

Order of the Tenancy Tribunal

Residential Tenancies Act 1986

Office of the Tenancy Tribunal

Tenancy Tribunal at Wellington

Tenancy Address

Suite 11d, Bellagio Apartments, 39 Taranaki Street, Te Aro, Wellington 6011

Applicant

Full Name

Nice Place Property Management Limited

Landlord

Respondents

Full Name

Jeff Walter Paterson

Tenant

Order of the Tribunal

The Tribunal hereby orders:

1. Jeff Paterson to pay Nice Place Property Management Limited the sum of \$11,513.29 immediately calculated as follows:

Rent Arrears	\$7,242.85
plus Costs to be paid to Landlord:	
Exemplary damages for abandonment	\$500.00
Exemplary damages for subletting	\$500.00
Exemplary damages for replacing locks	\$500.00
Costs for door replacement	\$600.00
Account of profits	\$2,150.00
Filing fee reimbursement	\$20.44
Amount payable by Tenant to Landlord	\$11,513.29

(Sections 77(2)(k) and 78(1)(d) Residential Tenancies Act 1986)

Reasons:

1. The Tribunal must consider applications lodged by both the landlord and tenant.
2. In broad summary, the landlords seek an order that the tenant pay rent arrears, an account of profits for subletting the premises on Airbnb, exemplary and other damages. The tenant seeks an order with respect to alleged failure to lodge the bond, failure of the landlord to appoint an agent when out of New Zealand, and damages with respect to what the tenant says was a damaged and unsafe premises.

Background

3. The tenancy in question, is unit 11D, located at 39 Taranaki St, Wellington, being an apartment block complex.
4. A tenancy agreement was signed by the parties on 1 May 2017. The tenancy agreement, records the landlords as "John & Christy Dobb", with an address listed in California, United States of America. The agreement also records, within the "landlord details" box:

"New Zealand (emergency) contact:

Ruth Dobbs

Address: [street address provided]

Phone: [cell phone number provided]

Email: [email address provided]"

5. The weekly rental was recorded as \$650 per week. With respect to bond "a bond of \$2600 is payable to the owner before this agreement will take effect." Otherwise the tenancy was a two year fixed term tenancy between 16 June 2017 and 16 June 2019.
6. Importantly, the tenancy agreement precluded subletting of the tenancy, stating:

"The tenant shall not assign or sublet the tenancy (including Airbnb and other temporary rentals platforms) without the landlords written consent."

Airbnb rentals and Tenancy abandoned

7. The position taken by the landlord, is that during the period of the tenancy, the tenant rented (sublet) the premises on Airbnb on some 54 occasions.
8. This was first raised by the landlord to the tenant on 12 December 2017.
9. On 17 December 2017, the tenant emailed the landlord asserting that the window in the premises were unsafe, and accordingly:

"It is imperative that I vacate / evacuate the apartment immediately, and have done so.

The keys will be couriered to the landlord on Tuesday, after cleaning is complete on Monday.

The apparent damage is from the 2016 earthquake, that has never been repaired, but well documented and known about, is at a crisis point. The catastrophic effects of glass blowing into the apartment have become apparent. It now concerns me with this new information, any one living there has been in incredible danger.

10. The tenant did not address the allegation of renting the premises on Airbnb.
11. The tenant ceased paying rent from 11 December 2017. The landlord applied to the Tribunal, for orders with respect to a proposed abandonment of the tenancy. The application was considered as an expedited abandonment of tenancy under section 91AA. The Tribunal issued a decision on 8 January 2018, accepting that the premises had been abandoned by the tenant. Immediate possession of the premises was granted to the landlord that day.
12. Applications were filed with the Tribunal by both the landlord and tenant.

Procedural note

13. A hearing was originally scheduled for December 2017, but was adjourned at Mr Paterson's request in part on medical grounds. In an email from 18 December 2017 Mr Paterson also advised he was seeking legal representation.
14. A hearing to consider both applications was then scheduled for 18 January 2018. That hearing was adjourned at the request of the tenant on medical grounds. In the order approving the adjournment, the Tribunal noted that:

"The above hearing is unlikely to be adjourned on the basis of further medical issues for Mr Paterson. If Mr Paterson is unable to attend the [8 February 2018] hearing, he will need to appoint a representative."

