Civil and Administrative Tribunal

New South Wales

Case Name:	Gravina v Ruehl
Medium Neutral Citation:	[2018] NSWCATAP 267
Hearing Date(s):	7 November 2018
Date of Orders:	13 November 2018
Decision Date:	13 November 2018
Jurisdiction:	Appeal Panel
Before:	The Hon F Marks, Principal Member L Wilson, Senior Member
Decision:	(1) The appeal is allowed in part (2) The decision under appeal is varied to the extent only that the respondents are to pay the appellants an additional sum of $371.36 representing four days' rental payments (3) There being no application for costs, no order as to costs.
Catchwords:	Residential tenancy – renovation work carried out by Body Corporate resulted in dust and other substances containing excessive lead levels entering premises – expert reports – premises cleaned – held rent abated for a period of 4 days.
Legislation Cited:	Residential Tenancies Act 2010 Civil and Administrative Tribunal Act 2013
Cases Cited:	John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 at [13].
Texts Cited:	Nil
Category:	Principal judgment

Parties:	David Gravina (First Appellant) Luscheyne Mellon (Second Appellant) Mercedes Ruehl (First Respondent) Oliver McCauley (Second Respondent)
Representation:	L Mellon, In Person (Appellants) L Cipollone (Agent for Respondents)
File Number(s):	AP 18/33013
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division
Citation:	N/A
Date of Decision:	11 July, 2018
Before:	M Tibbey Senior Member
File Number(s):	RT18/22291 and RT18/18811

JUDGMENT

Factual background

1 The appellants, Luscheyne Mellon and David Gravina leased residential premises from the respondent landlords Mercedes Ruehl and Oliver McCauley. On 24 April, 2018 the appellants filed an Application in the Consumer and Commercial Division of this Tribunal seeking orders for payment of compensation, reduction in rent and that the respondent landlords carry out repairs. The basis of that application was that the windows in the premises had been replaced commencing 19 March, 2018 and that the nature and extent of that work had forced them to seek alternative accommodation. The lease was due to expire on 24 May, 2018. Mention was made in the application of lead dust contaminating the premises. On 16 May, 2018 the respondents instituted their own Application seeking an order for payment of outstanding rent consequent upon the “abandonment” of the premises by the appellants, an order for access to the premises, an order for payment of an occupation fee

because the appellants had allegedly left goods in the premises, an order for payment out of a rental bond and a termination order effective at the end of the fixed term. The respondents denied that the premises or the appellants goods had been contaminated.

2 Both applications came on for hearing and were heard together before a Senior Member of this Tribunal. That Member heard both applications and made orders on 10 July, 2018. The effect of the orders were to almost wholly dismissed the appellants' application and uphold the respondents' application. By those orders, the respondents became entitled to $2,303 from the rental bond and the balance was to be paid to the appellants.

3 The Senior Member published separate reasons for decision in each matter on 11 July, 2018, but both appear to be in identical terms. It was noted that the controversy between the parties arose when all windows in the two-bedroom unit were removed and were replaced. The appellants alleged that the renovations resulted in high levels of lead contamination of the premises which were injurious to their health and that they and their almost 4-year-old daughter were forced to vacate the premises and seek alternative accommodation whilst tests were undertaken. They did not return to the premises before the lease expired. They had argued that the respondents were required by section 26 of the Residential Tenancies Act ("the Act"), to disclose that the window renovation works were intended to be undertaken, and that if such disclosure had been made they would not have entered into the tenancy agreement.

4 It appears that the premises were part of a larger block of apartments, and that renovation work had commenced on the whole apartment block on 6 February, 2018. The appellants were given "little notice" of the dates that the work would be carried out in their rented premises, which was performed on 19 and 20 March, 2018. It appears the appellants were informed in about January 2018 of the proposed building works, which started on other apartments in the strata scheme in February 2018. The appellants did not propose to vacate the rental premises early upon learning of the building works.

5 After the work was completed in the rental premises, the appellants complained that the premises were dusty and as a result the landlord had them

professionally cleaned on 21 March. When the appellants were not satisfied with that work, they were cleaned again the following day. The appellants said that they then spent about 5 hours themselves undertaking further cleaning work. The appellants complained that their daughter suffered an “inflamed nose”, and Ms Mellon complained of increased respiratory and other symptoms and obtained a medical certificate to this effect.

