

AUSTRALIA / JUDGMENT

Okazaki v Dickerson [2019] NSWCATCD 71

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Civil and Administrative Tribunal

New South Wales

Medium Neutral Citation: Okazaki v Dickerson [2019] NSWCATCD 71

Hearing dates: 14 June 2019

Decision date: 23 July 2019

Jurisdiction: Consumer and Commercial Division

Before: P French, General Member

Decision: (1) The tenants, Magdalena Dickerson and David Weir, must pay the landlord, Kimie Okazaki, the sum of \$3,048.12 immediately.

(2) Rental Bond Services is directed to pay the landlord, Kimie Okazaki, \$3,048.12 from Rental Bond No. E917502-6. Any amount received is to be credited against the money order (Order 1). Any balance of the rental bond plus any interest must be paid to the tenants, Magdalena Dickerson and David Weir.

(3) The application is otherwise dismissed.

Catchwords: RESIDENTIAL TENANCIES: landlord's end of tenancy claim for compensation – kitchen bench top – carpets bedroom doors – bathroom vanity units – blinds

Legislation Cited: Conveyancing Act 1919: s 117

Residential Tenancies Act 2010: ss 6; 13; 29; 30; 51; 187; 166; 175; 190

Residential Tenancies Regulation 2010: 22; 23; Schedule 2

Cases Cited: Abela v Walker [1997] NSW RT 15

Acetelli v Farrant and Allan [1997] NSWRT 91

Alamdo Holdings Pty Ltd v Australian Window Furnishings (NSW) P/L [2006] NSWCA 224

Bell & Bell v Boccola, Campbell & Lawrence (Residential Tenancies) [2009] ACAT 26

Bridgford v Brien [2017] NSWCATAP 111

Briginshaw v Briginshaw (1938) 60 CLR 336

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64.

Cooper v Westpac General Insurance Ltd [2007] ACTCA 20

Cure v Bridge Housing Ltd [2014] NSWCATAP 80

Fitzpatrick v Wu unreported, NSWRT, 2001, 01/16425

Hadley v Baxendale [1854] 9 Ex 341

Lindsay v NSW Land and Housing Corporation [2016] NSWCATAP 128

Marcourt v Clark [2012] NSWCA 367

Miller v Minister for Pensions [1947] 2 All ER 372

O'Brien v Twynam [2016] NSWCATAP 125

Sherson & Associates Pty Ltd v Bailey [2000] NSWCA 275

Sunray Investments P/l v Cruwys [1992] NSWRT 95

TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd (1963) 180

Westpac General Insurance v Cooper [2006] ACTSC 91

Yang v NSW Land and Housing Corporation [2016] NSWCATAD 37

Texts Cited: Australian Taxation Office, Guide to Rental Properties 2018

Category: Principal judgment

Parties: Kimie Okazaki (the landlord)

Magdalena Dickerson and David Weir (the tenants)

Representation: Rheanon Wooldridge, Property Manager (for landlord)

Magdalena Dickerson and David Weir (in person)

File Number(s): RT 19/16913

Publication restriction: Nil

REASONS FOR DECISION

1. This is an application by Kimie Okazaki (the landlord) for an order from the Tribunal pursuant to sections 51, 187, and 190 of the Residential Tenancies Act 2010 (RT Act) that would require Magdalena Dickerson and David Weir (the tenants) to pay her a total of \$12,390.00 in compensation for damage and loss she contends she has incurred due to the tenants' failure to leave the premises reasonably clean, and because of intentional or negligent damage to the premises caused or permitted by the tenants in the course of the

tenancy which resulted in them failing to return the premises at the end of the tenancy in a condition as close as possible to the condition it was in at the start of the tenancy, fair wear and tear excepted. The landlord also seeks an order pursuant to section 175 of the RT Act that will direct Rental Bond Services to pay her the whole of the tenants' Rental Bond in part satisfaction of this amount. This application was made to the Tribunal on 9 April 2019 (the application).

2. For the reasons set out following, the Tribunal is comfortably satisfied on the evidence before it that the landlord is entitled to an order that will require the tenants to pay her a total of \$3,048.12 in compensation in relation to the replacement of the kitchen bench top and the repair of two bedroom doors and the en-suite and main bathroom vanity units. Rental Bond Services has been directed to pay the landlord this sum from the tenants' rental bond. The balance of the rental bond plus any interest is to be paid to the tenants. The landlord's claims have otherwise been dismissed.

Procedural history

1. The application first came before the Tribunal in a Group List for Conciliation and Hearing on 30 April 2019. The landlord was represented at that listing of the application by a Property Manager employed by her Managing Agent, Ms Vukovic. The tenants both attended in person. In accordance with the Tribunal's usual practice where both parties are present at the first listing of an application, prior to the case being called, the parties were offered the opportunity to attempt to resolve the dispute cooperatively in conciliation with the assistance of a Tribunal conciliator. Those efforts were not successful. When the parties returned to the hearing room, the Tribunal adjourned the application to a special fixture hearing and gave directions to the parties for the filing and exchange of the documentary evidence they intended to rely on at that hearing.

