

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**RESIDENTIAL TENANCIES DIVISION**

**RESIDENTIAL TENANCIES LIST**

VCAT REFERENCE NO. R2021/20573

**CATCHWORDS**

Application by former renters under sections 67, 68, 452, and 472 of *Residential Tenancies Act 1997* (Vic); claim for compensation for poor living conditions and failure to address mould and damp - compensation awarded.

<b>FIRST APPLICANT</b>	Lauren Dale-Hooper
<b>SECOND APPLICANT</b>	Matthew John Hooper
<b>RESPONDENT</b>	Keith Cameron
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member A Eastman
<b>HEARING TYPE</b>	In person hearing
<b>DATE OF HEARING</b>	6 February 2024
<b>DATE OF ORDER</b>	23 April 2024
<b>DATE OF WRITTEN REASONS</b>	23 April 2024
<b>CITATION</b>	Dale-Hooper v Keith (Residential Tenancies) [2024] VCAT 372

**ORDER**

For the reasons provided, the Tribunal orders that:

The respondent must now pay the applicants compensation of \$3,270.64.

A Eastman  
**Member**

**APPEARANCES:**

For the applicants: Mr M Hooper

For the respondent In person



## REASONS

- 1 Lauren Dale-Hooper and her husband, Matthew Hooper (together referred to as ‘the renters’), along with their two children, resided at rented premises owned by Keith Cameron (also referred to as ‘the rental provider’) in Black Rock for almost 11 years. The tenancy commenced on 10 September 2010 and terminated on 1 April 2021.
- 2 In this proceeding the renters seek compensation totalling \$22,040.58<sup>1</sup> from their former rental provider. The compensation sought is ‘for the stress and the poor living conditions in the property over the last 12 months’ due to alleged breaches of duty owed by the rental provider to the renters under the *Residential Tenancies Act 1997* (Vic) (‘RT Act’). More particularly, the renters’ claim arises out of the presence of mould and rising damp at the rented premises.
- 3 Mr Hooper, who appeared on behalf of his wife at the hearing, was supported by Mr Peter Dunn. Mr Dunn had been referred to the renters by a mutual friend. Mr Dunn is a registered domestic builder and had prepared a document headed ‘Property Report’ dated 31 March 2021 (‘Property Report’) which was relied upon by the renters in support of their claim. Mr Dunn also gave evidence at the hearing.
- 4 Mr Cameron, who is a solicitor, appeared on his own behalf. Mr Cameron made submissions in response to the evidence and submissions made by the renters.

### Renters’ evidence

- 5 In giving his evidence before me, Mr Hooper spoke to and referred to the matters detailed in the first four pages of the Property Report. In this regard, the Property Report set out a summary of the renters’ experiences with the rental provider during the 11 year tenancy, as well as the matters the subject of this claim which all arose in the last 12 months of the tenancy.<sup>2</sup> As the renters’ claim is based on issues which arose in the last 12 months of the tenancy, I have limited the evidence set out below to those facts which are relevant to the claim.
- 6 The rented premises was described in the Property Report as a 3-bedroom dwelling attached to a retail shop, with a kitchen/living room, bathroom/toilet, and a laundry in a cupboard off the passageway. It included a garage that is accessed from the rear laneway, where the entrance to the house is also provided via a gate. Mr Hooper said that real estate agents had managed the rented premises on behalf of the rental provider at the commencement of the tenancy in September 2010. However, shortly after the

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<sup>1</sup> I note in the recent Summary of Proofs document completed by the renters and provided to the Tribunal on 1 November 2023, the amount claimed was stated to be \$20,040.70.

<sup>2</sup> On the last page of the Property Report under the heading ‘Summary of the report’, Mr Dunn set out his opinion of the conditions of the property as of 31 March 2021. It is evident that the information stated in the first four pages of the Property Report had been obtained from the renters and were not views expressed by Mr Dunn or accounts of events experienced by Mr Dunn.



tenancy commenced, Mr Cameron took over management of the property. Mr Hooper did not have a copy of any in going condition report of the rented premises and he said he did not believe such a report had been completed.

- 7 Mr Hooper said that there had not been an inspection of the property between the commencement of the tenancy in 2010 and prior to November 2020, when the renters asked Mr Cameron to attend the rented premises to view conditions for himself. The facts giving rise to that request are as follows.
- 8 In early May 2020,<sup>3</sup> the renters asked Mr Cameron to check the electric upright oven because of their concern that the rear element was faulty. They said the hot plate element would not turn off, and sometimes it would come on without anyone having to turn the knob. Mr Cameron said he would arrange for someone to inspect the oven, but no one attended between May and October 2020. The renters said the hotplate element was still faulty as of 4 October 2020 when, at that time, it would not turn off . The renters rang an electrician who told them to isolate the oven. On 7 October 2020, an electrician advised Mr Cameron that the oven could not be repaired, and a new oven was installed.
- 9 The renters said in early June 2020 they told Mr Cameron the shower head rose was defective and leaking and Mr Cameron had said he would arrange for someone to look at it. As no one had attended, on 15 June 2020 the renters sent an email to Mr Cameron asking for a plumber to inspect the shower head and taps. On 19 June 2020, the shower head burst. Mr Hooper said a shower head was placed in their letter box later that day for the renters to fix and fit themselves. Mr Hooper fitted the shower head, but it also failed as ‘it was a cheap flimsy unit’. By text sent by Ms Dale-Hooper on 22 June 2020 to Mr Cameron, Ms Dale-Hooper requested Mr Cameron arrange for a plumber to attend, saying ‘this is not my husband’s job’, and noting they could not shower. A new shower head was fitted, by a tradesperson, that day.
- 10 In August 2020, the renters said they spoke to Mr Cameron about issues with the house as a down light was unable to be changed because the ceiling was crumbling around it.
- 11 In September 2020, Mr Cameron arranged for a valuer to attend the property to conduct a valuation. The renters said they ‘pointed out the defects to the valuer’.
- 12 The attendance of the valuer prompted the renters to contact Mr Cameron at this time and ask about his intentions with the property. The renters told Mr Cameron there were urgent repairs required to the floors which were ‘springy and bouncy’, and there was dampness and mould. The renters said they had to keep windows open as much as possible during the day for clean fresh air, as well as keeping the split system working constantly to heat the property.