15. The hearing was rescheduled to 8 February 2018. There was also no appearance by the tenant at the 8 February 2018 hearing, or any appearance by a representative. Again, prior to the hearing Mr Paterson contacted the Tribunal to advise he could not attend due to medical reasons. At the hearing on 8 February 2018, following discussions with the landlord's representative, it was agreed that a final adjournment should be granted in the interests of justice. In the subsequent order, the Tribunal confirmed:

"The Tribunal wishes to emphasise to Mr Paterson that no further adjournments will be granted in this case on medical grounds for the tenant. The next scheduled hearing will be proceeding. Again, if Mr Paterson is unable to attend the hearing, he will need to appoint a representative."

16. The hearing was rescheduled to 28 March 2018.
17. Again the tenant advised immediately prior to the 28 March 2018 hearing that he could not attend due to medical reasons. There was no appearance at the hearing by the tenant or a

representative. In the circumstances, particularly in light of the earlier indications to the tenant about the requirement to attend the hearing or appoint a representative, the hearing proceeded as scheduled.

Landlords claim

18. The landlord has brought claims on a number of grounds. I will address each claim in turn:

Rent arrears

19. The landlord claims rent arrears totalling \$7,242.85. A rent ledger has been presented for the tenancy commencing on 16 June 2017. The ledger sets out the rent payments made, and the rent due to 26 January 2018, when a new tenant took over the premises.
20. The tenant is liable for rent until the end of the fixed term tenancy. However, given the tenancy was abandoned, then the tenant will be liable for rent arrears until the premises were re-let, if that was a date prior to the expiry of the fixed term period (see RTA section 61(3)(b)).
21. I am satisfied that the rent arrears claim has been established, and is awarded in full.

Exemplary damages for abandonment

22. The landlord claims exemplary damages for abandonment of the tenancy. Section 61(5) of the Act confirms that a tenant commits an unlawful act if they abandon the tenancy without reasonable excuse, when the rent is in arrears. The maximum level of exemplary damages as set out in schedule 1A, for abandonment of premises, is \$1,000.00.
 23. Section 109 of the Act relates to exemplary damages, and confirms that exemplary damages can be awarded if the unlawful act was committed intentionally, and having regard to:
 - a. The intent of the person committing the unlawful act; and
 - b. The effect of the unlawful act; and
 - c. The interests of the landlord or tenant against whom the unlawful act was committed; and
 - d. The public interest.
 24. In this case, the tenant has not presented a reasonable excuse for having abandoned the tenancy. The tenant has produced no evidence to support that the premises were unsafe in any way.
 25. On the information available, I am satisfied that it is likely the tenant abandoned the premises intentionally, and probably due to being found out by the landlord as renting the premises on Airbnb.
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26. There is a strong interest for landlords in not having a tenancy abandoned. There was a significant effect for this landlord, in that they have incurred losses and expenses from the abandonment, such as from rent lost, or costs in finding a new tenant. There is a public interest in ensuring tenants do not abandon tenancies.
27. I find this is a case where exemplary damages should be awarded. I am not aware of any previous case where Mr Patterson has abandoned his tenancy, which argues against an award of exemplary damages on the higher end of the scale. However the circumstances of the abandonment (having been found commercially renting the premises) is an aggravating factor. I fix the level of exemplary damages at 50% of the maximum, being \$500.00.

Subletting without consent

28. The landlord's position is that the tenant has sublet the premises on Airbnb in breach of the tenancy agreement, and therefore the tenant should be ordered to pay an account of profits to the landlord, for the funds received by the tenant for the subletting.
29. The evidence is that an associate of the landlord made a booking of the premises via Airbnb, for 11-12 December 2018. The confirmation email referred the 'renters' to "Jeff" to co-ordinate exchange of keys, and provided a cell phone number which is the same cell phone number recorded on the tenancy agreement for the tenant.
30. The landlord has also produced printouts of information from the Airbnb website, which I accept is likely to relate to the rental of these premises on that platform.
31. Following the landlords 'agent' renting the premises, on 12 December 2017 the landlord put to the tenant that the landlord believed he was renting the premises on Airbnb, and that activity was to cease immediately. I have not been presented with any evidence from the tenant in which he has disputed this allegation. Rather, on 17 December 2017 the tenant purported to cancel the tenancy on the basis of safety concerns.
32. I accept the Airbnb records record that the premises had been rented on Airbnb between June 2017 and December 2017 (unfortunately the Airbnb records do not record the day of the month of the rentals). The landlord submits that the tenant would have received \$12,450.00 for the rentals, at a rental of \$249.00 per night.
33. Again, the tenancy agreement prohibits the subletting of the premises where it records:

"The tenant shall not assign or sublet the tenancy (including Airbnb and other temporary rentals platforms) without the landlords written consent."

