

**Order of the Tenancy Tribunal***Residential Tenancies Act 1986**Office of the Tenancy Tribunal***Tenancy Tribunal at Dunedin****Tenancy Address**

20 Lewin Street, Balclutha 9230

**Applicant**

Full Name

Jordan Aaron Hill and Nikki Lee Tomkinson-Winterburn

Tenants

**Respondents**

Full Name

Kristal Meikle as agent for Colin McKinney

Landlord

**Order of the Tribunal**

The Tribunal hereby orders:

1. Kristal Meikle (Agent) and Colin McKinney to pay Jordan Hill and Nikki Lee Tomkinson-Winterburn the sum of \$963.44 immediately calculated as follows:

## Costs to be paid to Tenants

Bond	\$1,080.00
plus Exemplary damages for non lodgement	\$333.00
plus Filing fee reimbursement	\$20.44
less cleaning and rubbish removal costs	\$200.00
less costs of repairs to door and vent	\$270.00
<b>Amount payable by Landlord to Tenants</b>	<b>\$963.44</b>

(Sections 77(2)(n), 78(1)(d), 102(4)(a) &amp; 109 Residential Tenancies Act 1986)

**Reasons: The tenants both appeared; K Meikle appeared for the landlord**

1. On termination of their tenancy on 4 July 2017 the tenants sought a refund of their bond, and exemplary damages for non lodgement of the bond and unlawful entry by the landlord.
2. Although she had not made a claim the landlord sought compensation of \$2,656.50 for cleaning, rubbish removal and damages.

#### *Cleaning and rubbish removal*

3. Part of the landlord's claim was \$425 for cleaning. In support of the application the landlord provided photographs taken at the end of the tenancy and a property inspection report from two months prior.
4. I am satisfied the premises were not left reasonably clean and tidy and all rubbish was not removed on vacation. The hourly rate of \$53.12 before GST, claimed by the landlord has been reduced to reflect a rate more usually awarded by the Tribunal for such work.

#### *Damages*

5. In any claim for damages the landlord must prove that the damage occurred during the tenancy and was probably not caused by fair wear and tear. Once this has been established, in order not to be liable for the cost of repairs, the tenants must prove that the damage was not caused by their careless, intentional or unlawful acts or the actions of others at the property with their consent.
  6. I am satisfied that the property was damaged during the tenancy. In particular marks on walls, ripped wallpaper, broken door frame, water damage to laundry and bathroom cabinet and broken outside vent.
  7. However because of the recent Court of Appeal decision in *Holler & Rouse v Osaki* 2016 NZCA 130 the fact that the landlord has insurance for damage caused by tenants means, if the damage was careless the tenants are entitled to the benefit of the exoneration provisions in sections 268 and 269 of the Property Law Act 2007.
  8. In *Man-oock Holdings (2007) Limited v Hoskin & Ors* CIV-2016-012-000233, His Honour Judge Phillips when discussing the *Osaki* decision said:

"Quite simply the decision was one in which the Court of Appeal found that in terms of loss or damage caused carelessly (by any means whatsoever so long as it was not intentional damage) residential tenants are immune from landlord claims for such losses as per ss268 & 269 of the PLA."
  9. The evidence of the landlord was that she believed the damage was intentional; in particular to the door and vent.
  10. The intention of parties is often difficult to ascertain, especially if, as in this case the tenants deny any of the damage was intentional.
  11. Looking at the different approaches to determining intent in the criminal and civil jurisdictions
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there appears to be some consistency:

