016. Mrs Marsters says that the SES operatives declined to climb onto the roof as they informed the applicants that the roof was unsafe.

15 Mrs Marsters also states in her affidavit that the SES personnel said that the drainage pipes were blocked and that the guttering had not been cleared for a long time.

16 In her affidavit, Mrs Marsters also states that on 2 February 2016, builders attended the premises. She says that the builders made the comment that the drainage was severely inadequate.

17 The applicants remained in the premises until 13 February 2016, when they were able to obtain alternate premises to rent. The bond was refunded to the applicants on 16 February 2016. The landlord refunded all rent paid by them on 24 March 2016.

18 The applicants claim compensation for damage to several items.

19 Mrs Marsters has conceded that some of the items may be repairable. Those items are still in the possession of the applicants. No evidence was adduced about the cost of repairs or diminution in value of those items. The items which fall into this category are:

- Solid wood chest of drawers with changer top
- HP Z 230 workstation
- HP TouchSmart desktop
- IKEA children's chair
- IKEA children's table
- IKEA shelving unit (77×77 cm) (1 of 2)
- IKEA shelving unit (147×147 cm)
- Fantastic Furniture drawer tallboy

20 Those items which the applicants disposed of were:

- Sleepmaker queen mattress
- King single mattress

- Single sensor zone mattress
 - Cot mattress
 - ASUS 27 inch monitor
 - IKEA LED lighting chains (×2)
 - Queen size quilt
 - Dunlopillo pillows (×2)
 - Art blanket
- 21 Mrs Marsters also gave evidence that although they have retained an IKEA bookcase with glass doors, it is unusable. She also said that one of the IKEA shelving units (77×77 cm) is still retained by them, but is also unusable.
- 22 A quote for the repair of the 4 poster wooden bed frame has been obtained from Crafty Old Woodworker. The cost is \$2500.
- 23 Mrs Marsters provided comprehensive evidence of the date of purchase and the cost of purchase of the various items damaged in the flooding for which claims were being made.
- 24 The claims made by the applicants for the items which they disposed of are:

Item	Age	Purchase Cost	Life Expectancy	Current Value
Sleepmaker queen mattress	3 years	\$3999.00	10 years	\$2799.30
King single mattress	3 months	\$ 550.00	10 years	\$ 546.25
Single sensor zone mattress	3 months	\$ 550.00	10 years	\$ 546.25
Cot mattress	1 month	\$ 139.00	10 years	\$ 137.85
ASUS 27 inch monitor	1 year	\$ 389.00	4 years	\$ 291.75
IKEA LED lighting chains (×2)	1 year	\$ 30.00	5 years	\$ 24.00
Queen size quilt	3 months	\$ 198.00	5 years	\$ 188.10
Dunlopillo pillows (×2)	3 months	\$ 438.00	5 years	\$ 416.10

- 25 The claims made by the applicants for the items which they have not yet disposed of but which are unusable are:

Item	Age	Purchase Cost	Life Expectancy	Current Value
IKEA shelving unit (77×77 cm) (2 of 2)	1 year	\$ 49.00	13 years	\$ 45.23
IKEA bookcase with glass doors	1 year	\$255.00	13 years	\$235.38
TOTAL				\$280.61

- 26 The applicants also seek the costs of their removalists at \$900.

Respondent's evidence

- 27 The respondent's agents informed the Tribunal that they had been engaged to manage the premises only for about one month before the incident which occurred on 30 January 2016. Indeed, the agency agreement appears to have been signed on 16 January 2016, exactly one week before the inspection of the premises by the applicants.
- 28 Mr Saadeh was adamant in his oral evidence that neither of the applicants raised any concerns about the cleaning of the gutters during their inspection of the property on 23 January 2016.
- 29 The respondent's case was primarily run on the basis that the severe storm which affected Sydney on 30 January 2016 and not the state of repair of the premises was the cause of the damage to the applicants' belongings.
- 30 Mr Saadeh said that since the storm of 30 January 2016, no further instances have been reported of water penetration to the premises. However, no evidence was provided on behalf of the respondent about whether any remedial work has been carried out by the respondent to secure the premises from further water penetration.
- 31 The respondent provided no evidence to contradict the evidence of the applicants in relation to the state of repair of the premises and the comments made about the premises by the two SES workers who attended the premises on the night of the storm and by the builder who attended the premises a few days later.
- 32 Furthermore, the respondent's representatives did not challenge any of the costings provided by the applicants in relation to the compensation sought by the applicants, apart from a suggestion that the invoice for the purchase of the four poster wooden bed frame was not genuine. However, no challenge was made in respect of the quote for the repair to the bed frame.

RELEVANT LEGISLATION

Residential Tenancies Act 2010

52 Landlord's general obligations for residential premises

(1) A landlord must provide the residential premises in a reasonable state of cleanliness and fit for habitation by the tenant.

(2)

(3) ...

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

187 Orders that may be made by Tribunal

(1) The Tribunal may, on application by a landlord or tenant or other person under this Act, or in any proceedings under this Act, make one or more of the following orders:

(a) ...

(b) ...

(c) an order for the payment of an amount of money,

(d) an order as to compensation,

CONSIDERATION

33 There appears to be no dispute between the parties that on 30 January 2016 water penetrated the premises. That water penetration resulted in substantial damage to the applicants' belongings. The applicants were in the early stages of settling into their new home which had been occupied by them for about 48 hours when the premises suffered major water leakages.