34. Section 44 of the RTA relates to the assignment, subletting or parting with possession of the tenancy. Subsection 1 confirms that a tenancy agreement may include a prohibition on subletting or parting with possession of the tenancy during the terms of the tenancy. The above clause in the tenancy agreement would be entirely consistent with a prohibition on subletting provided for in section 44 of the RTA.

35. The Landlord has produced compelling evidence, which establishes to the Tribunal's satisfaction, that it is likely the tenant has rented these premises via Airbnb, on the occasions stated. In particular, the landlord has produced 'feedback' which appears to be from people who have rented these premises, from the tenant.
36. The Tribunal has considered a number of applications over recent years, relating to tenants renting their premises to a third party via Airbnb, and concluded that such actions would be subletting of the premises and unlawful. See for example *Lincoln Darling Real Estate Limited v Hoang* [2018] NZTT 4120222 and *Demos Ioannou v Celia Frith Drummond* [2018] NZTT 4117151 and 4118265.
37. The landlord seeks an order that all payments received for the tenant renting the premises on Airbnb, be paid to the landlord. The application is made on the basis of an application for account of profits. The doctrine of account, is associated with claims that allege the respondent has improperly profited from his position.
38. A claim for account of profits was considered by the New Zealand Court of Appeal in *Adlam v Savage* [2016] NZCA 454, which discussed the claim as follows:

[30].An account of profits requires "the defendant to pay to the plaintiff the net profits derived from the defendant's breach of duty".In other words, an account "is measured by what the defendant has gained". The purpose is "restitutionary not penal" so "the focus is on disgorgement of profits, properly analysed".

[31].Professor Peter Devonshire explains that causation has a "limited" role in the context of an account of profits bringing "to the fore equity's policy objective of deterring temptation and removing any economic benefit of exploiting a position of trust". Professor Devonshire says it must nonetheless "be demonstrated that there is some causal link between the gain and breach of duty". The fiduciary's duty to account is linked to profits attributable to the breach, not for "all profits" the fiduciary ever made from any source. The key question is whether the profit was made within the scope of the defendant's duty.

39. The landlord has claimed a total of \$13,750.00, Calculated on the basis that the premises has been sublet on at least 55 occasions (presumably including the 'agents' rental), at \$250 per night.
40. Overall, I am satisfied this is a case, where an account of profits should be ordered. I have no reservation in concluding that the tenant's actions in subletting at the premises on Airbnb was in a breach of the tenants duty to the landlord, to comply with the contract, the terms of the contract being set out in the tenancy agreement. Those terms could not have been clearer, that the tenant was not able to sublet to the premises on Airbnb. That is also a restriction that is entirely consistent with the Residential Tenancies Act, as discussed above.
41. However, the landlords claim, which is in effect for an order that the entire gross amount which would have been received by the tenant from the Airbnb subleasing, cannot be ordered. Any order made for an account of profits, must be the net amount, taking into consideration any expenses incurred. I refer for example, to Butler et al Equity and Trusts in New Zealand, which confirms at 28.4.1 that:

Once the court has decided that an account of profits is required, it must

(a) Determine how much of the defendant's gain is truly profit (that is, after allowing for costs and expenses);

(b) make an apportionment so as to arrive at the profits attributable to the wrongful conduct;

(c) Make an allowance for the defendant's time, trouble, and expertise.

As the gist of the plaintiff's claim is unjust enrichment, the claim for repayment is not allowed to extend further than the justice of the case demands. This can result in practical difficulties, the main one being apportionment.

