

## **Order of the Tenancy Tribunal**

*Residential Tenancies Act 1986*

*Office of the Tenancy Tribunal*

### **Tenancy Tribunal at Auckland**

#### **Tenancy Address**

66 Clonbern Road, Remuera, Auckland 1050

#### **Applicant**

Full Name

Laura Lin trading as Better Home Realty Property Management

Landlord's agent

#### **Respondents**

Full Name

Stephanie Deborah Shaw

Tenant

#### **Order of the Tribunal**

##### **The Tribunal orders:**

1. By way of declaration, after the end of the tenancy the following amounts are payable by the tenant and the landlord:

*Payable to landlord:*

Rent arrears	\$5,314.29
Water rates	\$90.13
Cleaning	\$100.00

*Payable to tenant:*

Compensation - loss of amenity (garage)	\$1,200.00
Failure to comply with all requirements relating to residential buildings (s.45(1)(c) RTA)	\$1,300.00
Exemplary damages - failure to comply with smoke alarm requirements (s. 45(1)(ba) RTA)	\$2,500.00
Failure to provide premises reasonably clean at commencement of tenancy (s.45(1)(a) RTA)	\$240.00
Water rates overpayment	\$164.08

2. All other claims made in applications 4095081 and 4095703 are dismissed.  
(Sections 38, 40, 45, 77, 78 and 109) Residential Tenancies Act 1986)
3. The Bond Centre to pay the bond of \$4,800.00 (6089978-002) apportioned as follows:

Laura Lin trading as Better Home Realty Property Management (as agent for the landlord)	\$100.34
Stephanie Shaw	\$4,699.66

(Sections 22 and 127 Residential Tenancies Act 1986 ("RTA"))

**Reasons:**

1. Both parties attended the two hearings held. At the second hearing Ms Shaw also had a witness, Ms Young.
2. The tenancy has ended.
3. This matter involved two applications. Ms Shaw's application was heard first as Ms Lin arrived at the first hearing after it had commenced at the allocated time.
4. In her application, Ms Shaw sought orders, including exemplary damages, in respect of : (i) the garage at the premises, (ii) heating in the lounge, (iii) smoke alarms, (iv) cleanliness of the premises at the commencement of the tenancy, (v) overpaid water usage and (vi) breach of privacy. A claim made as to the landlord contracting to evade the RTA was withdrawn during the hearing.
5. In her application, Ms Lin sought orders in respect of: (i) rent arrears, (ii) water rates, (iii) cleaning costs and loss of rent, (iv) gardening costs and (v) key/lock change costs.

***Tenant's application***

*Garage*

6. Ms Shaw's evidence was that she was only able to use a part of the garage as a number of items owned by the landlord were stored in the garage. Ms Shaw said that Ms Lin had told her prior to the commencement of the tenancy that these items would be removed but they never were. for the duration of the tenancy (a little over 5 months) Ms Shaw was unable to park her car in the garage.
7. Ms Lin's evidence was that she advised Ms Shaw prior to the commencement of the tenancy that the landlord's items stored in the garage would not be removed and that Ms Shaw would not be able to park in the garage. Ms Lin said that Ms Shaw had said to her that this was okay and that Ms Shaw had not raised this issue during the tenancy.
8. In reply Ms Shaw stated that she did send an email to Ms Lin on this issue but thus email has now been deleted from her electronic records.
9. The tenancy agreement records that Ms Shaw was renting "66 Clonbern Road, Remuera". This property includes a garage. The written tenancy agreement does not record that any part of the

premises (a portion of the garage area) was excluded from the tenancy or that the tenant agreed to the landlord storing items in any part of the premises that she was paying rent for. The weekly rent was \$1,200. Ms Lin is in business as a property manager and the tenancy agreement was prepared by her. If part of the garage (or the tenant's full use of it) was agreed by both parties to be excluded from the tenancy then this would have been recorded by Ms Lin as a term in the tenancy agreement (the document even has a section headed "special conditions" - this was left blank).

10. I find that Ms Shaw proved that it is more probable than not that: (i) the whole of the garage was included in the premises rented by Ms Shaw and (ii) Ms Shaw did not agree to the landlord's items being stored in the garage.
11. The loss of Ms Shaw's use of the whole of the garage was a breach of the tenancy agreement and caused a loss of amenity for Ms Shaw. I determine that she is to be compensated for this loss of amenity in the amount ordered above (\$50.00 per week for 24 weeks).