Evidence

1. Both parties have complied with the Tribunal's directions for the filing and exchange of their evidence. The landlord's bundle was marked Exhibit A1. The tenants' bundle was marked Exhibit R1.
2. Ms Rheanon Wooldridge, another Property Manager working with the landlord's Managing Agent, and Mr Peter Hale, the landlord's Managing Agent, attended the hearing on behalf of the landlord. Both gave oral evidence under oath. Ms Dickerson and Mr Weir also both attended the hearing in person and both gave oral evidence under affirmation. The parties had the opportunity to present their respective cases, to ask each other questions, and to make final submissions to the Tribunal.

Background

1. The residential tenancy agreement from which this dispute arises was made on 27 January 2016. It was for a fixed term of 12 months which was expressed to commence on 9 February 2016 and end on 8 February 2017. The agreement was in Standard Form. At the end of the fixed term, the agreement continued on a periodic basis. The agreement was terminated on notice from the tenants under section 97 of the RT Act (end of periodic tenancy) with effect on 16 February 2019. The tenancy was therefore of just over three years in duration. The rent payable under the agreement over the period of the tenancy was \$4,345.24 per calendar month. The agreement also required the tenants to provide the landlord with a rental bond of \$4,000.00 at the start of the tenancy. The rental bond was deposited with Rental Bond Services. It has been frozen pending the outcome of these proceedings.
2. On 8 February 2016 the landlord's agent completed a Start-of-Tenancy Condition Report in respect of the premises and provided two copies to the tenants for their review. The tenants completed their section of the report adding a number of dissenting notations and signed and returned it to the landlord's agent on 16 February 2016. No End-of-Tenancy Condition Report was prepared by either the landlord or tenants.
3. There was a joint final inspection of the premises by the landlord and the tenants on 6 March 2019. The purpose of that joint inspection was to discuss a number of end of tenancy issues that the landlord's agent had notified the tenant of, including the matters in dispute in this proceeding. The tenants are critical of the fact that this joint inspection did not take place until 18 days after they returned possession of the premises. The delay appears in part to arise from the landlord's agent's decision to investigate the costs of rectification of the disputed items prior to meeting with the tenants and in part from the fact that Mr Weir was working interstate in early March and was unavailable to meet. While the delay is inconsistent with the obligation of a landlord and tenant under section 29 of the RT Act to meet and prepare a condition report immediately at the end of the tenancy, it is difficult to see how this delay is of any real significance given the items in dispute in this case.
4. The residential premises is a three level town house in a strata scheme located in Neutral Bay. It has three bedrooms, a loft, one main and one en-suite bathroom and an additional toilet, a combined kitchen and dining area, an additional large lounge area, a laundry, two balconies, a courtyard and basement lock up garage. In his oral evidence, Mr Hale stated that the premises was constructed in 1991, and that in 2005 to 2007 a previous owner undertook a major renovation of the interior installing luxury fittings. In her submissions the landlord states that this renovation occurred in 2010.
5. The tenants lived at the premises with their four children and a pet dog.
6. There are two events that occurred in the course of the tenancy which the tenants contend are relevant to the outcome of this application.

7. In April and June 2016 there were serious water leaks from the windows and roof of the loft which caused water damage to the carpet of the loft (April and June 2016) and the lounge area (June 2016). The carpet in these areas was dried in situ and had water stains after that time. There is a dispute about how extensive the water damage and subsequent staining was. The tenants contend that the whole carpet of the loft was water damaged, and also that a large area of carpet in the lounge area was water damaged. The landlord contends that the carpet suffered light water damage in a localised area near the sliding doors to the loft balcony and that there was no water damage to the carpet of the lounge area at that time.
8. When the tenancy commenced the landlord party was Ms Christine Lim who then owned the premises. She sold the premises to the current landlord with settlement of that sale occurring on 21 July 2016. In their submissions, the tenants appear to contend that the effect of this sale is that they have no end-of-tenancy contractual obligations to the 'new landlord' as the property was sold 'as is' (whatever that may mean) and because the current landlord failed to complete a new Condition Report for the premises after her purchase was completed. This submission is misconceived as it overlooks the effect of section 117 of the Conveyancing Act 1919, which (in summary form) provides that all rights and obligations of the person holding the reversionary interest in the premises under the lease (being the landlord) pass to any successor in title (being the new owner). The current landlord is therefore able to assert the previous owners' rights against the tenants because those rights passed to her upon her purchase of the premises.
9. Two routine inspections of the premises were carried out during the course of the tenancy on 14 September 2017 and 18 September 2018. In the inspection report dated 14 September 2017 the "overall standard" of the premises is stated to be "in fair and clean condition o'all" and in the "general comments" section the following comment is noted: "carpets in good condition overall some marks". In the section headed "recommended maintenance" it is noted that the "bathroom tap ... to be changed leaking." In the inspection report dated 18 September 2018 in the general comments section it is stated "upon inspection it appears that the tenant is taking reasonably good care of the property. It was presented in a satisfactory condition..." In the section headed "overall standard" the following comment is recorded: "in fair and clean condition o'all". In the section headed "recommended maintenance" the following comment appears: "flexi hose to be changed x 1" which is a reference to the flexi hose in the single toilet.