42. Noting that the Airbnb records do not record the day of the month when the premises were first rented in June 2017, for the purpose of this decision, I will assume it was mid June 2017. The final Airbnb rental was to the landlords agent, on 11/12 December 2017. For the purpose of this decision, I will apply a period of an even 6 months over which the premises were sublet.
43. Noting that the rental for the premises is \$650.00, that would mean that the rent due for the premises over that 24 month period will be \$15,600.00. The landlord claims that the Airbnb rental was \$12,450.00. When calculating the amount which could be the subject for an account of profits, it is the net figure that must be used. That means costs from any gross profit must be deducted, which will include the 'cost' for the rental of the premises. After deducting rental over the 6 month period, then the potential profit would reduce to \$3,150.00. It can be accepted that in commercially renting the premises, as the tenant has done, then it is likely other costs would have been incurred, such as costs for linen and servicing of the apartment, as well as the tenant's administration of the premises. In the absence of more accurate costing's being presented, I will apply a nominal amount of \$1,000.00 for those costs. The remainder (\$2,150.00) I will accept as a net profit figure for which any claim could be based.
44. It is accepted that in exceptional circumstances, a claim for an account of profits, for breach of contract, could be awarded. Taking into consideration the commercial nature of the subletting which has occurred from the tenant, I find this is a case where an order that the tenant pay an account of profits, could be found to be an exceptional case to base such an order.
45. For the reasons as set out above, I find that the application for an account of profits must be upheld, and order disgorgement of profits to the amount of \$2,150.00.

Exemplary damages for subletting without consent

46. The landlord has claimed exemplary damages for the tenant subletting the tenancy.
 47. Section 44(2A) confirms that it is an unlawful act for a tenant to sublet a tenancy without consent of the landlord. The maximum that could be awarded for breach under section 44 (2A), is \$1,000.00 (as set in Schedule 1A to the RTA).
 48. Having considered the section 109 considerations, I am satisfied that exemplary damages should be awarded in this case. There could be no doubt that that action of subletting the premises on Airbnb would have been a deliberate action on the part of the tenant. There is an effect for the landlord, in that they are not able to control and oversee the premises which have
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been sublet, and also the landlord is no longer able to control who holds possession of the premises. There is a strong public interest, and interest for the landlord, in tenants not subletting premises without consent, as has occurred in this case.

49. I am not aware of any other instances where this tenant has sublet a tenancy without consent. I am also minded that the premises have been sublet over an extended period of time, on multiple occasions. Taking those factors into consideration, I fix the level of exemplary damages to apply at \$500.00.

Door replacement

50. The landlord has claimed compensation for replacement of an interior door, which had been damaged when the tenant installed a lock on the door.
51. There is no evidence on file supporting that the landlord had consented to the tenant installing the lock.
52. The file includes correspondence and a quotation from a tradesman, confirming that it would be more cost effective to replace the door, than remove and make good the door. The price quoted (including painting and labour) was \$600.00 including GST.
53. That claim seems reasonable and is awarded in full.

Exemplary damages for installation of lock

54. The evidence is that the tenant had an additional door lock installed, and that was without the consent of the landlord.
55. Section 46 of the RTA confirms at subsection 2 that:

Neither the landlord nor the tenant shall alter any existing lock or similar device, or add to or remove from the premises any lock or similar device, without the consent of the other given at the time that, or a reasonable time before, the alteration, removal, or addition is carried out.

56. Section 46(3) confirms that contravention of subsection 2 without reasonable excuse is deemed an unlawful act.
57. The tenant has not presented any explanation to excuse the installation of the lock. Again taking into consideration the factors set out in section 109 of the Act, I consider that exemplary damages should be awarded for the lock installation. The installation of a lock must have been an intentional action on the part of the tenant. While I am not persuaded that there has been a significant impact for the landlord beyond needing to remove and repair the door, there is a strong interest in landlords being able to enter premises as permitted within the Act as well as the Unit Titles Act 2010, especially at times of emergency. Installing locks where the landlord does not hold a key, defeats that ability, and is contrary to the interest of the landlord, and also the public (particularly from a safety point of view).

