Application Number: 4129914
Cross Application Number: 4130415

Order of the Tenancy Tribunal

Residential Tenancies Act 1986 *Office of the Tenancy Tribunal*

Tenancy Tribunal at Rotorua

Tenancy Address

22 Umuroa Street, Mamaku 3020

Applicant

Full Name	
Faye Myrtle Jensen	Landlord
Donald James Jensen	Landlord

Respondents

Full Name	
Rachael Irwin	Tenant
Tony Brake	Tenant

Order of the Tribunal

The Tribunal hereby orders:

1. The tenants are to return to the landlord immediately the following items: all keys provided; the lawnmower, the chainsaw, and the buggy and trailer.
2. If the tenants have the security system in their possession, then they must also return it to the landlord immediately. If so, then the amount the landlords are required to be paid will not include the payment of $489 from the tenants, and the landlords will be required to pay the tenants $2,361.00 (not $1,872.00 as ordered below).
3. Faye Jensen and Donald Jensen to pay Rachael Irwin and Tony Brake the sum of $1,872.00 immediately calculated as follows:

Heat pump cost	$2,331.00
Fencing cost	$750.00
minus amounts Tenants to pay Landlord:	
Rent owed to 23.3.18	$720.00

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Security system	$489.00
Amount payable by Landlord to Tenant	$1,872.00

4. The landlord's applications for termination of the tenancy and return of the steel gate are withdrawn at their request.

5. The tenant's application for exemplary damages for unlawful entry is dismissed.

(Sections 77(2)(l), 77(2)(n), 77(2)(o), 77(2)(q), 78(1)(c), 78(1)(d), and 78(1)(i) Residential Tenancies Act 1986)

Reasons:

Background

1. The tenants Mr Brake and Ms Irwin rented the 3-bedroom rural property from Mr and Mrs Jensen from 7 December 2016 under a verbal agreement.
2. During the tenancy the tenants carried out some work to the property with a view to eventually buying it from the Jensens. However the relationship between the parties deteriorated and this never happened.
3. On Friday 23 March 2018 the tenants gave notice to Mrs Jensen by Facebook messenger that they were ending the tenancy in 3 weeks (by 11 April 2018). Earlier in the week of 23 March, they shifted most of their possessions from the property.
4. On 23 March 2018 both parties applied to the tribunal for orders.
5. The Jensens sought orders for: rent owing and termination of the tenancy.
6. Mr Blake and Ms Irwin sought orders for damages for a heat pump they installed and fences they erected at the property, and unlawful entry and being 'locked out'.
7. At the hearing the Jensens asked to include a claim for compensation for goods removed from their property: a security system, a buggy and trailer, a lawn mower, and a steel gate. They say they had applied to Tenancy Services with this additional claim but it had not reached the file before papers were served and came to the Tribunal. Regardless, I amended the claim with the tenants' consent, and it was appropriately heard along with all other matters.

Issues

8. Subsequent to making their applications both parties agree that the tenancy has ended. The tenants have left and gave a 21 day notice to end the tenancy that expired on 11 April 2018. The Jensens have taken back possession of the premises so a termination order is no longer needed and that application is therefore withdrawn. The keys have not yet been returned so the tenants must do so immediately. Mr Brake confirms that he would do so after the hearing by placing them in the Jensen's letter box.
9. The Jensen's claim for compensation for the 4 items missing is dealt with by the tenants agreeing to immediately returning the lawn mower, and buggy and trailer. Mr Brake says he

has since discovered that he is also in possession of a chainsaw of Mr Jensen's which he will also return. The claim in relation to the steel gate is challenged and Mr Jensen concedes he is not worried about it, so that item of claim is withdrawn.

10. Mr Brake says he was unaware that the security system had been removed as he had others helping them shift. If he finds the security system he will also return it but if not he acknowledges responsibility for its cost of $489.00. So I order that he either returns it or is liable to pay the Jensens the sum of $489.00.
11. The Jensens raised a further matter during the hearing relating to a shed the tenants owned that was left at the property. I accept that it has been given to the neighbour and that only a small part of the shed is sitting on the shared driveway part of the Jensen's land. The neighbour is the now the owner of the shed and I understand will ensure it is fully shifted on to their land. As this was not formally part of the application I make no order in respect of it, but note for the sake of resolution of this dispute, that it should be shifted off any part of the Jensen's land.
12. The remaining issues for the tribunal to determine are:
    a. What rent is owed?
    b. Are the tenants entitled to compensation for the heat pump and fencing work?
    c. Have the Jensens unlawfully entered the premises?

What rent is owed?

13. The Jensens claim 8 weeks rent of $1,920.00. There is an error on their rent summary where they have claimed an additional fortnight's rent from the expiry date of the tenant's termination notice of 11 April. So I am satisfied that only 6 weeks rent of $1,440.00 could be owed to the end date of 11 April.
14. But the end date is in doubt. Mrs Jensen surmises that as the keys have not been returned, the tenancy has not ended. In some cases the return of the keys will form part of a determination of when the tenancy ends. In this case, the Jensens took back possession using their own keys so there is no doubt that the tenancy ended at the latest on 11 April.
15. However the tenants claim that they were locked out by the Jensens on 23 March 2018 even though the tenancy was not due to end until 3 weeks later on11 April. When Ms Irwin went to the property on 23 March to attend to some matters she found Mr Jensen inside. When both Ms Irwin and Ms Brake returned a couple of days later they say they could not get in and believe that the locks were changed. The question then is if the tenancy ended on 23 March.
16. The Jensens say they went to the premises on 23 March, had new keys cut, went inside to let off flea bombs, and activated the deadlock on the front door. They say that entry was still possible through the back door with a key. They say that they thought the tenants had abandoned the premises.
17. An abandonment occurs when the tenant wrongfully leaves the premises without notifying the landlord, not intending to return or to meet their obligations. Even if that were the case, which it is not, a landlord must first obtain an order from the tribunal to obtain termination and possession of the premises (section 61 RTA).