Jurisdiction

1. Before it can exercise any of the powers contained in the RT Act, the Tribunal must be satisfied that there is a residential tenancy agreement subsisting between the parties as defined by section 13 of the Act to which the Act applies pursuant to section 6. In this case, I am satisfied on the evidence before me that the agreement that subsisted between the parties was a residential tenancy agreement to which the RT Act applies.

2. An application by a party to a residential tenancy agreement for an order arising from the alleged breach of the agreement must be made within three months of the applicant becoming aware of the breach: subsection 190(1) of the RT Act and Regulation 22(9) of the Residential Tenancies Regulation 2010 (RT Regulation). The landlord's claims arise from the condition in which the premises was returned to her on 16 February 2019. The application to the Tribunal was made on 9 April 2019. The application has thus been made within the time period permitted.
3. Subsection 187(4) of the RT Act and Regulation 23 of the RT Regulation provides that there is prescribed monetary limit of \$15,000.00 on the Tribunal's order making power except in respect of a rental bond, in relation to which the prescribed limit is \$30,000.00 (but only up to the actual amount of the bond). This limit applies to an order made in relation to each cause of action, rather than to the total monetary value of the orders that may be made in the context of an application: *Bridgford v Brien* [2017] NSWCATAP 111 at [43]. In this case the landlord's claims are under the prescribed monetary limit on the Tribunal's order making powers.
4. Section 175(1) of the RT Act and Regulation 22(8) of the RT Regulation provide that an application in relation to a rental bond must be made to the Tribunal within six months of the payment of the rental bond. In this case the tenants' rental bond has not been paid, it remains frozen, so this limitation period has not started to run.

Applicable law

1. Section 29 of the RT Act requires a landlord to prepare a condition report that states the condition of the residential premises before or when the RTA is given to a tenant for signing. The condition report must be in the standard form prescribed by the regulation: subsection 29(6); Schedule 2 of the RT Regulation. Two copies of the condition report must be given to the tenant: subsection 29(2). The tenant must complete their comments on the report and give one copy of the report with any comments they have made to the landlord not later than seven days after receiving it: subsection 29(3). On the termination date of the residential tenancy agreement, or as soon as possible thereafter, the landlord and the tenant must complete the copy of the condition report retained by the landlord or tenant in the presence of the other party: subsection 29(4). However, this obligation is not breached if the party completing the report has given the other party a reasonable opportunity to be present when it is completed: subsection 29(5).
2. Section 30 of the RT Act provides that a condition report that is signed by both the landlord and the tenant is presumed to be a correct statement, in the absence of evidence to the contrary, of the state of repair or general condition of the residential premises on the day specified in the report: subsection 30(1). That presumption does not apply to any matter that could not have reasonably been discovered on a reasonable inspection of the premises or to any statement in the report about which the tenant makes a written dissenting comment on the copy of the report completed by the tenant and retained by the landlord: subsection

30(2).

3. The Tribunal's power to make an order requiring a party to a residential tenancy agreement to pay compensation is found in subsection 187(1)(d) of the RT Act. However, this order making power does not exist in abstract. It is only enlivened when an entitlement to compensation is established under a substantive provision of the RT Act. In this case, the relevant provision is section 190 of the RT Act which empowers a landlord or a tenant to apply to the Tribunal for an order in relation to a breach of a residential tenancy agreement.
4. The landlord's claims for compensation rest on the tenant's alleged breach of subsections 51(1)(d) and 51(3)(b) and (c) of the RT Act. Section 51 is made a term of every RTA by operation of subsection 51(5) of the RT Act. For the purpose of these proceedings, the tenant's relevant obligations are in the following terms:

51 Use of premises by tenant

(1) A tenant must not do any of the following:

- (a) ...
- (b) ...
- (c) ...
- (d) intentionally or negligently cause or permit any damage to the residential premises

(2) ...

(a) ...

(b) ...

(3) On giving vacant possession of the residential premises, the tenant must do the following:

(a) ...

(b) leave the residential premises as nearly as possible in the same condition, fair wear and tear excepted, and, if there is a condition report, as set out in the condition report applicable to the premises when the agreement was entered into,

(c) leave the residential premises in a reasonable state of cleanliness, having regard to the condition of the premises at the commencement of the tenancy,

(d) ...

(e) ...

"residential premises" includes everything provided with the residential premises (whether under the residential tenancy agreement or not) for use by the tenant.