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<sup>3</sup> An email from the renters to the rental provider dated 5 May 2020 asks the rental provider to provide a mobile number so the renters can contact him regarding the stove.

The renters said they asked the rental provider to attend the property to view the issues for himself.

- 13 The renters said that as no action was taken for 3 to 4 weeks, and with no contact from Mr Cameron, they applied for another property at the end of September 2020. The renters named Mr Cameron as a referee in support of their application, and this led Mr Cameron to contact them to ask why they were moving out. The renters responded by explaining that as no improvements had been made to the premises, they intended to move out. The renters said Mr Cameron said words to the effect 'you are good renters; I will get things fixed'.
- 14 The renters said nothing happened for 2 months.
- 15 In November 2020, Mr Cameron, accompanied by a plumber and a builder, attended the rented premises. According to the renters both the plumber and the builder stated that the property was a 'mess', in reference to the dampness and mould and poor construction mainly in the floor, which was 'sitting on top of the ground'. The renters said both tradespersons advised that it needed a lot of work which could be carried out one room at a time.
- 16 Mr Hooper said that after discussions with Mr Cameron at the inspection, it was agreed that the flooring and the rising damp and mould issues at the premises would be fixed, one room at a time.
- 17 On 17 November 2020, a plumber attended and replaced one side of the guttering. The guttering on the other side of the house was replaced in around 12 February 2021.
- 18 Mr Hooper said that no other works began until 10 or 11 January 2021 when a builder cut a hole in the floor in the first bedroom, which was his daughter's room, and this revealed the floor joists were rotting.
- 19 On 4 February 2021, as no further action had occurred, the renters contacted the rental provider to discuss the plans for the property repair issues. They said they were told a plumber would come the following week, but nothing happened.
- 20 On 18 February 2021, the renters sent photos of the mould on the ceiling in 'the bedrooms' to Mr Cameron.
- 21 On 27 February 2021, the renters again asked Mr Cameron about the plans for the works so they could understand the extent of the work and the timing of the work. No response was received.
- 22 On 2 March 2021, a builder attended the property. The builder removed the carpet in the first bedroom and removed part of the bedroom flooring. The renters said the mouldy and damp carpet was left inside the house for the next three days. The builder also removed the flooring along the main passage, which was left open, exposing the subfloor, for two days. The renters said the odour from the dampness under the house was 'rank and disturbing'.



- 23 The renters said at this time the first bedroom could not be used. The furniture in the kitchen dining area had to be removed to the small garage so that their daughter could sleep in the living area. They said this inconvenienced the entire family.
- 24 On 3 March 2021, the renters said they asked Mr Cameron to replace the carpet in their daughter's bedroom, and they wanted to know what the plan was in relation to the works to be undertaken. In response, the renters said Mr Cameron told them that they had 120 days to vacate so that he could renovate the property properly. The renters said Mr Cameron said it was getting too hard with the renters.
- 25 The renters said after three nights of their daughter having no bedroom, they put blankets over the floor in her bedroom and returned her bed back in the room. Their son stayed elsewhere. Although a week later the carpet area was measured by a contractor, it was never replaced prior to the renters vacating.
- 26 The renters said Mr Hooper missed a minimum of three days' work 'because of the upheaval around the unplanned works.' Mr Hooper is self-employed and calculated each day to be \$500 per day of lost income.
- 27 On 24 March 2021, the renters found another rental property. The tenant returned the keys to Mr Cameron on 1 April 2021.
- 28 Mr Hooper referred me to photographs that he or his wife had taken of;
- a. the state of the property whilst the furniture had been moved from their daughter's bedroom into the kitchen living area;
  - b. mould on the back of a TV cabinet and in a chest of drawers, and underneath a mattress, which he said was discovered when the renters were preparing to move from the property;
  - c. mould in the wardrobe of the main bedroom; and
  - d. the walls in the kitchen and passageway showing rising damp.
- 29 Mr Hooper also relied upon the photographs taken by Mr Dunn on 31 March 2021. These photos were of the entire property. In addition to photographs of mould on the ceiling and dampness in bedroom 1, rising damp in the passageway and rising damp and mould on the ceiling in the kitchen, there were photographs of items that were not the subject of this claim.
- 30 Mr Hooper said the mould on the ceiling in his daughter's room was constantly being cleaned by his wife. He said it had been an ongoing issue and every week his wife would clean the ceiling.

### The Claim

- 31 The renters' application was lodged on 7 June 2021. The application stated the rental provider had failed to remedy various issues over a significant period. The application referred to the damp and mould at the property and that the renters had suffered from poor living conditions. The application



quoted from the Property Report and the amounts detailed in that report. The amount claimed of \$22,040.58 was made up as follows:

- a. 50% of rent for 12 months –  $12 \times 50\% \$1,958.43 = \$11,750.58$
- b. loss of days employment by Mr Hooper - \$500 per day = \$1,500.00
- c. stress to the family over a long period of time - \$5,000.00
- d. lots of furniture that was rusted and moulding, two bed frames - \$600.00
- e. two TV cabinets damp effected - \$250.00
- f. clothes that were affected by mould and dampness - \$250.00
- g. doctor's appointments for Ms Dale- Hooper - \$250.00
- h. inconvenience of moving house and cleaning of mould - \$1,000.00
- i. Property Report by Peter Dunn - \$1,440.00.