#### *Heating in lounge*

12. Ms Shaw's evidence was that there was no form of heating the living room of the house. The house was very cold during the winter. Electric heaters were purchased by Ms Shaw to heat the house and large power bills were incurred.
13. Section 45(1)(c) RTA provides that a landlord must "comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises". Regulation 6 of the Housing Improvement Regulations 1947 ("HIR") provides "Every living room shall be fitted with a fireplace and chimney or other approved form of heating".
14. Ms Lin contended that the living room did comply with the HIR because it has a gas califont /bayonet and a heating device could be connected to this outlet.
15. Ms Shaw disputed that the living room had a gas califont.
16. In *Complete Property Management Ltd v White* (DC Christchurch, CIV 2010-009-3562, 3 February 2011) the District Court rejected an argument that the provision of a power point in a living room was sufficient compliance with regulation 6 of the HIR because a heater could be plugged into it. The Court held that a power point was not a "form of heating".
17. Similarly, I find that a gas califont is not a "form of heating" and the subject premises did not comply with the requirements of regulation 6 HIR. Ms Shaw is compensated for the landlord's breach of section 45(1)(c) and regulation 6 HIR in the amount ordered above.
18. A failure to comply with section 45(1)(c) RTA is an unlawful act and Ms Shaw sought exemplary damages for this breach.
19. Section 109 RTA provides that where a party to a tenancy agreement has committed an unlawful act, the Tribunal may award exemplary damages (in the nature of a penalty) where it is satisfied that: (i) the unlawful act was committed intentionally and (ii) having regard to the criteria set out in section 109(3) RTA such an award would be "just".
20. I find that an award of exemplary damages for the landlord's breach of section 45(1)(c) RTA, in the particular circumstances of this case and in addition to the compensation already awarded above, would not be just.

*Smoke alarms*

21. Ms Shaw's evidence was that the premises did not have compliant smoke alarms installed at any time during the tenancy (see section 45(1)(ba) RTA and the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016). Ms Shaw produced a photograph of a smoke alarm in an unopened packet that was sitting on a shelf in the laundry at the start of the tenancy as well as photographs (taken in late July 2017) showing the ceilings adjacent to bedrooms in the house.
22. Ms Young, who works as a property manager and is a friend of Ms Shaw, gave evidence that when she went to the premises on 25 July 2017 she saw that there were no smoke alarms installed and she was "surprised and concerned" that her friend had been living in a house with no smoke alarms. Although Ms Lin implored me to completely disregard Ms Young's evidence because she is a friend of Ms Shaw I note here that, to the contrary, I found Ms Young to be a credible witness who gave her evidence in a straightforward and non-partisan manner.
23. Ms Lin's evidence was that compliant smoke alarms have been installed in the premises since September 2016 (when she took over managing the property). She produced as evidence photographs taken by her in October 2017 which show smoke alarms installed in the lounge and hallway of the premises.
24. After considering the evidence put before the Tribunal, I am satisfied that Ms Shaw proved to the required standard that the landlord did not have compliant smoke alarms installed in the premises at any throughout the tenancy. I felt a distinct sense of unease about the evidence given by Ms Lin on this issue. During the first hearing she sought to convince me that a ceiling vent shown in one of the photographs of the hallway ceiling was a smoke alarm yet in her October 2017 photographs produced in the second hearing the hallway smoke alarm is mounted on the side of the wall and not the ceiling. I prefer, without hesitation, the evidence given by Ms Shaw and Ms Young as to the issue of smoke alarms.
25. A failure to comply with section 45(1)(ba) RTA is an unlawful act. Ms Shaw sought an award of exemplary damages and I am satisfied, after considering the criteria set out in section 109 RTA, that an award of exemplary damages is appropriate for the landlord's breach of the smoke alarm requirements (section 45(1)(ba) RTA). The act concerned was intentional in the sense that: (i) this is not a case where the landlord believed on genuine grounds that smoke alarms were installed when they were not, (ii) the smoke alarm left on the shelf in the laundry suggests that either the landlord or the agent had at some point turned their mind to compliance with the smoke alarm regulations and (iii) what I consider to have been Ms Lin's attempt in seeking to 'cover-up' the non-compliance during Ms Shaw's tenancy.
26. By setting the maximum amount of exemplary damages that the Tribunal can award for non-compliance with the smoke alarm requirements at \$4,000.00 Parliament signalled that there should be a significant consequence for landlords who breach their obligations as to smoke alarms. In his speech in Parliament during the first reading of the bill that brought into effect the new smoke alarm requirements the responsible Minister, the Hon Nick Smith, described these requirements as a "significant measure" and he also stated "We see tragedy after tragedy of home fires and the loss of life because of a lack of this most basic and inexpensive protection".

27. The legislative intention as regards the penalty for non-compliance was also made clear in the speech made by Matt Dooney in Parliament's second reading of the bill when he referred to a power imbalance between landlords and tenants and then said "We felt that increasing the penalty from \$3,000 to \$4,000 was an effective tool in redressing that balance as well".
28. Taking into account the relatively short duration of the tenancy I determine that an award of exemplary damages in the sum of \$2,500 is appropriate.