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

1. Several of the landlords' claims rest on the contention that the tenants caused or permitted "intentional" or "negligent" damage to the residential premises in the course of the tenancy. In the context of the RT Act, for conduct to be "intentional" it must be "pre-meditated": *Lindsay v NSW Land and Housing Corporation* [2016] NSWCATAP 128 at [45]. This requires proof that the tenant had "determine[d] on [a particular] result or such result must be that person's aim or purpose." Intention will not be present if the result was unforeseen": *Cure v Bridge Housing Ltd* [2014] NSWCATAP 80 at [43]. For conduct to be negligent there must be evidence of a lack of reasonable care and attention, or of a non-performance of a duty, or of neglect-full-ness of, thoughtlessness in relation to, or inattentiveness to, an obligation or duty by the tenant: cf *Sunray Investments P/l v Cruwys* [1992] NSWRT 95. This is an objective test.
2. A tenant is not strictly liable for any change in the condition of premises during a tenancy. The onus of proving negligent or intentional damage rests with the landlord: *Westpac General Insurance v Cooper* [2006] ACTSC 91 [at 14] (an appeal from the Court's decision in that case was upheld in *Cooper v Westpac General Insurance Ltd* [2007] ACTCA 20 but not on this point). If a landlord seeks to prove that a tenant has caused or permitted intentional or negligent damage, they must establish a credible hypothesis as to how this damage was caused: (*Fitzpatrick v Wu* unreported, NSWRT, 2001, 01/16425).
3. The meaning of the term "fair wear and tear" was considered in *Abela v Walker* [1997] NSW RT 15, in which the Residential Tribunal, after having reviewed the superior court authorities, concluded that the word "fair" goes to the cause, or nature of use of the premises by the tenant, that gave rise to the damage. It held that intentionally caused damage could never be excused as fair wear and tear. It concluded that the words "wear and tear" go to the effect of the damage; that is, how substantial or impactful the damage is on the premises.
4. In *Bell & Bell v Boccola, Campbell & Lawrence (Residential Tenancies)* [2009] ACAT 26, the ACT Civil and Administrative Tribunal concluded, having reviewed the relevant authorities, that fair wear and tear "generally relates to damage or deterioration that happens through the ordinary day to day use" of premises by a tenant [at 24]. It identified [at 25] six factors to be considered in determining whether particular deterioration is fair wear and tear or negligent damage: (a) the age, quality and condition of any item at the beginning of the tenancy; (b) the average useful lifespan of the item; (c) the reasonable expected use of such an item; (d) any special terms of the tenancy agreement related to that item; (e) the number and type of tenants; and, (f) the length of the tenant's occupancy.
5. The onus of establishing that damage is fair wear and tear rests on the tenants: *Westpac General Insurance v Cooper* [2006] ACTSC 91 [at 14]. The standard by which fair wear and tear is assessed in an objective one - it is not the subjective standard of a fastidious or obsessive landlord: *Fitzpatrick v Wu* (unreported, NSWRT, 2001, 01/16425). Fair wear and tear does not include deterioration in the premises that could be prevented by reasonable conduct on the tenant's part: *Alamdo Holdings Pty Ltd v Australian Window Furnishings (NSW) P/L* [2006] NSWCA 224.

6. A tenant must return residential premises to a landlord reasonably clean, having regard to its condition at the commencement of the tenancy. The test for reasonable cleanliness is an objective one - it is not the subjective standard of a fastidious or obsessive landlord: *Fitzpatrick v Wu* (unreported, NSWRT, 2001, 01/16425).
7. Any damage and loss claimed as a result of breach of the RTA must be a reasonably foreseeable consequence of that breach: *Hadley v Baxendale* [1854] 9 Ex 341. The purpose of an award of damages for breach of an obligation under a residential tenancy agreement is compensatory, just as it is in other types of contracts. It is designed to put the injured party in the position in which they would have been in had the obligation been performed (or if the breach had not occurred), so far as money is capable of doing so. The injured party is not entitled to any amount of compensation that would result in them being put in a better position than they would have been if there had been no breach. The injured party also has a duty to mitigate their loss. They are not entitled to be compensated for any loss which could reasonably have been prevented: *Marcourt v Clark* [2012] NSWCA 367 at [98-99]; *O'Brien v Twynam* [2016] NSWCATAP 125 at [80 to 85]; *Yang v NSW Land and Housing Corporation* [2016] NSWCATAD 37.
8. The injured party also has a duty to mitigate their loss. They are not entitled to be compensated for any loss that could have been prevented had they acted reasonably: *Sherson & Associates Pty Ltd v Bailey* [2000] NSWCA 275 at [77]. The onus of proving a failure to mitigate lies with the landlord in the circumstances of this case: *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 138.
9. With the exception of proving fair wear and tear, and failure to mitigate loss, in relation to which the tenants bear the onus, the landlord bears the onus of proving his case on the civil standard of proof, which is the balance of probabilities: *Briginshaw v Briginshaw* (1938) 60 CLR 336. This standard of proof was described by Lord Denning in *Miller v Minister for Pensions* [1947] 2 All ER 372 [at 374] as requiring the Tribunal to be satisfied that an alleged fact was "more probable than not". However, the Tribunal must "feel an actual persuasion of [the alleged fact's] occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality" ... [the occurrence or existence of the fact must be established]... to the reasonable satisfaction of the Tribunal": *Briginshaw* [at 361-2].

Consideration

The landlord's claims

1. The landlord's compensation claim is itemised as follows:

Item	No	Description	Amount
1		Kitchen bench top and window sill replacement	\$3,500.00
2		Carpet replacement	\$7,500.00