6 The Senior Member noted that the appellants said that they had purchased a DIY lead testing kit from a hardware store, and had ascertained that there were elevated levels of lead in the dust. They moved out of the premises on 23 March, 2018 and sought compensation from the respondents which was refused. They left some of their belongings in the apartment. They then engaged an expert to conduct testing. A written report from that expert concluded that on the date when samples were taken, 26 March 2018, elevated levels of lead infused dust were found in one place only, namely a toilet brush bowl holder in a bathroom. The Senior Member concluded that this area had not been cleaned after the building works had been completed in the rental premises.

7 The respondents engaged their own expert who reported that when inspected and tested on 15 May 2018 there was no evidence of excessive lead levels in any part of the premises.

8 There were two significant differences in the reports of the experts. The appellants’ expert report referred to a particular industry standard and the expert had tested the lead levels in the toilet brush holder. The respondents’ expert relied solely on the relevant Australian Standard and had tested for lead levels at a much later date. Significantly, the Senior Member said that she had compared the “qualifications and experience” of each of the authors of these reports and said that she found those of the respondents’ expert superior to those of the appellants’ expert, although “both have some experience in the industry.” The Senior Member did not describe the qualifications or furnish any reasons why she preferred one to the other. She did conclude that she preferred and accepted the report of the respondents where it differed from that

of the appellants. However, importantly there is no analysis of the consequences of accepting one opinion over the other.

9 The Senior Member concluded that she was “not persuaded that the levels of lead in the paint flakes in the toilet brush holder are sufficient to indicate that the unit posed a danger to human health sufficient to render the premises “uninhabitable,” particularly if they were safely and speedily disposed of.” The Senior Member also referred to blood tests of the appellants and their daughter which failed to disclose elevated blood lead levels.

10 Both parties had endeavoured to elicit evidence from other residents in the apartment block concerning the general nature of the renovations carried out and their impact on the premises generally. None of this was directed specifically to the circumstances of the appellants, and the Senior Member declined to rely on any of this evidence.

11 The Senior Member declined to find that the premises were uninhabitable by reason of the nature and extent of the renovation work carried out, allowing for the cleaning which was undertaken on 21 and 22 March 2018. Even though the appellants were genuinely concerned and alarmed about the possibility of lead contamination, the Senior Member held that as it transpired there was no justification for this reaction and accordingly no compensation was payable to them. Furthermore, she declined to hold that a failure to disclose the nature and extent that renovation work breached any duty of disclosure under section 26 of the Act, nor was there any breach of any duty of care owed to the appellants by the respondents.

12 However, when considering whether there had been a breach of quiet enjoyment having regard to the fact that Ms Mellon worked from the premises, the Senior Member held that the work constituted a breach of quiet enjoyment and awarded the appellants compensation in the sum of $706, representing one week’s rent. It was an agreed fact before the Appeal Panel that one week’s rent was in fact $650. There was no appeal against the amount of compensation ordered by the Senior Member to be paid to the appellants, and therefore that amount has not been disturbed by the Appeal Panel.

13 The appellants had also claimed compensation to replace goods which they had left in the premises which they alleged had been contaminated. In view of the evidence that no contamination existed the Senior Member declined to award any compensation and referred also to the appellants' expert opinion that the items such as clothes and soft toys could be laundered and there was no need to dispose of them. She also rejected the appellants' claim for reimbursement for the purchase of replacement items including a new mattress, vacuum cleaner filter, sofa cushions and the like. Even if there had been any demonstrated justification for the need to purchase these items, the appellants had not provided appropriate quantification of their claim.

14 Having regard to these findings the Senior Member allowed the appellants the sum of $706 by way of compensation, and ordered payment to the respondents for outstanding rent of $2,303 from the rental bond with the balance to be paid to the appellants.