32 More recently, when the renters were asked by the Tribunal to complete a Summary of Proofs, the renters set out their claim, which was for the reduced amount of \$20,020.70, as follows:

- a. failure to keep property in good repair – amount claimed of \$11,748.00 being rent at \$1,958.00 per month for the months of November 2020, December 2020, January 2021, February 2021 and March 2021, ‘when the property was very uninhabitable’, and 4 months at 50% of rent for the period June to September 2020;
- b. VCAT application fee - \$217.70;
- c. Mould inspection report - \$55.00;
- d. breach of quiet enjoyment – amount claimed of \$5,000.00 for ‘poorly maintained and minimal actioning for urgent repairs. Mess and upheaval of life. Missed employment. No space to live in bedrooms while works carried out. Living with mould, smell of mould. Constant cleaning. No plans or information provided by the rental provider to the renters for works to be carried out. Stress for whole family. Promise to make repairs and not carry out effectively. Forced to move out for asking for repairs; and
- e. damaged goods - great deal of belongings destroyed by mould - \$3,000.00.

33 Before me, Mr Hooper referred to the amounts stated in the Property Report. He said the focus of the claim was for the last three months at the premises when they had been told repairs would be undertaken, but nothing occurred.

#### Mr Dunn's evidence

34 As I have previously stated, Mr Dunn is a registered building practitioner. Mr Dunn has worked in the building industry for approximately 40 years



carrying out various roles relating to both domestic and commercial premises.

- 35 In the Property Report Mr Dunn summarised his opinion of the rented premises as of 31 March 2021 as follows:
- a. The conditions noted in the property are poor and it is obvious that there is dampness and mould from the poor subfloor structural conditions despite some replacement of subfloor timbers that are not compliant with the National Construction Code – NCC (Part 3.4.1- Subfloor ventilation and AS 3660) i.e. clearance under the bearers of 150 mm as per photos taken by the renters.
  - b. The various gaps around the perimeter of room confirms that the subfloor has rot and are defective allowing these damp conditions to permeate the rooms and result in mould growth as evidenced in the photos submitted.
  - c. The plumbing fixtures are defective as seen in the bath waste where the connection on the bath outlet is broken- this leads to wastewater seeping onto the ground under the house and contributing further to the damp and mould issues. The renters have been unable to use the bath due to this situation.
  - d. The dwelling (Class1) abuts another class of building being a retail shop and there is no indication of a fire separation between these areas that are under the one roof and separated by only a door and I believe a timber stub frame. This matter needs to be checked by a building surveyor as I believe it contravenes the Building Code of Australia as the occupants in the dwelling are not connected to the retail shop that fronts onto Balcombe Rd.
  - e. The conditions noted from the inspection of the property have contributed to the damp and mould and the renters have suffered from the poor living conditions.
  - f. Having regard to the reported conditions within the report I believe the property as a dwelling at the rear of 9street address removed) is not fit for habitation.
- 36 In his oral evidence Mr Dunn referred to the report of Mould Zappers dated 31 March 2021 which recorded moisture ratings throughout the house. The Mould Zapper report stated “All walls throughout the rear of the house, and flooring, in all rooms, were found to be holding high levels of moisture. Normal acceptable moisture content of walls and wooden flooring are 10% to 15% moisture content. See attached photos. This suggests a rising damp issue throughout the rear of the property.” The photos referred to in the report showed the moisture reading in the hallway of ‘100.0’, in the bathroom of ‘33.5’, in the master bedroom of ‘47.9’.





- 37 Mr Dunn said the conditions under the house showed dampness. He said the guttering and the disconnected waste had contributed to the conditions of mould and rising damp.
- 38 Mr Dunn said that the damp and mould at the rented premises was some of the worst he had ever seen, and he had been involved in social housing for 20 years. He said mould was evident. Mr Dunn referred to photographs taken by him on 31 March 2021 which he said showed a deteriorated property and one where there had been a lack of maintenance for 10 years.
- 39 The renters claimed the cost of Mr Dunn's report of \$1,440. Mr Dunn said he did not recall if he had issued an invoice for attending the rented premises and preparing the Property Report.

### **Rental provider's evidence**

- 40 Mr Cameron said that the rented premises was in good condition at the start of the tenancy in 2010. He said a condition report was completed at the time and provided to the renters, but that he did not have a copy of it.
- 41 Mr Cameron said that based on Mr Hooper's evidence, the renters had lived at the rented premises for 11 years and that, for the first ten years, Mr Cameron had not disturbed them, other than on a few minor occasions when he attended to respond to requests. He said the renters were happy there and that it was only in the last 12 months that problems were raised.
- 42 Mr Cameron said that during the period the subject of this complaint, that there were COVID-19 restrictions in place. In particular, he said:
- a. between 31 March and May 2020 there was a lockdown of 43 days;
  - b. between 9 July and 27 October 2020 there was 111 lockdown days, with a hard lockdown from 5 August 2020;
  - c. in total there were 154 days of a complete lockdown and, following this, was the Christmas period.
- 43 Later, Mr Cameron noted there was a further 5-day lockdown between 13 February 2021 to 17 February 2021.
- 44 Mr Cameron said there had not been a complaint regarding damp or mould until it had been raised with him for the first time in September 2020. In this regard he noted that Mr Hooper had said in his evidence there was a problem with mould at the premises for the 12 months prior to the renters vacating at the end of March 2021. He said therefore the renters knew of the issue with mould in March 2020 but did not raise it with him until September 2020.
- 45 Mr Cameron said he had no idea of the magnitude of the issues the subject of complaint until he attended in November 2020, accompanied by a builder and plumber. He agreed the property required significant repairs and that it was 'old and faded and damp'.
- 46 Initially in his evidence Mr Cameron said that when he discussed the repair works with the renters he had said 'more likely you will have to vacate





because significant works are to be carried out', and he could not renovate the property properly without them vacating. Later during his evidence Mr Cameron said that the renters were asked to move out firstly in September 2020 in a telephone discussion, and then in November 2020, when he attended the premises in person. He said he had given them six months' notice to move out, but they wanted to stay. He said he thought he would give them time to find suitable alternative premises. Mr Cameron said that he could have served a formal notice to vacate but he thought it was the correct thing to do to give them six months. Mr Cameron said the renters wanted to stay at the rented premises because the rent was modest rent for the Black Rock area.