58. Considering the circumstances of this case, and presuming the lock installation was related to the commercial operation of the tenant renting the premises on Airbnb, then I conclude exemplary damages should be awarded. The maximum level of exemplary damages that can be awarded for a breach of section 46 is \$1,000.00. I fix the level of exemplary damages at \$500.00

Compensation for loss of dignity and injury to feelings

59. The landlord has claimed \$10,000.00 compensation for loss of dignity and injury to feelings, in relation to the actions of the tenant particularly as it relates to renting the premises on Airbnb. This claim is dismissed for the following reasons:
- a. There is no ability in the RTA for the Tribunal to award compensation of this nature. The landlord has referred to section 77(2)(n) of the RTA as providing a basis for a claim. That provision allows for compensation to be awarded for a breach of any implied or express provision of the RTA or tenancy agreement. There is no provision in the Act or RTA relating to dignity or feelings on the part of the landlord.
 - b. Even if that were not the case, I have not received evidence from the owners of the premises supporting any such effect.
 - c. The landlord submits in support of this claim that the tenant took advantage of the landlords, as they were in a vulnerable situation being overseas. As discussed below, there is an obligation in the Act for the landlord to appoint an agent when overseas for an extended period. If the landlords failed to appoint an agent sufficiently capable to manage the premises while they were overseas, then that is a situation of the landlords making.
60. This claim is dismissed.

Tenants claim

61. The tenant has also filed a claim against the landlords on a number of grounds. The usual situation when an applicant does not attend the hearing to pursue their claim, is that the claim will be dismissed, unless the Tribunal was satisfied that it had sufficient information to determine the claim.
62. Notwithstanding the fact of the tenant not pursuing the claim, I have concluded that based on the available information, the claims have not been established, for the following reasons:

Failure to lodge the bond

63. The tenant states there was failure on the part of the landlord to lodge the bond with the bond centre within the required 23 working days. The position expressed by the landlord, is that the
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agreement was for the tenant to pay the bond to the bond centre directly, but that he did not make that payment. The landlord states that no bond payment was received by the landlord.

64. The file does include a letter from the 'Bond Centre' dating 15 December 2017, stating that a check had been received for a bond at the premises, on 6 December 2017, but had been dishonoured, and that the Centre had "contacted Jeff Paterson seeking a replacement payment". A copy of the cheque was also provided, which was a cheque from "Jeff Paterson".
65. In the absence of evidence to show that the bond payment was in fact made to the landlord, then no breach of the landlords obligations with respect to bond has been established.

Compensation earthquake damage

66. The tenant claims that the premises were damaged in the earthquake, and should not have been let to him in the first instance. The tenant states there was a gap in an external window, and considers that the building was otherwise unsafe.
67. The tenant claims compensation of \$50,000.00.
68. I have had considerable difficulty reconciling this claim with the actions of the tenant himself. In particular, if the tenant did not consider the premises were suitable to let (unsafe), he has not explained why he proceeded to let the premises himself, some 54 times.
69. I am not persuaded that the tenant has presented sufficient evidence to show that the premises were unsafe, or affected by earthquake damage to the extent compensation would be required. In fact, the landlord has supplied the EQC statement of claim for the building complex. The only damage identified to this unit (11D) was a cracked granite bench top.
70. The landlord has also provided email communications from the Wellington City Council, which confirms that the Council had no concerns with respect to any safety issues in these premises.
71. I am also satisfied, based on documentation on file, that the landlord had made efforts to address the window gap and bench top, but that the tenant appears to have delayed that work being undertaken. In that case, it would not be reasonable to compensate the tenant for any loss.
72. This claim has not been established and is dismissed.

Failure to appoint an agent

73. The tenant claims exemplary damages on the basis that there was a failure of the landlord to appoint an agent when out of New Zealand.
74. The evidence is that the landlords (owners) live in the United States of America. That is the address recorded on the tenancy agreement.
75. Section 16A of the RTA requires that a landlord appoint an agent if outside of New Zealand for more than 21 consecutive days.

76. In response the landlord states that an agent was appointed, that was Ms Dobb's. The tenant has responded in an email from 8 February 2018, that that appointment was for emergency purposes only.
77. This application is finely balanced, however I am satisfied that the appointment of Ms Dobbs, even if as an emergency contact, would meet the requirement for an appointment of an agent.
78. This claim is dismissed.

Legal costs

79. The landlord claims legal costs.
80. I direct that written submissions be filed with respect to the costs claim on the following basis:
 - a. An account and submissions for legal costs to be provided by the landlord, by 9 May 2018.
 - b. Any submission on costs from the tenant to be provided in reply by 24 May 2018.
81. I will issue a costs decision then in due course.