3 Bedroom door repairs (2) \$170.00

4 Bathroom vanity repair \$730.00

5 Blind cleaning \$490.00

Total \$12,390.00

Item 1: Kitchen bench top and window sill replacement

1. The landlord seeks an order pursuant to sections 51(1)(d), 51(3)(b), 187(1)(d) and 190 of the RT Act that would require the tenants to pay her \$3,500.00 in compensation towards the cost she contends she will incur in replacing a Caesarstone kitchen bench top and an associated window sill which she contends were fatally damaged by the tenants in the course of the tenancy. In order to succeed in this element of her claim the landlord must prove that the tenants breached their obligation not to cause or permit intentional or negligent damage to the bench top and window sill in the course of the tenancy with the result that they failed to return them at the end of the tenancy in a condition as close as possible to their condition at the start of the tenancy, fair wear and tear excepted. If the landlord does establish the tenants breached this obligation the measure of her loss will be the value of the loss of expected future use of the bench top and window sill she suffered.
2. The Start-of-Tenancy Condition Report prepared by the landlord's agent states that the kitchen bench top and window sill were in clean, undamaged and in working order. In the copy of the Condition Report the tenants returned to the landlord's agent they agree with this stated condition but add the following comments "[a] few stains around the sink area, and other small stains (good but not perfect)". As I have noted above, the landlord and tenants failed to complete the standard form End-of-Tenancy Condition Report required by section 29 of the RT Act and set out in Schedule 2 of the RT Regulation.
3. The landlord's evidence in relation to the condition of the kitchen bench top and window sill at the end of the tenancy is therefore limited to Ms Wooldridge's and Mr Hale's oral evidence and a series of photographs which are not date or time stamped. However there appears to be no dispute that the photographs depict the condition of the bench top and window sill at the end of the tenancy. They are depicted as having multiple and extensive stains across their surface which include several 'ring marks' where a saucepan, planter pot or other similar item have been placed. There are also a number of photographs which depict small chips on the surface of the bench top. From an objective point of view the damage to the bench top and window sill is considerable and unsightly.
4. The landlord contends that the stains and chips to the bench top and window sill constitute negligent damage arising from the inappropriate placement of wet and hot items onto the surface, the dropping of heavy items onto the surface, and the spillage or leakage of corrosive liquids onto the surface which have not been cleaned away. I am satisfied that this is a plausible explanation for the damage depicted in the photographs.

5. The tenants contend that the condition of the bench top and window sill results from fair wear and tear, and additionally or in the alternative, that it results from the landlord's failure to maintain the bench top and window sill by applying a sealant to ensure that they were not susceptible to corrosion. In this latter respect, Mr Weir gave oral evidence that he had discussed the matter with an unnamed "stone repair expert" who works for a business trading as 'The Stone Guys' and had been advised that:

...either the stone will be impervious to liquid or not. If so, then wiping the benches down daily will preserve them ... If the benches are porous then the benches should be sealed every 1 to 2 years

1. The tenants submit that they always kept the kitchen clean and wiped the bench top down after each use. They contend that they used the bench top every day, three or four times a day over the period of the three year tenancy and that its condition would inevitably deteriorate with normal use. They submit that the bench top was not sealed by the landlord at any time during the course of the tenancy.
2. Neither the landlord nor the tenants have filed any expert evidence in relation to the damage to the bench top and window sill, and in this respect I note that both parties bear an onus of proof in relation to this element of the claim: the landlord to prove negligent damage and the tenants to prove fair wear and tear.
3. The landlord bears the onus of proving negligent damage to the bench top and window sill on the balance of probabilities. In spite of the absence of expert evidence, I am satisfied that onus has been discharged in this case. There can be no argument that the bench top and window sill were seriously damaged at the end of the tenancy with multiple stains and chips. That is an objective fact. From an objective point of view, this is most unlikely to be the result of ordinary use, notwithstanding that it can be accepted that the bench top was in frequent daily use over the course of the tenancy. I am satisfied that it is only careless use that could account for such serious and extensive damage.
4. The tenants bear the burden of proving that this damage was fair wear and tear in the context of a porous surface. Apart from their own assertions, the only evidence that is offered in support of this claim is hearsay from an unnamed person who it is claimed is a stone specialist. The Tribunal is not bound by the rules of evidence and can consider hearsay, but little weight can be given to it in circumstances where the person who is said to have proffered this information is unidentified by name, qualification, and experience, and where he has not inspected the bench top and window sill. Even if what he is claimed to have said is taken at face value, his comments are at level of generality that provides little assistance to the tenants' case. It is clear that he is commenting on stone bench tops in general, not on the likely specific cause to the damage of the bench top and window sill at issue in this proceeding.

