Tenancy Tribunal at Tauranga

Applicant: Adam Reis and Liat Reis

Tenants

Respondent: Michael Robert Rayner

Landlord

Tenancy Address: 19 Rewarewa Place, Matua, Tauranga 3110

ORDER

1. By declaration Michael Rayner is the landlord and Adam Reis and Liat Reis are the tenants.

2. By declaration Michael Rayner is responsible for all unpaid asbestos testing costs relating to this tenancy.

3. Michael Rayner is to pay Adam Reis and Liat Reis the sum of **$10,084.31** immediately being:

Compensation for:

a) Breach of obligation to provide property in reasonable state of cleanliness $355.00

b) Breach of quiet enjoyment, comfort and privacy $1,775.00

c) Electricity use $30.00

d)	Loss of use of garage	$614.42
e)	Reimbursement of asbestos testing fee	$816.75
f)	Damaged possessions/purchases (contribution)	$1,500.00

Exemplary damages for:

g)	Breach of building, health and safety regulations (s 45(1)(c) (Health and Safety at Work (Asbestos)Regulations 2016 sections 10(1): duty to ensure asbestos is identified at workplace; section 20 (2): duty to determine presence of asbestos when carrying out refurbishments.	$2000.00
g)	Breach of building, health and safety regulations (s 45(1)(c) (Health and Safety at Work Act 2015 i.e. sections 36(2): primary duty of care of the health and safety of tenants, section 36(3): ensure that the work environment is without risks to health and safety.	$2000.00
h)	Breach of building, health and safety regulations (s 45(1)(c) (Electricity Act 1992)	$250.00
i)	Failure to provide insulation Statement (s 13)	$250.00
j)	Disposing of tenant's goods	$500.00
k)	Tenancy tribunal filing fee	$20.44

	$10,111.61
Less water rates	$27.30
	$10,084.31

4. The Bond Centre is to pay the bond of $2,840.00 (5055930-014) to Adam Reis and Liat Reis immediately.

5. All other claims by either party are dismissed.

Sections 11(1), 11(2), 13A, 33(1) (b), 38, 40, 45, 77,78,85,109, Schedule 1A Residential Tenancies Act 1986 ("the Act").

Reasons

1. This tenancy commenced on 19 April 2018 and ended 19 October 2018.

2. Both parties have now filed claims.

3. A hearing was held 9 November 2018.

Background

4. With respect to background factors, I make the following findings:

- although the tenancy was managed by Mr Rayner, it was initially arranged by a rental agent, Beehome Realty Limited;

- Mr Rayner has indicated that he is a trustee of a family trust. That of course does not relieve him of personal liability as the landlord, whether a trustee or not. He did not contract in the tenancy agreement to limit his liability to the assets of a trust, nor can he do that anyway, as it is a breach of the Act to attempt to do so (s11);

- although Mr and Mrs Reis submitted that they, together with Mr Reis's parents (Mrs Malec and Mr Buczynski), applied for the tenancy jointly, the written tenancy agreement was completed in the names of Mr and Mrs Reis only. They were the only tenants that signed that agreement;

- I did request Mr Rayner to forward to the tribunal a copy of the original tenancy application made by the tenants, but that was not received;

- however, even if I had received that tenancy application and it was shown to be in the name of both Mr and Mrs Reis and Mr Reis's parents, it is clear from the ultimate written tenancy agreement signed, that only Mr and Mrs Reis formally accepted the offer to rent the property;

- accordingly, I find that only Mr and Mrs Reis were the tenants ("the tenants");

- when the tenancy began, Mr and Mrs Reis, together with Mr Reis' parents who had only just arrived in New Zealand from the Netherlands, all moved into the property;

- there was a large garage on the property in which the tenants also stored the parents' belongings from the Netherlands;

- when they moved in, the tenants were unhappy with the cleanliness of the property and notified Mr Rayner of this;

- soon after moving into the property, the tenants realised that the home was not big enough to contain all the parents' possessions;

- to resolve matters, Mr and Mrs Reis in May 2018, shifted into a neighbouring property. They accordingly notified Mr Rayner by email, that they would be living in the neighbouring property but would still be responsible for the tenancy as the tenants, including rent payments. The landlord concurred with that, thus waiving any allegation that the tenants were in breach by sub-letting (section 11(2) is applicable);

- in the same May 2018 email chain (being only a month after the tenancy had begun), Mr Rayner mentioned that he wanted to undertake some renovations namely, having the garage door replaced as well as other possible renovations. Mr Rayner informed the tenants that there would be

builders coming to take measurements to prepare quotes (see email 15 May 2018);

- shortly thereafter the builders duly arrived and took measurements;

- the tenants were surprised that Mr Rayner had not taken the opportunity to do the proposed renovations prior to their renting the property and they began to be concerned that the proposed renovations would be disruptive to Mr Reis's parents living arrangements;

