

## **Order of the Tenancy Tribunal**

*Residential Tenancies Act 1986*

*Office of the Tenancy Tribunal*

### **Tenancy Tribunal at Rotorua**

#### **Tenancy Address**

25a Phillip Street, Victoria, Rotorua 3010

#### **Applicant**

Full Name

Eves Realty Limited

Landlord

#### **Respondents**

Full Name

Arjun Sharma

Tenant

Ankita Sharma

Tenant

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

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The Tribunal hereby orders:

1. Eves Realty Limited is granted possession of the premises situated at 25a Phillip Street, Victoria, Rotorua 3010 **at midnight on Wednesday 14 February 2018.**
2. Arjun Sharma and Ankita Sharma to pay Eves Realty Limited the sum of \$20.44, being the filing fee paid on this application.

(Section 64(1) and 102(4) Residential Tenancies Act 1986)

3. The landlord's application for rent arrears is withdrawn at its request.

(Section 77(2)(q) Residential Tenancies Act 1986)

4. The landlord's other applications are dismissed.

(Section 78(1)(i) Residential Tenancies Act 1986)

#### **Reasons:**

1. The landlord seeks orders for possession of the premises, rent arrears, and compensation for
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damage to the premises.

2. Ms Louise Bidois represented the landlord. Both tenants Mr and Mrs Sharma attended the hearing.
3. At the hearing Ms Bidois withdrew the claim for rent arrears. Rent was technically 3 days in arrears on the hearing day Wednesday 7 February 2018, but rent has in recent times been routinely paid on Thursdays when Mr Sharma gets paid. Mr Sharma confirmed that the weekly rent would be paid the next day.

***Is the 90 day termination notice valid, and has it been extended?***

4. A landlord may terminate a tenancy by giving a minimum period of notice of 90 days to the tenant (section 51(1)(d) of the Residential Tenancies Act 1986). The notice must comply with the following requirements: be in writing, identify the premises, state the date the tenant is to vacate the premises, and be signed by the landlord or their agent. A 90 day notice is not required to set out any reasons (s 51(3) RTA).
5. By notice dated 17 October 2017 the landlord terminated the tenancy effective 20 January 2018. I am satisfied that the minimum period of notice has been provided for, including for service. The notice was hand delivered to the Sharmas on the date of the notice. The notice is also technically valid.
6. The sole issue then is whether there was an agreed extension to the termination notice. The Sharmas say that they sought an extension to their tenancy to coincide with the expiry of their one year immigration visa on 21 March 2018. They say Ms Bidois verbally agreed to the extension a week later.
7. They say they proceeded on the basis of this agreement until they received a letter dated 29 December 2017 which was a reminder of the earlier termination notice. They say by this letter that Ms Bidois attempted to withdraw the extension because of the accidental damage to the premises she found on an inspection on 28 November 2017.
8. Ms Bidois adamantly denies she agreed to any extension and disputes the Sharma's version of events.
9. I think it more likely that Ms Bidois merely offered to put the Sharma's request for an extension to the landlord, along with her suggestion that they might pay an amount towards the damage to the carpet and vinyl equivalent to the landlord's insurance excess to assist their case to the landlord. No contribution towards the damage was ever made by the Sharmas, which is consistent with the Sharma's advice they had no funds available to do so.
10. In the end I find it highly unlikely that a professional property manager would agree to an extension to a termination notice without putting it in writing. It is significant that the next written notice of 29 December 2017 from the landlord was a reminder that the tenancy was to terminate on 20 January 2018 consistent with no extension being granted. The Sharma's view that the 29 December was a withdrawal of the extension in response to finding damage on the inspection is also unlikely. I accept that Ms Bidois merely made a suggestion that if the

Sharma's made a contribution to the damage incurred that the owner may consider their request more favourably. But the Sharmas never acted on that suggestion.

11. The Sharmas personal circumstances are difficult with a 3 year old child, no family support, and a short period before their visa applies. However those factors are not relevant to the Tribunal's determination. A landlord is entitled to end a tenancy on 90 days notice. As I find no agreement to an extension, the tenancy is to terminate immediately. But in order to provide time for the Sharmas to shift out in an orderly manner, I allow 5 more days, and order the tenancy to terminate at midnight on Wednesday 14 February 2018.