5. Having established breach, the landlord is entitled to be compensated for the damage and loss she suffered as a result of the breach. The threshold issue is whether the bench top and window sill require replacement or whether they can be more economically repaired. The landlord has filed an email quotation/comment from a contractor who inspected the bench top and window sill on or about 11 March 2019. He states that the cost of installing a new Caesarstone bench top would be in the range of \$4,000.00 to \$6,000.00, but that the stains may be able to be removed by sanding and polishing, depending upon how deep they penetrate into the surface. He states that his "guess" would be this would cost \$660.00. However, in her oral evidence Ms Wooldridge said she was subsequently advised by a Caesarstone specialist that the damage could not be repaired and that the bench top would have to be replaced. The landlord has also filed two contractor quotations for the replacement of the bench top and window sill at a cost of \$4,250.00 and \$4,930.00 respectively. However, these quotations do not contain any information as to whether a more economical repair could be performed.
6. The landlord's evidence on this point is therefore not helpful. It is also the hearsay of a person who is unidentified by name, qualification or experience. However, this is essentially an issue of mitigation of loss in relation to which the tenants bear the onus of proof. That is, it falls to the tenants to prove that it is unnecessary for the landlord to replace the bench top and window sill because it can be more economically repaired. They have filed no evidence to discharge this onus. Bearing in mind the seriousness of the damage to the bench top and window sill, and the absence of any evidence that this can be satisfactorily repaired, I am therefore satisfied that the landlord's loss is to be assessed on the basis that the bench top and window sill must be replaced.
7. The measure of the landlord loss in relation to the replacement of the bench top and window sill is to be assessed as the value of the loss of expected future use of the bench top and window sill she suffered. The bench top and window sill are capital assets with a depreciable life of 40 years for Australian taxation purposes: Australian Taxation Office, Guide to Rental Properties 2018 at page 41. There is conflicting evidence as to the age of the bench top and window sill. In his oral evidence, Mr Hale said the installation was in the period 2005 to 2007, while in her submissions the landlord appears to contend it was in 2010. In the face of this conflicting evidence I will adopt a supply and installation date that is most beneficial to the tenants, which is 2005. The bench top and window sill were thus 14 years old when the tenants returned possession of the premises to the landlord. The landlord therefore lost 26 years of expected future use of the bench top and window sill.
8. To determine the value of that loss the starting point is the original supply and installation cost of the bench top and window sill, not their new replacement cost. However, there is no evidence before me as to what this was. The Tribunal must do its best to assess the landlord's loss on the evidence before it: *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64. In order to arrive at an estimate of the original supply and installation cost I will therefore discount the average of the two quotations for the replacement of the bench top in the

landlord's evidence by 20% to account for inflation over the 14 year period since the bench top and window sill were installed. I therefore arrive at the figure of \$3,672.00.

9. I must also take into account the pre-existing damage to the bench top that the tenants noted in the Start-of-Tenancy Condition Report they returned to the landlord's agent. Any damage usually has a significant impact on the value of an asset. Although the stains noted by the tenants are relatively minor and localised to the area of the sink it is nevertheless appropriate to discount the value of the bench top and window sill by a further 10% to account for this pre-existing damage. I thus arrive at \$3,304.80.
10. The landlord had the benefit of 14 years use of these assets which must be accounted for. She is thus entitled to an order that will require the tenants to pay her \$2,148.12 which is the value of the 24 years of expected future use of the bench top and window sill she lost.

Item 2: Carpet replacement

1. The landlord seeks an order pursuant to sections 51(1)(d), 51(3)(b), 187(1)(d) and 190 of the RT Act that would require the tenants to pay her \$7,500.00 in compensation towards the cost of replacing the carpets throughout the premises which she contends were fatally damaged by the tenants in the course of the tenancy. In order to succeed in this element of his claim the landlord must prove that the tenants breached their obligation not to cause or permit negligent or intentional damage to the carpets in the course of the tenancy with the result that they failed to return the carpets at the end of the tenancy in a condition as close as possible to their condition at the start of the tenancy, fair wear and tear excepted. If the landlord does establish the tenants breached this obligation the measure of her loss will be the value of the loss of expected future use of the carpets she suffered.
2. The carpeted areas of the premises are a section of the entrance hall, the lounge room, bedrooms, stair case and loft. In the Start-of-Tenancy Condition Report the landlord's agent states that the carpet in the lounge room is in clean and undamaged condition and that it has been "steam cleaned: no stains". In the copy of the Condition Report the tenants returned they agree with the overall stated condition but add the comment "stains and press marks from previous furniture, water damage right side". With respect to the carpet of bedroom 1 the landlord's agent states that it is clean and undamaged condition and that it has been steam cleaned. However, the agent also comments that there is a "slight discolour by balcony door". The tenants do not dissent from this stated condition. With respect to the carpet in bedroom 2 the landlord's agent states that the carpet is in clean and undamaged condition and adds the comments that it has been steam cleaned and that there is one patch. The tenants agree with the overall stated condition but add the comment 'stains on carpet'. With respect to the carpet of bedroom 3 the landlord's agent states that the carpet is in clean and undamaged condition and that it has been steam cleaned. The tenants agree with the overall condition but add the comment "good but worn condition". There is no specific section of the Condition Report that deals with the staircase or loft areas of the premises. However, in the "General" section of the report there is a reference to the "rumpus room", which is

apparently the loft. The landlord's agent states that it is in clean and undamaged condition and that the carpet has been steam cleaned. The tenants agree with the overall stated condition but add the comment "stains on carpet per photos". As I have noted, the landlord and tenants failed to complete an End-of-Tenancy Condition Report.