- on or about 27 August 2018, without being consulted earlier, the tenants received an email informing them that work was to commence in the garage 3 days later 30 August 2018;

- this was concerning as the garage was fully stored with possessions belonging to both the tenants and Mr Reis's parents;

- when the tenants contacted Mr Rayner by telephone to express their concern, Mr Rayner became agitated and claimed that the tenants had been notified that the building work would start at the end of August 2018;

- the tenants explained to Mr Rayner that they had a considerable number of personal belongings stored in the garage and Mr Rayner requested that these possessions be moved away from the garage doors, so that the builders had space when replacing the garage doors;

- Mr Rayner then informed the tenants that ceiling panels and wall linings were also to be replaced in the garage, as well as a hatch door installed (I believe in the house), as well as some new electric sockets to be installed;

- the frustration that the tenants and the parents were feeling about not being properly informed about the renovations and when they would occur, was fully described in an email dated 31 August 2018 sent by Mr Reis to Mr Rayner;

- it was eventually agreed that the renovations would be postponed by one day and would commence on 31 August 2018;

- the tenants and the parents, then proceeded to spend hours moving their belongings away from the garage doors as instructed;

- when the builder arrived on 31 August 2018, he was immediately hostile when he saw the personal possessions stored in the garage and enquired why they were there. The tenants informed the builder that they had been told to move the possessions away from the garage doors, which they had done;

- at this point, the builder confirmed that as well as replacing the garage doors, they would also be removing wall and the ceiling linings and that they could not do this work with possessions in the garage;

- communications with Mr Rayner then followed wherein Mr Rayner expressed his frustration and requested that all the possessions be removed away from the walls;

- when the tenants suggested that the builders could help with the moving, Mr Rayner stated that he did not want to pay them $50 an hour for moving the tenants' belongings;

- the tenants then made their best effort to move possessions away from the walls;

- while carrying out the work on the first day, the builders tripped the house alarm causing it to go off for about 15 minutes. Unfortunately, the tenants did not have the code to the alarm and had to communicate with Mr Rayner to obtain it;

- by this time the tenants and the parents were distressed and frustrated;

- despite the thin plastic coverings that the builders had put over the possessions, a lot of the tenants' belongings were covered in dust from the renovation, as the falling pieces of ceiling had disturbed and moved the plastic coverings;

- a subcontracting electrician attended and spent several hours vacuuming around the garage spreading dust even further over belongings as he worked;

- after being concerned about their belongings, the tenants then moved some of the possessions into the house and others in boxes were left in the center of the garage;

- at one-point, Mr Reis's father, who was a retired builder, picked up a piece of the removed ceiling panel and commented that he thought it could be asbestos. He then expressed his concern regarding the possibility of asbestos to Mr Rayner, which Mr Rayner dismissed;

- Mr Reis's father also discussed his asbestos concerns with the builder personally, who indicated that *"he had trained for asbestos"* and that *"this was definitely not it"* and that *"it looked different*";

- over the next 3 weeks the builders kept returning to the house to do more work. The tenants only received occasional notices by text or email from either Mr Rayner or the builders;

- effectively the tenants' normal living arrangements were severely disrupted for up to 3 weeks and required them to cancel several meetings and appointments to accommodate the builders;

- when the tenants requested compensation, Mr Rayner offered $20 per week off the rent while the builders were in attendance, or as an alternative, offered a $50 per week rent discount if the tenants would clear out the entire garage and keep it empty for the duration of the renovation;

- Mr Rayner did not offer to pay to store the tenant's possession elsewhere and the compensation offer was rejected by the tenants;

- Mr Rayner's attitude during the renovation is best summed up with a quote from an email he forwarded to the tenants dated 13 September 2018 being:

> *"I have also spoken with Tenancy Services just now and, have established with them that the work in the garage definitely does not count as being substantial as it does not impinge on any of the living areas of the house and all of the items previously stored there are still able to be stored there. After my discussion with them I am prepared to offer a discount of $20 per week for the remainder of the building work until the builders and the subcontractors have completed their work. This is because, the garage is still able to be used for the purpose for which it was intended but recognises the inconvenience".*

- in the same email dated 13 September 2018, Mr Rayner informed the tenants that:

> *"On a different subject, I have just been awarded a scholarship for 2019 at the University of Auckland to study for the Master of Education. Because of this, my partner and I have decided to move our family back to Tauranga and live in the property. This means that it is necessary to terminate your tenancy."*

- therefore, after only 5 months in the property, and after weeks of an unreasonable disruption, the tenants were required to look for a different place for their parents to live;

- after the notice of termination had been given and on 21 September 2018, Mr Rayner attended at the property without giving prior notice and carried out electrical work which caused power outages and loss of work not saved on the tenant's computer;

- the full scope and timeline of the renovation was not properly made clear to the tenants;

- I also accept that had the full nature of the work been made known to the tenants earlier, the tenants would have had reasonable cause to object to the work being undertake;