- 47 Mr Cameron said there was no written opinion as to whether the mould present at the property was dangerous or not. He said if there was mould, and it was urgent, then the property had to be vacated. Mr Cameron said it wasn't sustainable to have the renters remain whilst repairs were carried out and that, after the third COVID-19 lockdown in February 2021, it was obvious it wasn't working out and the renters couldn't live there or didn't want to be there. He said the renters knew that it was difficult to provide a timeline to them for the repair works because of the COVID-19 lockdowns and because he was having trouble finding tradespeople.
- 48 Mr Cameron denied he said that he would attend to things so the renters could stay at the rented premises. On the contrary he said he told them they had to go. He said he was caught in a quandary as the renters were asking for things to be fixed and he was trying to appease them, even though they had given notice to move out.
- 49 Mr Cameron said if he'd known about the property deteriorating in the 10 years, works would have been carried out accordingly. He contended the renters themselves brought a lot of the issues on in that they say they knew about the damp and mould but did not advise Mr Cameron of it for six months.
- 50 Mr Cameron said because of the COVID-19 lockdowns he was not free to go to the property, as he would have been arrested. He said the repair works were severely impacted because of COVID-19 restrictions, saying even when Victoria came out of those restrictions it was difficult to find qualified tradespeople. Mr Cameron said he made many calls to trades regarding the rectification works.
- 51 In response to questions I raised, Mr Cameron said he was not attempting to avoid having the property repaired - but it was impossible to carry out repairs with the renters in there. When I asked what repairs were required, he said the dampness issue, the mould, and repairs to the floor. He said when the next-door house was built, they had put a new roof on the premises and water was accumulating under his current roof. He said he wasn't aware of it and only found out about it last year, after the renters had left and a section of roof was replaced.



- 52 In relation to the amounts sought and claims made, Mr Cameron said that:
- a. there had been no proof given and no basis for the calculations made;
  - b. statements were made, but the basis and estimates were not set out; and
  - c. he had no idea how the stress claim has been calculated.
- 53 Mr Cameron drew my attention to the fact that in the Summary of Proofs the renters' claim had been based on 100% of the rent for the period November 2020 to March 2021, and 50% for the months of June to September 2020, but that today a different calculation had been provided because Mr Hooper referenced the amounts claimed in the initial application.
- 54 Mr Cameron said if a rental provider is not advised of a problem, and the renters acquiesce to a problem, how could rectification works have been carried out earlier?
- 55 In relation to the loss of quiet enjoyment, Mr Cameron said the renters sought to stay at the property, even though they say they initially wanted to leave, and at the same time they were demanding trades to attend, and then say there was a breach of quiet enjoyment.
- 56 Regarding the claim for \$3,000, Mr Cameron said there was no proof as to how that was calculated. He said there was no proof relating to the furniture and clothes. He said if damp and mould had affected the furniture then the renters contributed to that by not acting for six months in circumstances where Mr Hooper said they had mould at the premises for the previous 12 months prior to vacating.

### **Renter's reply**

- 57 In reply, Mr Hooper said that the renters had complained about the mould numerous times in telephone calls to Mr Cameron, but he did not have proof of those calls. Mr Hooper denied that he had been told in November 2020 that they had to move out. Mr Hooper said he understood the plan was works were to be carried out one room at a time.
- 58 Mr Hooper said the works that were done were superficial and the issue was never taken seriously. He said there was never a plan put forward of how the works were to be managed.
- 59 In response to the submission that trades were unable to work during COVID-19 lockdowns, Mr Hooper said he had been able to work at various times.

### **Legal framework**

- 60 The Tribunal has power to award compensation to a renter for inconvenience,<sup>4</sup> loss of amenity<sup>5</sup> or loss of quiet enjoyment<sup>6</sup> under s 210 and

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<sup>4</sup> *EL v EA* [2006] VCAT 2049 following *Reardon v Ministry of Housing* (unreported, Supreme Court of Victoria, 13 November 1992).

<sup>5</sup> See for example *Davies v Tereke* [2015] VCAT 92 and *Micallef v Todio* [2014] VCAT 976.

<sup>6</sup> See for example *Randall v De Fraga* [2015] VCAT 458.



section 452 of the RT Act if a rental provider has failed to comply with the rental provider's duties under the RT Act.<sup>7</sup>

- 61 It is well established that the power to award compensation includes the power to award compensation in respect of non-economic loss for distress, hurt or humiliation. Recently, in *Young v Chief Executive Office (Housing)*<sup>8</sup> the High Court held, when considering comparable provisions to s 210 and section 452 of the RT Act, that the equivalent legislation in the Northern Territory 'can extend to non-economic loss and can include non-economic loss in the form of disappointment or distress suffered by a rental provider or tenant as a normal, rational reaction of an unimpaired mind.' The Court said, 'There is also no dispute that disappointment or distress of that nature is not 'physical injury, pain or suffering' so that an order for compensation in respect of disappointment or distress of that nature is not precluded by [the equivalent section 447(2) of the RT Act]'.<sup>9</sup>
- 62 When considering the loss arising from a breach, the Tribunal must consider whether the person claiming compensation has mitigated (reduced) their loss and whether the person who is in breach has taken steps to comply with their obligations under the RT Act.<sup>9</sup>
- 63 The relevant duty provisions that the renters say Mr Cameron breached in this matter are sections 67 and 68 of the RT Act.
- 64 Section 67 of the RT Act requires a rental provider to ensure renters have quiet enjoyment of the rented premises. The notion of quiet enjoyment of a rented premises at common law relates to the renter being able to live in peace and quiet and without any unnecessary interruptions or disruptions by the rental provider, or its servants and agents, such as unlawfully entering the rented premises.
- 65 Section 68 of the RT Act provides that a rental provider must ensure that the rented premises is provided and maintained in good repair and in a reasonably fit and suitable condition for occupation.
- 66 In *Shields v Deliopoulos*<sup>10</sup> the Court found that the duty imposed upon a rental provider under section 68 of the RT Act to ensure that the rented premises are maintained in good repair is strict and absolute, and imposes an obligation upon a rental provider to identify and rectify any defects of which they are aware or ought to be aware, including ensuring that premises are reasonably fit and suitable for occupation at the start of a tenancy. The Court found that, in relation to defects that occur or develop during the tenancy, a rental provider is not in breach of the tenancy agreement unless he or she has notice of that defect and failed to act with reasonable diligence to repair it.
- 67 For completeness, under s 86 of the RT Act, a rental provider is entitled, upon providing the relevant notice to a tenant, to enter the premises to carry