The grounds for appeal and their consideration

15 The appellants relied on amended grounds for appeal filed by leave on 23 August 2018. They are as follows;

> (1) At the time that the premises were cleaned neither the appellants nor the respondents knew whether there were undue levels of lead in the dust. The respondents should have called in specialist hazard removal cleaners rather than regular cleaners and undertaken testing for lead. The failure of the respondents to do so constituted a breach of the respondents' duty of care.

16 The answer to this is that the appellants proceeded on the basis of a presumption that there were harmful substances in the premises and there was a need for the respondents to displace this. The proper approach is that the respondents were required to have taken all reasonable care with respect to known circumstances or circumstances which were reasonably foreseeable, which they did, and they were not obliged to take into account lead levels unless it was reasonably appropriate to do so. There is no evidence that the respondents were aware or should have been aware that there were excessive lead levels in the premises before being told of this problem by the appellants. Once informed the respondents arranged cleaning to be carried out the next day, and again on the following day when the appellants expressed dissatisfaction with the state of the premises.

17 The determination of this ground and, indeed, the determination of the remainder of the appeal proceedings requires an analysis of each of the competing expert reports which were presented to the Senior Member. Copies were made available to us during the course of the appeal hearing. The appellants relied on a report of Ecolibria which appears to carry on business as "Building Biologists." The report was written by Jeanette Williams, who represents herself as an "Australian Qualified Building Biologist" a profession said to have originated in Germany in 1979 and which studies "the relationship between buildings, the health of the occupants and the environment as a whole." Ms Williams attended at the premises on 26 March, 2018. She noted that she had been asked to ascertain whether the dust created by the replacement of windows in the unit complex and in particular in the appellant's unit contained lead. The unit complex was built around 1970, at a time when higher concentration of lead levels was permitted in paint. Using alcoholic swabs she took samples of dust and paint chips from items in the living room, child's bedroom, bathroom, master bedroom and from carpet under a window in the foyer- stairwell. Significantly, the bathroom sample was taken from a toilet brush holder, because she said that it appeared not to have been cleaned. The samples were analysed by an independent laboratory, Envirolab Services Pty Limited. Ms Williams reported upon the results of the laboratory analysis which showed that all samples contained some indication of the presence of lead, but all, other than the toilet brush holder, were within tolerable limits according to the relevant Australian Standard. However, some of them were above the recommended level established by the LEAD Group, said by Ms Williams to be an "Australian Not for Profit" organisation. Importantly, for our purposes, the analysis showed the presence of lead in the toilet brush holder of more than 7 times the maximum level established by the Australian Standards.

18 The respondents relied on a report of JBS&G whom they had retained to review the report of Ecolibria and to take their own independent samples for analysis, which was carried out on 15 May 2018. The analysis of those samples indicated that there was no relevant lead contamination as at that date, but there was evidence of the presence of lead at levels below the

relevant threshold on the floors of the main bedroom, the second bedroom, bathroom and lounge as well as in the kitchen. It may be assumed that the toilet brush holder was no longer in the premises, because it was not referred to in the report.

19 In their report JBS&G noted that the profession of building biologist was not widely recognised, “at least within Australia.” They thought that the work carried out by Ms Williams would be more commonly undertaken by “occupational hygienists and environmental scientists” who were employed in their organisation. Furthermore, they said that the assessment criteria and recommendations provided by The Lead Group were not recognised by any regulator or health agency within Australia. The generally accepted standard was that set out in the relevant Australian Standard. They noted that “For clearance after lead paint management activities, the acceptance limits for surface dust lead loadings” were 1 mg/m² for interior floors, 5 mg/m² for interior windowsills and 8 mg/m² for exterior surfaces, for measurements referable to the presence of lead. They were also critical that laboratory certificates were not provided to support the lead dust results presented in the Ecolibria report and that there were no details provided about the calculations undertaken to generate the lead dust concentrations.

20 In dealing with these reports, the Senior Member said in her reasons;

> 21 The report of the respondents attacked the qualifications of the report writer of the report of the tenants. On a review of the qualifications and experience of each of the report writers, the Tribunal finds that the qualifications and experience of the respondents’ report writers after the period to those of the tenant’s report writer, though both have some experience in the industry. Where it differs from the report of the tenants, the report of the landlords is to be preferred.
>
> 22 The Tribunal accepts the criticisms of the Ecolibria report contained in Section 2 of the JBS&G report and accept the conclusions of the JBS&G report that “the site is not subject to lead contamination and/or lead containing paints and/or lead containing dusts. On the basis of lead levels within the premises, there is no reason to consider that the building is unsuitable for human habitation.”