3. The landlord's evidence as to the condition of the carpets at the end of the tenancy is therefore limited to Ms Wooldridge's and Mr Hale's oral evidence and a series of photographs. Both Ms Wooldridge and Mr Hale gave evidence, in effect, that the carpets were left seriously stained, marked and soiled at the end of the tenancy, and the landlord's photographs establish that this was the case. From an objective point of view the carpets appear seriously damaged.
4. The tenants do not dispute the condition of the carpets depicted in the landlord's photographs. However, they contend that the carpets were already damaged at the start of the tenancy as they recorded in the Start-of-Tenancy Condition Report, were further damaged by water ingress in April and June 2016, and otherwise that the deterioration in their condition is fair wear and tear.
5. I do not accept that such serious an extensive marking and staining of the carpets results from fair wear and tear. It could only result from seriously careless use. Quite obviously substances have been dropped and spilled onto the carpet and have been ground-in. This is quite apart from the minor pre-existing damage to the carpets, and any water damage to the carpet in the loft and lounge area that was or may have been the result of water ingress in April and June 2016.
6. The difficulty for the landlord with respect to this element of the claim is in establishing any compensable loss arising from the tenants' breach. That is because I am satisfied on the basis of the landlord's conflicting evidence that I must assume that the carpets exceed 10 years of age, having been installed in 2005. Carpets have a depreciable life of 10 years for Australian Taxation purposes: Australian Taxation Office, Guide to Rental Properties 2018 at page 38. The landlord had therefore had the benefit of the full period of expected use of the carpets when the tenants returned possession, and she can have suffered no loss because they required replacement.
7. I note that even if I were to have accepted that the carpets were installed in 2010, which is the date most beneficial to the landlord, the landlord would only have lost one year of expected future use of the carpet. Once inflation, pre-existing damage, the water damage that occurred in the course of the tenancy, and the age of the carpets were accounted for, I would still not be satisfied that the landlord had suffered compensable loss due to the tenants' damage. This asset's expected life had ended due to its age and damage for which the tenants were not responsible. This element of the claim must therefore be dismissed.

Item 3: Bedroom door repairs

1. The landlord seeks an order pursuant to sections 51(1)(d), 51(3)(b), 187(1)(d) and 190 of the RT Act that would require the tenants to pay her \$170.00 in compensation for the cost of repairing two bedroom doors which she contends were damaged by the tenants in the course of the tenancy. In order to succeed in this element of her claim the landlord must prove that the tenants breached their obligation not to cause or permit negligent or intentional damage to the doors the course of the tenancy with the result that they failed to return the doors at the end of the tenancy in a condition as close as possible to their condition at the beginning of the tenancy, fair wear and tear excepted. If the landlord does establish the tenants breached this obligation the measure of her loss will be the reasonable cost of the repair of the doors.
2. This element of the dispute concerns the doors to bedrooms 2 and 3. In the Start-of-Tenancy Condition Report prepared by the landlord's agent the doors/doorway frames in bedrooms 2 and 3 are noted to be in clean, undamaged and working order. In the copy of the Condition Report the tenants returned to the landlord's agent they agree with the overall stated condition of the doors in both rooms but add the comment "[a] few marks and scratches" in both cases. As already noted, neither the landlord nor the tenants completed an End-of-Tenancy Condition Report.
3. The landlord's evidence of the condition of the doors at the end of the tenancy consists of photographs of the doors. These photographs depict extensive vertical scratch marks on both doors which have removed the top layers of paint. On behalf of the landlord, Ms Wooldridge contended, and the tenants conceded, that these scratch marks were caused by the tenants' dog. As there is no dispute about this, I am satisfied that the landlord has established a breach of the tenants' obligations.
4. As evidence of the loss she suffered as a result of this breach the landlord has submitted into evidence a contractor quotation for the repair and repainting of both doors which is in the amount of \$170.00. The tenants do not take issue with the amount claimed and I am also satisfied that it is objectively reasonable having regard to the work to be carried out. I will therefore order the tenants to pay the landlord \$170.00 in compensation in relation to this element of the claim.

Item 4: Bathroom vanity repair

1. The landlord seeks an order pursuant to sections 51(1)(d), 51(3)(b), 187(1)(d) and 190 of the RT Act that would require the tenants to pay her \$730.00 in compensation for the cost of repairing the vanity units in the main bathroom and en-suite bathroom which she contends were seriously water damaged by the tenants in the course of the tenancy. In order to succeed in this element of her claim the landlord must prove that the tenants breached their obligation not to cause or permit negligent or intentional damage to the vanity units in the course of the tenancy with the result that they failed to return them at the end of the

tenancy in a condition as close as possible to their condition at the start of the tenancy, fair wear and tear excepted. If the landlord does establish the tenants breached this obligation the measure of her loss will be either the reasonable cost of repair, or if the vanity units cannot be repaired and must be replaced, the value of the loss of expected future use of these assets she suffered.