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<sup>7</sup> Refer *Boyce v Gao* [2020] VCAT 1404.

<sup>8</sup> [2023] HCA 31.

<sup>9</sup> Refer s 211 of the RT Act.

<sup>10</sup> [2016]VSC 500.



out inspections. I note that a rental provider is not obliged to carry out regular six monthly or yearly inspections, but a failure to do so may mean that the extent of repair works that may subsequently be required to be undertaken are more extensive than might otherwise have been the case had the need been identified earlier, thereby enabling preventative works to be carried out.

- 68 The 12-month period for which compensation has been claimed by the renters in this proceeding is effectively from 31 March 2020 to 31 March 2021. In April 2020, the Parliament introduced, by the passing of the *Covid – 19 Omnibus (Emergency Measures) Act 2020* (‘Covid-19 Act’), a new Part 16 into the RT Act in response to the COVID19 pandemic. Part 16 operated retrospectively from 29 March 2020 until 28 March 2021 (the pandemic period).
- 69 The new Part 16 temporarily changed the operation of the RT Act in response to the COVID-19 pandemic. Relevantly, under the COVID-19 Act:
- a. applications for possession could not be made based on a notice to vacate. Instead, a rental provider could apply for a termination order and a possession order without serving a notice to vacate in specified circumstances set out in Part 16; and
  - b. a party to a rental agreement could not be in breach of the rental agreement or a relevant duty provision under the RT Act, if the rental provider or tenant could not comply or it was not reasonably practical to comply because of a COVID-19 reason.<sup>11</sup> Significantly, if there is no breach of the agreement or the duty provision because of a COVID-19 reason, it follows that compensation should not be awarded.
- 70 Section 537 of the COVID-19 Act set out when the inability to comply with a duty provision or the agreement was regarded as being due to a ‘COVID-19 reason’. Section 537 provided the COVID-19 reasons as being:
- a. if the person cannot comply because of illness;
  - b. if the person cannot comply because of the exercise of emergency powers or public health risk powers or a public recommendation of the Chief Health Officer or the exercise of a power by the Minister under the *Emergency Management Act 1986* (Vic); or
  - c. if the person cannot comply without suffering severe hardship; or
  - d. if a person cannot comply because of any exceptional circumstances in relation to the COVID-19 pandemic.
- 71 Neither the Stage 4 lockdowns nor the COVID-19 Act affected a renter’s right to bring an application for urgent repairs, or a rental provider’s duty to carry out urgent repairs. In this regard, during the pandemic period the Tribunal continued to hear applications, and make orders, for the carrying out

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<sup>11</sup> Refer section 542 of Part 16 of the *Residential Tenancies Act 1997* (Vic), as in effect in accordance with the *Covid-19 Omnibus (Emergency Measures Act) 2020* (Vic).



of urgent repairs and tradespeople were permitted to attend rented premises for those urgent works.

- 72 During the pandemic period, ‘urgent repairs’ was defined under the RT Act to include any work necessary to repair or remedy a serious roof leak, flooding or serious flood damage, a failure or breakdown of any essential service or appliance provided for hot water, water, cooking, heating or laundering, and any fault or damage that makes rented premises unsafe or insecure.<sup>12</sup>

### **Assessment of evidence, reasons and findings**

- 73 The burden of proof rests with whoever brings an application to the Tribunal, which means that an applicant must produce sufficient evidence during a hearing to support what they say and to prove their case. It is not usually enough for an applicant to merely assert that they have a right to an outcome. Generally, they must also have quality evidence to back up what they say.
- 74 In assessing whether the renters are entitled to compensation, I must first determine whether Mr Cameron was in breach of his duty to ensure the premises were maintained in good repair and/or his duty to ensure the renters have quiet enjoyment of the premises.

### **Preliminary Comment**

- 75 In their application the renters stated the premises were unfit for human habitation.
- 76 Mr Cameron said that he could have served a notice to vacate in November 2020, but that he thought he would ‘do the right thing’ by the renters and give them six months to vacate.
- 77 In fact, under the COVID-19 Act there was no entitlement for Mr Cameron to serve a notice to vacate. As stated above, a rental provider was required to make an application to the Tribunal for a termination and possession order in specified circumstances. The specified circumstances included if the rented premises were unfit for human habitation - but did not include if the rental provider intended to repair or renovate rented premises. Similarly, a renter could apply for a termination order if they considered the premises were unfit for habitation. Neither party made any such application.
- 78 In any event, the application before me does not require me to consider or determine whether the premises were unfit for human habitation. The application before me requires me to determine whether the renters are entitled to compensation because there has been a failure by Mr Cameron to comply with his duties owed to the renters under the RT Act.