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18. I accept that the Jensens did not have the locks changed but had a locksmith out to cut keys for them which they then used to enter the premises. Although by deadbolting the front door as they did, it was a reasonable inference to make by the tenants that the locks had been changed when they were subsequently unable to gain access through the front door with their key. Their actions amounted to a 'lock out'.
19. In addition by letting off the flea bomb inside, the Jensens deprived the tenants of their right to use the premises so they effectively took possession of the premises from 23 March. This is supported by them returning to the property to attend to matters such as removing planks of wood and removing the conservatory fireplace that they had installed during the tenancy. They are not then not entitled to any rent beyond 23 March 2018.
20. I therefore order the tenants to pay 3 weeks rent of $720.00.

Are the tenants entitled to compensation for the heat pump and fencing work?

Heat pump

21. The tenants installed a heat pump during the tenancy with the Jensen's approval, although Mr Jensen says there was no need for it because there was an operable electric wall heater in the living area.
22. Every living room must be fitted with a fireplace and chimney or other approved form of heating (regulation 6 Housing Improvement Regulations 1947 and s45(1)(c) RTA). An electric wall heater is an approved form of heating.
23. No independent evidence was provided by the tenants to establish that the existing wall heater was deficient. I find it more likely that it is operable based on the Jensen's recent use of it, although it may not have been to the tenants' desired standard. So I do not find the landlord in breach of any obligation.
24. The heat pump is a fixture. Any fixture erected by the tenant but not removed at the end of the tenancy becomes the property of the landlord (section 42(4) Residential Tenancies Act 1986). However, the context of its installation is relevant. It was installed as part of improvements being made by the tenants with a view to eventually buying the property, although that understanding never came to fruition. Notably Mr Jensen also accepted responsibility for compensating the tenants for it (see Facebook messenger 14 March 2018). At the hearing Mr Jensen confirmed this. The tenants have acted to their detriment in reliance on being compensated for the heat pump and did not remove it at the end of the tenancy.
25. So I find that the Jensens have waived their strict legal right that the heat pump becomes their property (ss11(2) and 42(4) RTA), and must compensate the tenants for the heat pump. I have taken in to account depreciation of approximately one year's use of an estimated useful life for the heat pump of 10 years so have deducted 10% from the full cost of $2,590.00. I award the sum of $2,331.00. This finding is also in accordance with the substantial merits and justice of the case (s85 RTA).

Fencing work

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26. Similarly the fence is a fixture which if not removed at the end of the tenancy becomes the landlord's property. However the Jensens have also waived their right to keep the fencing without paying for it. Mr Jensen also agreed to pay fair compensation for the fencing and the tenants acted in reliance on that.

27. The tenants claim the fencing costs of $1,755.00 by way of invoice from Bradley Stevens.

28. The Jensens say this amount is unreasonable because the cost of any wire was to be free; there was second-hand wire there that could have been used; most posts were already supplied, and the overall cost is too high for what work was done. They also cast doubt on the reliability of the invoice because the contractor was a friend of Mr Brake's. Further they contend that the fencing around the drains was not necessary for health and safety purposes.

29. The Tribunal is required to determine if the amount claimed is reasonable. The onus is on the tenants as the applicants to prove their claim on the balance of probabilities, that is, more likely than not. In the absence of any photographs showing the fencing work carried out it is inherently difficult to assess the reasonableness of the amount claimed. Equally the invoice does not detail the costs for any materials supplied or provide an hourly rate. While the rate is expressed per metres of fence built there is scant evidence to support the length of fence built.

30. For all the above reasons I am not persuaded that the amount claimed is reasonable, and consider it reasonable to award compensation of $750.00 for the fencing work.

Have the Jensens unlawfully entered the premises?

31. The facts as to what occurred on 23 March are set out in paragraphs 16 to 19 above.

32. A landlord may not enter the premises during the tenancy except with the tenant's consent, in an emergency, or after giving the required notice for inspections and repairs and maintenance (ss 48(1) and (2) RTA). Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $1,000.00 (s 48 (4)(a) and Schedule 1A RTA). Equally a landlord may not take possession of the premises until the tenancy has ended or an order for possession of the premises is made by the Tribunal.

33. The tenancy had not ended when the Jensens entered the premises on 23 March and let off the flea bomb so they have entered unlawfully. No prior notice was given as required. So the Jensens have committed an unlawful act. My finding that the tenancy ended on 23 March does not negate this unlawful action.

34. Should exemplary damages be awarded? Where a party has committed an unlawful act intentionally, the Tribunal may award exemplary damages where it would be just to do so, having regard to: the party's intent; the effect of the unlawful act; the interests of the other party; and the public interest (s 109(3) RTA).

35. The Jensen's mistaken view of the law and their rights of entry does not mean that their actions were unintentional. However I do not consider it just to award exemplary damages against the Jensens because they genuinely believed that the tenants had left the premises. All possessions had been removed from the interior. It was only that same day that they received notice from the tenants that they were ending the tenancy. Their actions were pre-emptive and naïve, rather than malicious. The tenants never chose to return to the

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premises to live so there was there was little real impact on them, particularly given my finding above that the tenants rent liability ceased that day. I find no public interest is served in making an award of damages.

36. So no award of damages is made.

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