21 However, the Senior Member then continued;

> 23 The Tribunal is prepared to draw the inference that the levels of dust in the unit, blown inside on a particularly windy day, were considerable, as demonstrated by the dust residue left in the toilet brush holder, which Mr

> Gravina gave evidence was located just under the window sill in the small toilet.
>
> 24 The Tribunal accepts that evidence and finds that the extent of the dust in the toilet brush holder, tested on 26 March, 2018 as referred to in the Ecolibria report, was indicative of the state of parts of the premises before the two professional cleaning jobs undertaken by the landlords within a day of been notified by the tenants of the extent of the dust. The dust in the toilet brush holder had apparently been overlooked in the clean-up.
>
> 25 The Tribunal is not persuaded that the levels of lead in the paint flakes in the toilet brush holder are sufficient to indicate that the unit posed a danger to human health sufficient to render the premises "uninhabitable," particularly if they were safely and speedily disposed of.

22 With respect, we have a number of difficulties with the analysis of the evidence and the conclusions expressed in the reasons extracted above. Most obviously, the JBS&G samples were taken at a much later date than that of Ecolibria, namely 15 May 2018 when compared with 26 March, 2018. Indeed, the JBS&G results are irrelevant for our purposes for the determination of these proceedings. Accordingly, the acceptance of the Ecolibria report is an important matter in order to establish the state of the premises, at least as at 26 March, 2018. Apart from the reference to the LEAD standard which we can ignore whilst applying the relevant Australian Standard, the JBS&G report was critical of Ms Williams with respect to her qualifications and with respect to the laboratory results. We can leave aside the question of the qualifications of Ms Williams because the only matters which would arguably influence the test results would be the methodology adopted by her when taking samples and the work of the independent laboratory in assessing them. In circumstances where both reports were seemingly admitted into evidence before the Senior Member and neither expert was required to give evidence, it would be inappropriate in our opinion to exclude the laboratory test results which are reported on in the Ecolibria report. Furthermore, the Senior Member specifically accepted the test results in [24] which we have extracted above.

23 On this basis, there was a finding of an unacceptably high level of lead in the toilet brush holder, coupled with the inference drawn by the Senior Member that this unacceptably high level was indicative of lead levels throughout the apartment which had been blown in through the open windows as is clearly made in [23] above. In these circumstances the conclusion expressed in [25] above does not logically follow. Once there is a conclusion that during the

course of the removal of the windows dust and other substances entered the subject premises and created lead levels which substantially exceeded by 7 times the Australian Standard, then it must follow that the premises were uninhabitable at least until the second clean undertaken by or on behalf of the respondents. On this basis it must be concluded that the premises were uninhabitable for a period of 4 days, being the two days during which the work was carried out and the following two days during which the premises were cleaned.

24 The failure of the Senior Member to so find constituted an error of law because there was no evidence to support the finding of fact or alternatively the Tribunal identified the wrong issue or asked the wrong question: *John Prendergast & Vanessa Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [13].

25 Having found an error of law, the appeal is as of right: s.80(2)(b) *Civil and Administrative Tribunal Act 2013*.

26 Given the small amount of money in dispute, and the fact the parties have already participated in a hearing at first instance and an appeal hearing, the Appeal Panel determined to deal with this appeal by way of a new hearing, rather than remit the matter for a further hearing in the Consumer and Commercial Division. This would better achieve the quick, just and cheap resolution of the real issues in dispute.

27 Having conducted a new hearing, the appeal is allowed to the extent that the Senior Member concluded that the premises were not, and had never been, uninhabitable. The Appeal Panel finds that the premises were uninhabitable for four days. As a result, the Appeal Panel determines that the appellants are entitled to an abatement of rent for a period of 4 days.