2. In the Start-of-Tenancy Condition Report prepared by the landlord's agent the vanity units in the main bathroom and en-suite bathroom are stated to be in clean, undamaged and working condition. The tenants agree with this stated condition. As already noted the landlord and the tenants failed to complete an End-of-Tenancy Condition Report.
3. The landlord's evidence in relation to the condition of the vanity units is limited to Ms Wooldridge's and Mr Hale's oral evidence and a series of photographs. Ms Wooldridge and Mr Hale describe the fronts of both vanities as seriously water damaged and this condition is borne out in the photographs. The varnished wood surfaces of the cabinets are seriously degraded and the particle board interior of the cupboard doors are swollen and split.
4. The tenants do not dispute the condition of the vanity units depicted in the landlord's photographs. However, they contend that this was the result of water damage from a leaking tap, the absence of an exhaust fan in the en-suite, furniture that was not fit for use in a wet area, and that it is otherwise fair wear and tear.
5. The only record of the existence of a leaking tap over either bathroom vanity in the course of the tenancy is in the Routine Inspection Report dated 14 September 2017. The tap in the main bathroom is recorded as leaking and requiring repair. No damage to the vanity unit is noted in that report. Ms Wooldridge gave oral evidence that this repair was carried out shortly afterwards. There is no other record of any complaint by the tenants about leaking bathroom taps, still less that these leaks were causing damage to the vanity units over the course of the tenancy. In the absence of any objective or surrounding evidence to this effect I am not satisfied that the damage depicted in the landlord's photographs resulted from a leaking tap. It does not appear to be in dispute that there was no exhaust fan in the en-suite bathroom. It may therefore be accepted that the ordinary use of that room would create moisture on the surface of the vanity unit. However, there was an exhaust fan in the main bathroom so the identical damage to the vanity unit in that room cannot be explained in this way. Moreover, the condition of the vanity units depicted in the photographs suggests extensive exposure to water, not light moisture. I am therefore not satisfied that the damage to the en-suite vanity unit primarily results from the absence of an exhaust fan, although this may well have been an aggravating factor. It may also be accepted that bathrooms are wet areas of any home and that bathroom furniture should be fit for use in such an area, but that does not mean that ordinary use would involve the extensive splashing of water over bathroom cabinetry. I am satisfied that this would only occur as a result of careless use. The tenants assert without evidence that the bathroom cabinetry was not fit for purpose. That is not self-evident and it is contrary to the appearance of the cabinetry which is typical for bathroom vanity units. I am therefore satisfied that the landlord has established a breach of

the tenants' obligations with respect to the vanity units.

6. As evidence of her loss the landlord has submitted a contractor quotation for the repair of the vanity units which describes two options for rectifying the damage:

Damaged wooden cupboards in ensuite and bathroom – to return the timber work back to original condition, it should be replaced – estimated at \$1850 in white gloss epoxy custom panelling, with \$770 in labour. OPTION – of sanding and clear coating all the timber work in both bathrooms – estimate of \$70 in clear lacquer, sandpaper etc – labour at \$660.00 Totalling approx. \$730.00

1. The landlord claims compensation in the amount of the cheaper of these two options. Having regard to the extent of the damage depicted I am satisfied that the amount claimed is objectively reasonable, and will order the tenants to pay the landlord this amount.

Item 5: Blind cleaning

1. The landlord seeks an order pursuant to subsections 51(3)(c), 187(1)(d) and 190 of the RT Act that would require the tenants to pay her \$490.00 in compensation for the cost of cleaning of the blinds of the premises at the end of the tenancy. In order to succeed in this element of her claim the landlord must prove that the tenants failed to leave the blinds in a reasonable state of cleanliness having regard to their condition at the beginning of the tenancy. If the landlord establishes that the tenants breached this obligation the measure of her loss will be the cost she incurred in making the blinds reasonably clean.
2. This element of the dispute concerns the seven roller blinds located in the lounge room, kitchen, bedroom 1, bedroom 2 (two), bedroom 3 (two) and a roman blind which is apparently located in the loft. In the Start-of-Tenancy Condition Report prepared by the landlord's agent the kitchen blind is stated to be in clean, undamaged and working order. The tenants agree with the overall stated condition but add the comment "a few small stains". The landlord's agent notes that all other roller blinds are in clean, undamaged and working order. The tenants agree with this stated condition in each case. There is no comment as to the state of cleanliness of the roman blind in the Start-of-Tenancy Condition Report. As already noted the landlord and the tenants failed to complete an End-of-Tenancy Condition Report.
3. The landlord's evidence as to the condition of the blinds at the end of the tenancy is limited to Ms Wooldridge's and Mr Hales oral evidence. They contended that the blinds were left seriously unclean. The landlord has provided no supporting photographic or other evidence in relation to this element of her claim.

4. The tenants deny that the blinds were left in an unclean condition. They contend that they were left reasonably clean having regard to their condition at the start of the tenancy. Additionally or alternatively, they contend that the blinds were soiled in 2016 when the windows of the premises were repaired to rectify water ingress and that they should not be held responsible for this. They also point out that there were some stains on the kitchen blind at the start of the tenancy.
5. The landlord's evidence is not sufficient to discharge her onus of proving that the blinds were not left reasonably clean. No End-of-Tenancy Condition Report was completed on her behalf, and there is no photographic or other satisfactory evidence that would enable the Tribunal to prefer Ms Wooldridge's and Mr Hale's oral evidence as to the condition of the blinds over that of Ms Dickerson and Mr Weir. For the same reason the Tribunal is unable to objectively assess if there was a change in the state of cleanliness of the blinds from the start to the end of the tenancy and if any uncleanliness is the result of the tenants' conduct as distinct from soiling caused by building contractors. This element of the claim must therefore be dismissed.

Conclusion

1. For the foregoing reasons, the landlord is entitled to an order that will require the tenants to pay her \$3,048.12 in compensation in relation to the loss she incurred due to the tenants' damage to the kitchen bench top, bedroom 2 and 3 doors, and the en-suite and main bathroom vanity units. Rental Bond Services is directed to pay the landlord \$3,048.12 from the tenants' rental bond in satisfaction of this order. The remainder of the rental bond plus any interest must be paid to the tenants. The remainder of the landlord's claim has been dismissed.

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: 26 November 2020

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