***Is the tenant responsible for the damage to the premises?***

12. The landlord seeks the cost of repairs and/or the insurance excess for damage to the kitchen vinyl flooring, the living room carpet, and the kitchen wall.
13. A landlord has to prove that damage to the premises occurred during the tenancy and is more than fair wear and tear. If that is established, to avoid liability, the tenant must prove they did not carelessly or intentionally cause or permit the damage. Tenants are liable for the actions of people at the premises with their permission (ss 40(2)(a), 40(4) and 41 RTA).
14. In addition, in *Holler and Rouse v Osaki* [2016] NZCA 130 the Court of Appeal decided that provisions in the Property Law Act 2007 ("PLA") which relate to commercial tenancies also apply to residential tenancies. As a consequence, tenants are not required to pay for the cost of repairing damage in a number of circumstances, including where the damage is caused by fire or is of a kind covered by the landlord's insurance. There are exceptions to this general rule, for example where the damage is intentional.
15. The Court has also held that the principle in *Osaki* applies to any insurance excess, and where the amount claimed is less than the excess and the landlord does not make an insurance claim. It is the fact that there is insurance, not the extent of it, that protects the tenant. ( *Property Brokers Ltd v Dickison and Others* [2017] NZDC 5751 and *Linklater v Dickison* [2017] NZHC 2813 at [39]).
16. Damage is intentional where a person intends to cause damage and takes the necessary steps to achieve that purpose. Damage is also intentional where a person does something, or allows a situation to continue, knowing that damage is a virtual certainty (*Tekoa Trust v Stewart* [2016] NZDC 25578).
17. I now turn to consider liability for each item of claim.
18. *Kitchen vinyl flooring and carpet*: There are burn marks on the kitchen vinyl and living room carpet, along with oil stains on the carpet. It is not disputed that this damage was caused during the tenancy, and is more than fair wear and tear. As the landlord accepts that this damage was caused accidentally and the landlord has insurance cover for accidental damage, the tenant is not responsible for such costs (*Osaki*).
19. The tenant is also protected from paying for any insurance excess applying the same principle as noted in paragraph 16 above.
20. *Kitchen wall*: The landlord says that the plaster and wallpaper are damaged due to the

ongoing moisture build up and dampness in the house brought about by the tenant's failure to ventilate the premises. Inspection reports record walls in good condition in February 2017 but in June and August 2017, some walls were noted to be damp.

21. The Sharmas strenuously deny they caused any damage to the walls from dampness as a result of not opening windows. They assert the dampness comes from the ground as confirmed to them by the DVS people who inspected the property. They say they are limited to opening windows during the middle of the day in the winter months because it is too cold to leave the windows open at other times. They say that the wallpaper was already peeling in the kitchen and on other walls throughout the house, and provided photographs in support.
22. The landlord has the onus of proving the claim on the balance of probabilities. Where the parties evidence is in direct conflict the Tribunal will turn to any independent supporting evidence to assist. While the inspection reports record dampness, they do not assist in determining the cause of the dampness. On the other hand the photographs provided show worn and peeling wallpaper throughout the house.
23. Preventing mould in a house is a dual obligation of the tenant and landlord: the tenant must live in a way that avoids mould developing by heating and ventilating the house, and wiping away daily condensation that arises from ordinary living; and a landlord must provide a house that is not prone to mould, fix any issue creating mould; and provide the means to heat and ventilate it.
24. The landlord has not provided any independent evidence but instead relies solely on the inspection reports showing the unit was not damp in February 2017 but became so during the tenancy. It is not surprising that a house can become damp during the wet winter months but that is insufficient for me to conclude that the cause of the dampness is any failure by the Sharmas to properly ventilate the premises as opposed to an inherent problem with the unit. The worn peeling kitchen wallpaper shown at the start of the tenancy might suggest there was a pre-existing problem. This claim is therefore not proved to the required standard.
25. And even if liability was established, the loss is not proved. A figure has been 'plucked out of the air' by Ms Bidois which is an inadequate basis on which to award compensation. There would also be depreciation to take in to account of the aged wallpaper which may result in no actual loss. This claim fails.

***Should the filing fee be reimbursed?***

26. As the landlord has been partially successful with its claim, I consider it appropriate to award them reimbursement of the filing fee.