28 The second ground of appeal was:

> (2) The Tribunal was wrong to conclude that the professional cleaning undertaken by the respondents was adequate given that the premises must have been contaminated to the extent of the excessive levels of lead found in the toilet brush holder. There was always a chance that higher lead levels might have been found elsewhere in the premises.

29 The answer to this is that there is simply no evidence that would justify a finding that there were undue levels of lead other than in the toilet brush holder, and the inference which can be drawn from this that there were undue levels of lead throughout the premises until the second clean was carried out. There is simply no evidence that there was any undue level of lead other than in the toilet brush holder itself throughout the premises after the second clean. Certainly, as at 26 March, 2018 when the Ecolibria tests were conducted the concentration of lead was confined to the toilet brush holder. There is no evidence to suggest that this would render the premises as a whole uninhabitable as asserted by the appellants. Even though the appellants suggested that the premises should have been scientifically cleaned by hazard removal experts, such evidence as is available to us indicates that the cleaning carried out achieved the purpose of removing hazardous lead levels, other than for the toilet brush holder. This ground is rejected.

30 The third ground of appeal was:

> (3). The Tribunal failed to take into account the requirement of the contractor and building owner to undertake hazard prevention testing before work was commenced. It was alleged that the original 1960's windows and doors of the unit would contain lead paint. This was said to give rise to a breach of the respondents' duty of care. It is asserted that the Tribunal fell into "procedural error" by not referring a question of law under section 54 of the Civil and Administrative Tribunal Act as to whether an examination of this issue could have been undertaken.

31 The answer to this is that there is no evidence that in all the circumstances that the respondents acted unreasonably, and presumably they relied upon the expertise of the contractors and the Body Corporate when the overall contract was entered into. Any allegation that part of the contractors or the Body Corporate breached any duty of care owed to the appellants would need to be dealt with in proceedings other than those in this Tribunal which are confined to proceedings between the appellants as tenants and the respondents as landlords. There is no question of law raised which would require referral to the Supreme Court. This ground is rejected.

32 The fourth ground of appeal was:

> (4). The respondents breached their duty of care by relying on the Body Corporate to deal with the question of lead contamination when it was first reported and by failing to obtain an expert report which was not produced to

the appellants for 50 days after their expert report had been made available. This was said to be an inordinate delay and rendered the respondents in breach of sections 50, 52 and 63 of the Act

33 These provisions are in the following terms;

50 Tenant's right to quiet enjoyment

(1) A tenant is entitled to quiet enjoyment of the residential premises without interruption by the landlord or any person claiming by, through or under the landlord or having superior title (such as a head landlord) to that of the landlord.

(2) A landlord or landlord's agent must not interfere with, or cause or permit any interference with, the reasonable peace, comfort or privacy of the tenant in using the residential premises.

Maximum penalty: 10 penalty units.

(3) A landlord or landlord's agent must take all reasonable steps to ensure that the landlord's other neighbouring tenants do not interfere with the reasonable peace, comfort or privacy of the tenant in using the residential premises.

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

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) A landlord must not interfere with the supply of gas, electricity, water, telecommunications services or other services to the residential premises unless the interference is necessary to avoid danger to any person or to enable maintenance or repairs to be carried out.

(3) A landlord must comply with the landlord's statutory obligations relating to the health or safety of the residential premises.

Note. Such obligations include obligations relating to swimming pools under the Swimming Pools Act 1992.

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

63 Landlord's general obligation

(1) A landlord must provide and maintain the residential premises in a reasonable state of repair, having regard to the age of, rent payable for and prospective life of the premises.

(2) A landlord's obligation to provide and maintain the residential premises in a reasonable state of repair applies even though the tenant had notice of the state of disrepair before entering into occupation of the residential premises.

(3) A landlord is not in breach of the obligation to provide and maintain the residential premises in a reasonable state of repair if the state of disrepair is caused by the tenant's breach of this Part.

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

34 This ground of appeal ignores the fact that the appellants obtained a favourable finding from the Senior Member that their right to quiet enjoyment provided for in section 50 had been breached. The answer to the remainder of the ground lies in the finding that the only area of lead contamination found after the cleaning was in the toilet brush holder. This would not be sufficient of itself to have caused the respondents to have taken any particular remedial action. It follows that the respondents were not in breach of any of sections 52 and 53.