*Cleanliness of premises at start of tenancy*

29. Section 45(1)(a) RTA requires a landlord to provide the premises in a reasonable state of cleanliness.
30. The condition report attached to the tenancy agreement, which was signed by both parties, records that the carpet in the house had not been cleaned and that the two bathrooms needed to be cleaned as at the commencement of the tenancy.
31. Ms Shaw stated that she spent at least eight hours cleaning the house after she moved in. Ms Lin stated that a cleaning contractor was employed by her to clean the house after Ms Shaw had moved in - this cleaning included doors and windows. Ms Shaw disputed that the cleaning done by these contractors was effective - she said that did not have mops or a vacuum cleaner.
32. It was not disputed that a number of boxes/packaging materials were left at the house by the former tenants.
33. I am satisfied that Ms Shaw proved that, as at the commencement of her tenancy on 11 February 2017, some parts of the premises were not reasonably clean. This is a breach of the landlord's obligations - see section 45(1)(a) RTA and it is appropriate that Ms Shaw is compensated for this breach by the landlord (see section 77(1)(n) RTA). In fixing the quantum of compensation under this heading I have taken into account that this claim was not filed with the Tribunal until after the tenancy had ended.
34. A breach of section 45(1)(a) RTA is an unlawful act. However I find that an award of exemplary damages for the landlord's breach of section 45(1)(a) RTA, in the particular circumstances of this case and in addition to the compensation already awarded above, would not be just.

*Breach of privacy*

35. Ms Shaw's evidence was that Ms Lin, as agent of the landlord, breached her privacy during the tenancy in two main respects: (i) by allowing a person who accompanied a tradesman to the premises to take photographs inside the premises and by "getting involved in" a dispute that arose between Ms Shaw and her former flatmates.
36. Section 38(2) RTA provides that "The landlord shall not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises by the tenant".
37. After carefully considering the evidence given by both parties on this claim, I find that Ms Shaw failed to prove, on the evidence adduced, that Ms Lin (as agent for the landlord) breached Ms

Shaw's reasonable privacy in her use of the premises. This claim was therefore dismissed.

38. Ms Shaw's claim for a refund of water rates paid is addressed in paragraph 41 below.

***Landlord's application***

*Rent arrears*

39. The rent arrears owed at the end of the tenancy was proved by Ms Lin and was not disputed by Ms Shaw.

*Water rates*

40. The claim made for the final water rates invoice was proved by Ms Lin.
41. However Ms Shaw also proved that, aside from the final invoice, during the tenancy the total cost of water recorded as actually being used by her, \$218.10, was more than the monies for water rates paid to the landlord's agent, \$382.18. A tenant in Auckland, because water charges are made on the basis of consumption, is only liable for the water proved to have been consumed by the tenant (see section 39 RTA).

*Cleaning and gardening costs/loss of rent*

42. At the end of the tenancy, Ms Shaw was required to leave the house reasonably clean and tidy and the garden and lawns reasonably tidy - section 40 RTA.
43. Ms Lin alleged that Ms Shaw failed to comply with this obligation and she claimed cleaning costs, gardening costs and loss of rent. Photographs showing some parts of the interior of the premises (taken after a new tenant had moved in after Ms Shaw left) and the exterior grounds/gardens of the premises were produced by Ms Lin. No photographs showing the state of the grounds/gardens at the commencement of the tenancy were produced.
44. Ms Shaw stated that she left the house much cleaner than it was when she moved in and that the grounds/gardens were in the same state when she moved out as they were when she moved into the premises.
45. After considering the evidence given by both parties on this issue I find that: (i) Ms Lin proved that some of the window sills inside the house were not left reasonably clean by Ms Shaw, (ii) the claim for gardening costs was not proved and (iii) the claim made for lost rent was not proved.
46. The cleaning costs claimed by Ms Lin were \$230.00. However the cleaner's invoice makes it clear that the work charged for included 'non-cleaning work' done - replacing a handle and repairing some glass. In these circumstance and given the limited amount of cleaning required to clean the window sills shown in the photographs an award of \$100.00 is made for this claim.

*Key/lock replacement*

47. Ms Lin's evidence was that not all of the keys provided to Ms Shaw at the commencement of the tenancy were returned by her at the end of the tenancy - the key for the dining room door. She therefore incurred locksmith costs in the sum of \$299.00 for replacing the lock to this door.
48. Ms Shaw stated that no key was ever provided to her for the dining room door at issue. She said the list of keys stated on the tenancy agreement was not accurate as, for example, she was provided with (and returned) a key for the garage but this key was not listed on the tenancy agreement.
49. Taking into account the onus of proof, I find that Ms Lin failed to prove that Ms Shaw did not return all of the keys provided to her at the commencement of the tenancy and this claim was therefore dismissed.

***Filing fees***

50. As both Ms Lin and Ms Shaw have been successful with some of the claims made by each, no order in respect of the filing fees paid for the applications is made.