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<sup>12</sup> Refer section 3 of RT Act as it then was. I note that under the amendments to the RT Act passed on 28 March 2021 urgent repairs is defined to include any fault or damage that makes the rented premises unsafe or insecure, including the presence of mould or damp caused by or related to the building structure.





### Failure to ensure quiet enjoyment of rented premises

79 The renters stated in their Summary of Proofs that the basis of their claim of \$5,000.00 for breach of quiet enjoyment was as follows:

For poorly maintained and minimal actioning for urgent repairs. Mess and upheaval of life. Missed employment. No space to live in bedrooms while works carried out. Living with mould, smell of mould. Constant cleaning. No plans or information provided by the rental provider to the renters for works to be carried out. Stress for whole family. Promise to make repairs and not carry out effectively. Forced to move out for asking for repairs;

80 The equivalent amount of \$5,000.00 was described in their initial application as being for 'stress to the family over a long period.'

81 I consider the claim described by the renters as being more appropriately described as a claim for inconvenience and/or stress and disappointment arising for the rental provider's breach of duty to maintain the premises in good repair, rather than a breach of quiet enjoyment. I have considered and discussed the claim in that context in the paragraphs below.

82 However, for completeness, I am not satisfied that this ground has been established because there was no evidence that Mr Cameron caused any unnecessary interruptions or disruptions to the renters' quiet enjoyment. (In fact, the evidence was Mr Cameron did not attend the premises at all for the past 10 years, and few trades attended during that time). The limited text and email correspondence sent by the renters to the rental provider did not refer to any breach of quiet enjoyment. I am not satisfied Mr Cameron breached the duty to provide quiet enjoyment of the premises.

### Failure to ensure premises were maintained in good repair

83 Based on the evidence I am satisfied there was mould on the ceiling in the kitchen and bedroom one and mould was found on a bedroom mattress, behind the TV cabinet and in a chest of drawers, and that there was also rising damp in the kitchen and the passageway. For completeness, I note Mr Cameron did not dispute the presence of mould and rising damp, nor the poor state of the rented premises, as observed by him when he inspected the property in November 2020.

84 It is not disputed that there was no indication of mould at the premises at the commencement of the tenancy. I am satisfied that the cause of the mould was not due to something that ought to have or could have been discovered by the rental provider undertaking an inspection of the premises at the start of the tenancy.

85 In some cases, mould may be due to the way a tenant uses the premises. However, the uncontested evidence submitted to the Tribunal by way of the Property Report obtained by the renters was that the cause of the mould and rising damp was due to wetness underneath the house and gaps around the floors and walls, thus allowing moisture to penetrate. I am therefore satisfied





that the mould and rising damp was due to structural issues and deficiencies in the rented premises and was not caused by the renters' use of the premises.

- 86 Mr Cameron said he first became aware of the issue with mould and rising damp when advised of it in a telephone discussion with the renters in September 2020. Although Mr Hooper said it had been previously raised with Mr Cameron prior to that date, he did not specify when he maintained Mr Cameron was aware of it. Based on the evidence before me, I am satisfied Mr Cameron was notified of the presence of mould and rising damp at the property in September 2020.
- 87 I must now consider whether, having been made aware of the mould and rising damp at the property, Mr Cameron acted with reasonable diligence to have the mould remediated in accordance with the duty he owed the renters under the RT Act.
- 88 There is no evidence of Mr Cameron taking any steps to assess whether the rented premises were affected by mould prior to his attendance at the premises in November 2020.
- 89 The presence of mould in and of itself is a 'defect' or item which is required to be 'repaired' and attended to. I consider mould to be an urgent repair because it is a 'fault' that makes the premises unsafe. Whilst Mr Cameron queried whether the mould was of a type that was detrimental to health, he did not provide any evidence on this point. Having been notified there was mould at the premises, it was incumbent upon Mr Cameron to inspect, investigate and remediate the mould.
- 90 Based on the evidence, I am satisfied that having been notified of the presence of mould in September 2020, Mr Cameron failed to act with reasonable diligence to have the mould remediated and subsequent repairs undertaken to prevent its return, such that he was in breach of his obligation under section 68 of the RT Act. I find that a reasonable time for Mr Cameron to inspect the premises and arrange remediation of the mould to be 2 weeks and that he was therefore in breach of this obligation from mid-September 2020 until the tenancy terminated on 1 April 2021.
- 91 I note in September 2020, whilst there was a hard lockdown which ended on 27 October 2020, urgent repairs were able to be undertaken. This means the Tribunal could have made an order for the mould to be investigated, remediated and repairs undertaken to prevent it from recurring. It means also that Mr Cameron could have attended the property and/or arranged for specialist tradespersons to attend to carry out these works. Curiously, the rental provider arranged for a valuer to attend the premises in September 2020, when such an attendance could not be regarded as 'urgent'.
- 92 I therefore reject Mr Cameron's contention that the repair work required to remove the mould was unable to be carried out due to COVID-19 restrictions.