35 There does not appear to be any ground 5 specified.

36 The sixth ground of appeal was:

> (6) The Tribunal was in error in failing to take into account that the work had been performed without a hazard risk assessment, that the appellants' belongings had been damaged and that the respondents had failed to take action within a reasonable time in determining the level of compensation.

37 It was the evidence in the proceedings that the work was being carried out at the instigation of the Body Corporate, which is understandable given that the windows are common property. The contract was between the Body Corporate and the building contractor. There can be no obligation on the respondents personally in the event that there had been a failure to carry out a hazard risk assessment, assuming that such failure had occurred, in the absence of any evidence of any kind that the respondents were aware of any such failure or condoned any such failure or in some other manner were responsible for any such failure. There is no merit in this ground.

38 The seventh ground of appeal was:

> (7) There was present in the hearing room a lawyer who was advising the real estate agent appearing for the respondents. It was said that this breached section 45 of the Civil and Administrative Tribunal Act and the Tribunal should not have allowed this to occur.

39 The answer is that whilst the lawyer cannot appear without leave, there seems no reason why a lawyer should not be allowed to remain within a hearing room during a public hearing and be able to provide assistance appropriately to a party during the course of the hearing.

40 The appellant erroneously submitted two seventh grounds of appeal. The second of these was:

> (7) The appellants had issued summonses for the production of material concerning the window replacement project, presumably undertaken by the Body Corporate and material relating to the risk hazard identification process. It is alleged that the material was never produced. It is further alleged that the Tribunal was in error in determining the matter without acknowledging the absence of this material.

41 In the absence of any evidence of any kind sheeting home any responsibility of any kind imposed on the respondents with respect to the contract works being carried out by the Body Corporate, and the manner in which that work was to be carried out, any such material would be irrelevant and would have no bearing on the outcome of the proceedings. This ground must fail.

42 In addition to the above matters, it is clear that the appellants had raised an issue concerning an alleged breach by the respondents of their obligations under section 26 of the Act to inform them about the nature and extent of the building works on the basis that if they had been so informed, they would not have entered into the tenancy. Section 26 is as follows;

> 26 Disclosure of information to tenants generally
>
> (1) alse representations A landlord or landlord's agent must not induce a tenant to enter into a residential tenancy agreement by any statement, representation or promise that the landlord or agent knows to be false, misleading or deceptive or by knowingly concealing a material fact of a kind prescribed by the regulations.
>
> (2) Disclosure of sale, mortgagee actions A landlord or landlord's agent must disclose the following to the tenant before the tenant enters into the residential tenancy agreement:
>
> > (a) any proposal to sell the residential premises, if the landlord has prepared a contract for sale of the residential premises,
> >
> > (b) that a mortgagee is taking action for possession of the residential premises, if the mortgagee has commenced proceedings in a court to enforce a mortgage over the premises.
>
> (3) Subsection (2) does not apply to a landlord's agent unless the agent is aware of the matters required to be disclosed.
>
> (4) Information statement to be given A landlord or landlord's agent must give a tenant an information statement in the approved form before the tenant enters into the residential tenancy agreement.
>
> Maximum penalty: 20 penalty units.

43 In dealing with this matter the Senior Member said that; "the work on their unit took, at most, one day and was not of such magnitude or extent that there was a positive duty on the landlords prior to the tenant's entering into the residential tenancy agreement to disclose that to the tenants." Even allowing for the fact

that the work occupied two days, we agree on the evidence that section 26 would not have the effect of requiring disclosure of the replacement of the windows in the apartment, assuming that there was no discussion concerning this matter between the appellants and the respondents' agent at the time the lease was negotiated.

Conclusion and orders

44 Pursuant to the finding that the Senior Member was in error in failing to have determined that the premises were uninhabitable by reason of high lead levels for a period of 4 days as explained above, and that the rent should therefore have abated during that period we make the following orders;

(1) The appeal is allowed in part

(2) The decision under appeal is varied to the extent only that the respondents are to pay the appellants an additional sum of $371.36 representing four days' rental payments

(3) There being no application for costs, no order as to costs.

****

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