- xi. the emphasis is on intended consequences rather than actions,
  - xii. recklessness and wilful disregard of consequences can be considered in the same category as intention, or expressions of intention
  - xiii. there is an element of subjectivity, courting the risk or foreseeability, judged from the point of view of the perpetrator
  - xiv. there are other elements of less certainty such as mental state or capacity
12. I accept the evidence of the landlord that the damage to the door frame and vent was intentional because of the force required to break these items; a solid wooden door and a steel vent.
  13. An award has been made for these claims, after a reduction in the claim for the door repairs due to the lack of supporting evidence about the reasonable costs of repair.
  14. However I accept the tenants' evidence that the other damage was careless, such as their children ripping already damaged wallpaper and the leak from their washing machine which they were unaware of.
  15. As the landlord has insurance and there is insufficient evidence to support that the other damage claimed was intentional or the result of an imprisonable offence then the tenants are not liable to compensate the landlord for making good that damage.
  16. The claim for replacement of light bulbs and a light shade fails because of the lack of supporting evidence these were removed during the tenancy, in the face of the denials by the tenants this was the case.
  17. Although the tenants agreed they left a dishwasher in the premises in breach of section 40(1)(e)(ii) the landlord's claim for compensation of \$110 for disposal fails. This is because there is no evidence that the landlord made any attempt to allow the tenants to collect the dishwasher or ascertain its value. In addition there is no objective documentation such as a tip fee to support the amount claimed.

#### *Unlawful entry*

18. A landlord may not enter premises during the currency of the tenancy agreement except in accordance with sections 48(1) & (2) of the Residential Tenancies Act 1986).
  19. Entry by the landlord into the premises, except in accordance with the specific provisions allowing right of entry, is deemed to be an unlawful act.
  20. The tenants claimed the landlord's partner took doors from a garage without consent and the landlord inspected the premises without prior notice.
  21. I am not satisfied that on the two dates suggested that there was unlawful entry. I accept the evidence of the landlord that the special terms in the contract allowed access for renovations and to the garage. In addition I accept that the landlord gave more than 48 hours prior notice, via a text message for the inspection on 17 May.
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22. The tenants' claim for exemplary damages for unlawful entry therefore fails.

*Non lodgement of bond*

23. The landlord agreed that the tenants paid a bond of \$1,080 on 23 May 2016. After the Tribunal confirmed with the Bond Centre during the hearing that the bond had not been lodged, the landlord reluctantly agreed that she must have forgotten to do so.
24. If I am satisfied that the landlord intentionally failed to lodge the bond, which I am, and that it would be just and equitable to require the landlord to pay a sum in the nature of exemplary damages then I can make an award accordingly.
25. Exemplary damages under the Act are different from compensation. The provision of such damages is designed to punish and deter; *Attorney-General (Commissioner of Crown Lands) v Little Bo Peep Sheep Company Ltd* (HC CIV 2010-412-134).
26. In making an award of exemplary damages I need to consider the four matters set out in section 109(3).
27. First the intent of the landlord - despite the fact that the landlord produced a signed bond lodgement form I do not accept her evidence that she forgot to lodge the bond. Rather I consider the failure to lodge was deliberate.
28. The landlord gave evidence that she sent a cheque with the lodgement form but did not think anything about the matter until seventeen months later when she checked the rent account and found a credit for the bond which she suggested had been refunded in July 2017. I found the evidence of the landlord at best vague and obtuse.
29. Second the effect of the unlawful acts - the landlord has held \$1,080 in her account for eighteen months. This meant a loss of income to the Bond Centre. The tenants have been denied the benefit of the Bond Centre holding the bond while the claims against them have been dealt with.
30. Third the interests of the tenants against whom the unlawful acts were committed - when their attempts to sort out the matter with the landlord were unsuccessful the tenants had to make an application the Tribunal for a refund of their bond. The issue has caused them significant stress at a time of personal health issues.
31. Fourth the public interest - the legislation provides for bond money to be used to pay for the dispute resolution procedures under the Act. Non payment of bonds is therefore a loss and against the public interest. The public should be able to rely on landlords to comply with the legislation and when they do not the public should expect some censure.
32. The amendments to the legislation in 2010 increased the maximum exemplary damages for non lodgement of the bond from \$750 to \$1,000. This clearly signals an important element of public policy inherent in the legislation for such breaches, which the Tribunal must be mindful of.
33. Taking all the circumstances into account I consider the breach by the landlord was serious and warrants a reasonable award of exemplary damages, which I have set at one-third of the

maximum.

34. I am satisfied that the applicant has been largely successful in the claims brought to the Tribunal and therefore consider it appropriate the landlord pay the applicant the filing fee.