- 93 Mr Cameron did not dispute that the works which were required to be undertaken included not only the remediation of the mould but also works necessary to prevent the mould and rising damp recurring. The wetness of the ground under the house was due to several factors including a disconnected bathroom waste and poor guttering, and the gaps between the floor and walls which allowed moisture to penetrate the house.<sup>13</sup> This meant repairs were required to the subfloor, so that there were no gaps between the walls and the floors, and also works to prevent water accumulating under the house.
- 94 Other than gutter repairs to one side of the house in November 2020, there was no other meaningful work undertaken until 3 March 2021 when works commenced on the first bedroom flooring. At this time the builder removed carpet and part of the floor in the daughter's bedroom and carried out works on the floor in the passageway. Whilst these works formed part of what was required to address the mould and damp at the property, these work alone did not rectify the issues.
- 95 Mr Cameron said that, after the COVID-19 lockdowns, he had difficulty finding trades to attend the property. No evidence was produced by Mr Cameron corroborating attempts by him to have trades attend. I am therefore not satisfied that the works were unable to be carried out due to limited trades.
- 96 I note that each party's version of what was discussed between them in November 2020 is at odds. On the one hand Mr Hooper said that Mr Cameron agreed to carry out repairs, one room at a time, and that there was no request to vacate at that time. On the other hand, Mr Cameron said he told the renters that they would have to vacate, but gave them time to do so. He said that in March 2021 he again told the renters they had to go, and, if they had not, he would have served a formal notice.
- 97 It is not necessary for me to determine whose version of the discussion I prefer in order to determine the claim made in this proceeding. That is because Mr Cameron acknowledged that even on his own version of the discussion, he was required to undertake the repair works. His evidence was that the repair works were unable to be carried out due to a lack of trades and COVID-19 restrictions. As stated, COVID-19 restrictions did not prevent attendance at rented premises for urgent repairs and I am not satisfied on the evidence before me that the failure to attend to the works was due to a lack of trades.
- 98 Finally, I have considered whether the renters could have mitigated their loss by applying to the Tribunal for an urgent repair order. Prior to Mr Cameron's attendance, the renters applied for another property at the end of September 2020. I find this was effectively an 'attempt' by the renters to 'mitigate their loss' in the sense they were prepared to move, and it led to a promise by Mr Cameron to attend to the repair works. Further, in November 2020 Mr Cameron attended the premises and agreed to undertake necessary

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<sup>13</sup> Refer to the Property Report.



rectification works. I am satisfied that Mr Cameron's agreement to attend to the repair works was such that the renters would not have believed there was a need to make an application to the Tribunal. I am therefore satisfied the renters did not fail to mitigate their loss.

### Consideration of amount of compensation

99 In their application the renters claimed \$11,750.58 based on 50% of the monthly rent of \$1,958.43 for the 12 months prior to vacating the premises, being the period March 2020 to March 2021 and stated, with reference to the Property Report, that the rental provider had failed to remedy 'various issues over a significant period of time'. In their Summary of Proofs, the amount claimed was \$11,748.00 based on 50% of the monthly rent for the 4 months between June and September 2020, and 100% of the monthly rent for the period November to March 2021 when the premises was 'very uninhabitable'. Mr Hooper told me the focus of the period was the three months before vacating the premises.

### Mid-September 2020 to end of the tenancy

100 Except for the five days in March 2021 which I have considered separately in paragraphs 104 to 106 below, I must now consider what is appropriate compensation for the period I have found Mr Cameron to be in breach of his duty to maintain the premises in good repair, namely, from mid-September 2020 to the end of the tenancy.

101 I consider the renters' claim of 100% rent for the period November 2020 to March 2021 to be excessive given the renters did remain at the premises. However, I accept that whilst the renters continued to live at the property, they did so in circumstances where the property had mould, rising damp, and gaps between walls and the sub floor such that the renters use of the premises was impacted given the continual need to:

- a. clean the mould from the ceilings in the bedroom (I have accepted Mr Hooper's evidence that his wife would attempt to clean the mould); and
- b. ensure the premises remained well-ventilated by continuously opening windows.

102 The rent payable was \$1,958.43 per calendar month which equates to daily rent of \$65.40. The total number of days during the period 15 September 2020 to 31 March 2021, excluding 5 days in March 2021, is 193 days. I find reasonable compensation is to reduce the rent payable over this time by 20%, arising from inconvenience and an inability to have the effective use of some rooms. Therefore, the renters are entitled to compensation in the amount of \$2,524.44.

### 1 March - 5 March 2021

103 I am satisfied that the renters were required to remove the furniture from their daughter's bedroom on 1 March 2021 to allow works on that room to commence. The bedroom furniture was then stored in the living room and the



living room furniture was stored in the garage. The bedroom furniture was not returned to the bedroom until 4 March 2020. At this time blankets were placed on the floor as the carpet had been removed. The return of their bedroom furniture would also have then required the renters to return the living room furniture from the garage. I take into account the evidence of the renters that whilst the sub floor was removed in the passageway it allowed the smell of wet earth to permeate the house.

- 104 I consider the renters' claim for 100% of the rent during this period to be excessive given they remained at the property, albeit in the circumstances described above. I am satisfied a reasonable reduction for the rent paid during this time to be 60% given the daughter did not have use of her bedroom, the living room was unable to be used for the family, the time spent by the renters moving furniture around to accommodate the works and the odour which permeated the premises whilst the subfloor remained exposed. Whilst the bedroom furniture was returned to the bedroom on 4 March 2021, I have allowed an additional day in this period for returning the furniture to the living room.
- 105 Accordingly, I find the renters are entitled to \$196.20 compensation for a period of five days.

#### March 2020 to mid-September 2020

- 106 The Property Report included photographs of items that were not the subject of the claim. Other than the issues with mould and rising damp, no evidence was led by the renters concerning any of the other items contained in that report. There were two matters that Mr Hooper briefly referred to during the hearing which had arisen during this time, namely, the stove cooktop and the shower head. No specific monetary claim was made for these items.
- 107 I understood Mr Hooper relied upon the evidence given in relation to the stove cooktop and the shower head, as well as the description of the general state of the property at the end of the tenancy as detailed in the Property Report, to support the renters' claim for \$5,000.00 for 'stress and poor living conditions,' and 'mess and upheaval of life' and 'poorly maintained and minimal actioning for urgent repairs'.<sup>14</sup> Before turning to consider that claim, I make the following observations.
- 108 Firstly, I note the renters had not made any application to the Tribunal for repairs for any of the items, nor did they submit any evidence of correspondence with the rental provider requesting repairs to the items. Whilst a tenant is not obliged to make an application for urgent or non-urgent repairs, a failure to do so may impact the amount of compensation they may be entitled to claim.

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<sup>14</sup> Refer to full description in the Summary of Proofs, referred to in paragraph 78 above.