34 As the applicants were unable to continue residing in the premises, the landlord, quite properly, released them from their obligations under the lease and refunded all rent paid in advance by the applicants. The bond was also fully refunded to the applicants.

35 Section 52 of the Act requires the landlord to provide premises which are fit for habitation by the tenant.

36 In *Bhandari v Laming [2015] NSWCATAP 224*, the Appeal Panel of the Tribunal said at par [38] – [39] par [40]:

The obligation to provide residential premises fit for habitation is mandatory and, according to language used in the provision, unqualified. Relevantly, the obligation is not expressed to be contingent on reasonable steps or to be dependent on the landlord being at fault or having control over the event or circumstance affecting the state of the premises. This is in contrast with the obligation on the landlord to provide and maintain the residential premises in a reasonable state of repair (s 63 RTA) and the obligation that arises in respect of the tenant's entitlement to quiet enjoyment of the residential premises (s 50 RTA). The landlord's obligations under sections 50, 63 and 52 (in relation to the state of cleanliness of the residential premises) are mandatory and ongoing but qualified by the concept of reasonableness.

Section 52 is expressed in clear and unqualified terms because the fitness, or otherwise, of residential premises for habitation is at the core of the subject matter of the agreement. Imputing the concept of reasonable steps or reading down the provision is not only inconsistent with the clear language of s 52 but may lead to an unfair outcome. This can be illustrated by the effect that reading down or qualifying the obligation would have on a tenant, who finds themselves bound by a fixed term lease where there is a defect, albeit outside the control of the landlord, which makes the residential premises uninhabitable. The tenant would have no satisfactory or clear

available remedy under the RTA. For instance, the rent abatement provisions (ss 43(2) and 45 RTA) apply to supervening events where premises become wholly or partly uninhabitable, otherwise than as a result of breach [emphasis added]. Relevantly, the remedy for reduction of rent under s 43(2) is expressly stated in s 45 to arise in respect of the frustration of a residential tenancy agreement. Accordingly, this provision would not apply in circumstances where the premises are unfit at the outset. Moreover, a residential tenancy agreement for a fixed term (which this agreement was) may only be terminated by the Tribunal on application by the tenant if the landlord has breached the agreement (s 103 RTA) or for hardship (s 104 RTA). The hardship provisions do not provide for the tenant to be compensated for loss, only the landlord.

Thus, if the obligation to provide residential premises fit for habitation is qualified or read down to include reasonable steps, as contended by Dr Bhandari's representative, this would leave a tenant in Ms Laming's position without remedies other than the limited remedy available under s 104. This construction is not supported by the text of the provision, it is inconsistent with the use of the language qualifying other obligations of the landlord under the RTA and would produce an unfair result, which is inconsistent with the scheme of the RTA to balance rights and obligations between landlords and tenants.

- 37 The damage caused to the applicants' goods occurred because water entered the premises from the roof.
- 38 Whether or not the applicants requested the respondent's agent to clear the gutters is irrelevant. The landlord had an unqualified obligation to provide premises which were fit for habitation at and from the date of commencement of the lease.
- 39 The Tribunal finds that the premises were not fit for habitation at the commencement of the lease. The Tribunal also finds that because of the landlord's breach to provide premises which were fit for habitation, the applicant suffered loss when their belongings were damaged by water entering the premises.
- 40 The cause of the damage was not the result of some surface flood, but because water entered the premises from the roof. Applying the concept of reasonableness, the Tribunal finds that it was reasonable to expect that the structure of the roof of the premises was sufficiently secure and in a state of repair to ensure that the copious amounts of water which entered the premises did not occur. This was not a situation where a few leaks appeared during a storm which could have been adequately contained in the short term by towels and buckets. The water ingress is so severe that the back section of the house was swamped with water to a depth of about 1 inch. Regrettably, most of the applicants' belongings were stored in that back section whilst they progressively unpacked and settled into their new home which they had only occupied for two days.
- 41 The applicants are entitled to be compensated for the damage which affected their goods to the extent that they have proved the loss.
- 42 The applicants' claims for the depreciated values of the goods not disposed of and still in their possession (apart from the claim for the repair of the bed frame, the claim for the 77×77 cm shelving unit and the claim for the bookcase with glass doors) are rejected. The applicants have a duty to mitigate their loss. These claims are rejected because the applicants have not produced any evidence about the cost of repairs or the diminution in value in respect of these items. In the result, the Tribunal is unable to quantify the applicants' loss in respect of these items.

- 43 The applicants' claim for moving costs is also rejected. The lease was for a fixed term of 12 months and at the end of the tenancy, whenever that might have been, the applicants were going to have to meet the costs of moving.
- 44 The Tribunal finds that the following compensation is payable by the respondent to the applicants. In making that finding, the Tribunal has taken into consideration the fact that the landlord repaid all rent paid in advance by the tenants.
- Repair costs for 4-poster wooden bed \$2,500.00
 - Items already disposed of \$5,041.60
 - Items not yet disposed of, but unusable \$ 280.61
 - \$7,822.21
- 45 Pursuant to ss 187(1)(c) and (d) of the Act, the Tribunal will order that compensation in the sum of \$7,822.21 is to be paid by the respondents to the applicants on or before 23 September 2016.

ORDERS

- 46 The respondent must pay \$7,822.21 to the applicants on or before 23 September 2016.

C R Xuereb

General Member

Civil and Administrative Tribunal of New South Wales

14 September 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

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Decision last updated: 03 November 2016