- 109 It is not unusual for appliances to fail during a tenancy. Whether a renter is entitled to compensation because of that failure depends upon the rental provider's response to having been notified of the need for a repair.
- 110 The rental provider was notified of the defective shower head on 15 June 2020 and the shower head failed on 19 June 202 at which time a new shower head had been placed in the renters' letterbox, for Mr Hooper to install. When that shower head failed the renters said they reported the matter to the rental provider on 22 June 2020 and it was replaced by a plumber on that day. I am satisfied the rental provider arranged the repairs to the shower head within a reasonable time. I accept it is not the renters' responsibility to replace faulty items and Mr Hooper certainly would have been within his rights to have requested a plumber be arranged to attend to the repair, rather than attempting the repair himself. However, the fact he initially replaced the shower head is not a basis to award compensation to the renters.
- 111 I am satisfied that the renters notified the rental provider of the rear faulty hotplate on 5 May 2020 and that repairs to it were not carried out until 7 October 2020 when the oven was replaced. When the element did not 'turn off' and was arcing on 4 October 2020, a new stove was installed on 7 October 2020. I also take into account that the cooktop had 4 elements, the other 3 of varying sizes. Based on the photographs it is evident it was an old oven. I accept that the arcing of the oven on 7 October 2020 would have been very concerning and that the stress associated with the faulty oven could have been prevented had the repair been attended to urgently.
- 112 I find Mr Cameron did not take all reasonable steps to comply with his duty to repair the oven until the fault became urgent. I note the renters could have made application to the Tribunal for an urgent repair order, although they are under no obligation to do so. Such an application might have reduced the period the oven was not fully functional.

#### Renters claim for \$5,000.00 for stress

- 113 I note the description of this claim as set out in the Summary of Proofs and set out in paragraph 78 above. There was no evidence given by the renters explaining how the claim for \$5,000.00 was assessed.
- 114 I accept that there was an unacceptable ongoing fetter to the renters' right to peacefully enjoy the premises by reason of the rental provider's failure to remediate the mould and damp, communicate the time frame for the repair works, and considering the delay in attending to the faulty oven. In addition to the compensation that I have awarded for the loss of amenity due to the rental provider's failure to maintain the premises in good repair, I am satisfied it is also appropriate to award the sum of \$500 for the stress and disappointment associated with the breach of duty, noting the failure to attend to the repair works was ongoing for no less than 5 months.



### Other items claimed

- 115 A further cost claimed by the renters was the cost associated with the preparation of the Mould Report dated 31 March 2021 by Mould Zappers. The report cost \$50 and consisted of one paragraph confirming high levels of moisture of walls and wooden flooring, suggesting rising damp was an issue throughout the rear of the property.
- 116 I am not satisfied the renters are entitled to the cost of this report. The report was obtained on the last day of the tenancy. Whilst I accept the required repair works had not been completed at this time, the rental provider had agreed that there was mould and rising damp at the property and that repair works were necessary. I therefore do not consider the report was a necessary expense.
- 117 The renters also sought the cost of \$1,440.00 for the preparation of the Property Report. There was no evidence either in the form of an invoice rendered by Mr Dunn or statement demonstrating payment of that amount. Further, Mr Dunn was unsure whether he sought payment. I am not satisfied the renters incurred the cost of \$1,440.00 and therefore I do not allow the amount claimed.
- 118 In the Summary of Proofs, the renters claimed \$3,000.00 for damaged goods. In the initial application, a total of \$1,150.00 for damage to a mattress, clothes and two TV cabinets was claimed.
- 119 Mr Hooper relied upon photographs of the base of a mattress and a chest of drawers. However, the renters have not provided any evidence regarding the age of the items or whether the items were replaced or disposed of. Nor did the renters provide any invoices, receipts or quotes for the original damaged items or replacement items.
- 120 The rental agreement does not act like an insurance policy where a replacement cost might be given for an item damaged during the tenancy. The Tribunal must take into account the age of the item and depreciation costs. In the absence of this evidence, and noting, based on the photographs, the items claimed would more than likely have reached the end of their depreciable life, I am not satisfied the renters have proved the loss claimed. There is also no evidence that the items were damaged after the rental provider was informed about the mould and failed to carry out the repairs in a reasonable timeframe, or what steps the renters took to mitigate their loss by having the items removed from the effected rooms or remediated or repaired. I therefore dismiss the claim.
- 121 It is not clear whether the renters intended to pursue a claim for \$250.00 for doctor's appointments for Ms Dale – Hooper. There was no documentation submitted in support of the claim, or how the costs incurred were caused by mould at premises. I am not satisfied on the evidence before me the renters are entitled to \$250.00 for medical expenses. I also consider this claim to be



excluded from an order in accordance with a claim for physical injury under section 447(2) of the RT Act.

- 122 The renters claim a loss of \$1,500.00 being 3 days of work for Mr Hooper at \$500 per day. Mr Hooper said he was unable to attend work whilst the works in March 2021 were being carried out. In this instance there was insufficient documentary evidence of income, the availability of work and the lack of alternative arrangements to prove any loss to the renters. Further, I have had regard to the inconvenience caused to the renters in having to move furniture for the works carried out in early March 2021 when assessing the amount of compensation for this period and so dismiss this part of the claim.
- 123 I am not satisfied the renters are entitled to \$1,000.00 claimed for moving costs. There is no documentation to support the amount claimed and, in any event, I am of the view it is a cost the renters would have had to incur in any event when vacating the premises.
- 124 Finally, the renters seek the cost of the filing fee paid in lodging this proceeding, being the sum of \$217.70. Although the renters have been awarded compensation, the amount awarded is substantially less than that claimed, being only about 15% of the claimed. In the circumstances, having regard to section 115B of the *Victorian Civil and Tribunal Act 1998* (Vic), I find it is appropriate the rental provider reimburse the renters \$50.00, being a portion of the filing fee paid.

A Eastman  
**Member**