- the work was a capital improvement; it was not maintenance that needed immediate attention (if it was then Mr Rayner was in breach for not providing a property in a reasonable state of repair) and the renovation should have been completed prior to the tenants taking possession;

- on 24 September 2018, in complete frustration, the tenants sent Mr Rayner an email expressing their discontent and voicing all their concerns on behalf of themselves and the parents once again. They concluded the email by indicating that they did not want any further work undertaken at the property;

- Mr Rayner responded by dismissing their concerns and threatening monetary damages and tribunal action;

- the tenants then gave notice that they were discontinuing the tenancy at the end of the fixed term, being 19 October 2018;

Testing for asbestos

- on 27 September 2018, the tenants had a sample of the garage ceiling tested for asbestos which was found to be positive;

- after contacting Work Safe, the tenants were advised to have another test carried out to test whether asbestos fibres had come loose and spread;

- a testing team duly attended at the property on 2 October 2018. The team took five swabs, two from around the garage, one from Mr Reis's father's clothes, one from the carpet in the living room, and one from Mr Reis's father's tools;

- on 5 October 2018, the test results for the swabs came back indicating four positive matches for white asbestos;

- this news was obviously a shock for the tenants and the parents who submitted that they had trusted the builders and Mr Rayner's assurances that the material involved was not asbestos;

- understandably the tenants are now concerned that they may get affected by some illness at some point in the future, as they believe they have been exposed to asbestos during the period of the renovation and a month thereafter that they kept walking around and in the garage;

- further, because the builders and Mr Rayner had also walked into the house to use the toilet, the tenants are concerned that dust containing asbestos fibres was spread around the whole living area of the house;

- after receiving the positive asbestos test, the tenants contacted a lawyer on 8 October 2018;

- on 9 October 2018, the tenants informed Work Safe of the test results, having informed Mr Rayner before Work Safe were informed;

- after Mr Rayner had been informed of the positive test, Mr Rayner arranged on 9 October 2018 for an asbestos removal specialist to attend at the property'

- the removal expert reiterated that nobody should be living at the property. He also recommended that the occupants throw away their vacuum cleaner on account of it having been used for cleaning the carpets in the house which could possibly be contaminated with asbestos;

- the expert also recommended that all soft items like clothing, fabric, cardboard etc. should not be cleaned and should be disposed of as a safety measure;

- on 10 October 2018 Mr Rayner emailed the tenants suggesting that they remain on site during the asbestos clean-up process to take their clean belongings away from the garage one by one and suggesting that their home contents insurance might cover the expenses of items that would have to be thrown out;

- on 10 October 2018, a prohibition notice and improvement notice was also issued by Work Safe confirming that health and safety regulations had likely been breached, that exposed occupants and workers to the risk of inhalation of asbestos fibres. This further demonstrated the house was not fit to occupy;

- the parents then vacated the property and moved into their new address on 11 October 2018. Because their possessions were still in the property, they purchased an inflatable mattress to sleep on;

- the tenancy ended on 19 October 2018;

Final asbestos samples taken

- on 11 October 2018, the asbestos clean-up occurred;

- final samples were taken by Asbestos Consultants NZ Limited and these came back all negative;

- on 17 October 2018, the movers arrived and took the tenant's parents belongings to their new home;

- to the date of hearing Mr Rayner had not refunded the tenants the testing expenses they had paid for or the balance of testing invoices (Mr Rayner suggested insurance may be attending to these).

Tenant's claims

1. With respect to the tenant's claims, I determine as follows:

a) **Asbestos Testing fees**. It was appropriate that the tenants had the renovation works tested for the presence of asbestos. This involved an initial test for the existence of asbestos, a further five sample tests and a final test following cleaning. In addition, it was appropriate that the tenant's purchase asbestos breathing masks for their protection. Accordingly, the total cost incurred of $816.75 is awarded. Further, for the sake of certainty, a declaration is made that Mr Rayner who was responsible for the asbestos clear up, is also liable for any other outstanding testing fess relating to or arising as a consequence of the tenancy.

b) **Contribution to cost of electricity**. Vacuuming by asbestos cleaners and Mr Rayner and use of electricity used by builders etc. The minimum claimed amount of $30.00 is awarded.

c) **Loss of normal use of garage for at least 5 weeks.** Since 31 August 2018 when the renovations began, the tenants were essentially deprived of normal use without intervention of the large 30m2 double garage, the use of which was being paid for in their rent of $710.00 per week. It was no answer for Mr Rayner to submit that the storage of goods in the garage continued. In fact, what should have been secure and safe storage, became the opposite. The tenant's claim assessed according to square footage (a 208m2 house) being $614.42 is awarded.

d) Loss of quiet enjoyment in the use of the property since 31 August 2018 (including interference with reasonable peace, comfort and privacy). The tenant's incurred:

- disruptions caused by the landlord arranging to have the work undertaken.
- the necessity to postpone plans and cancel appointments to be present for the builders, including when they never showed up.
- renovation taken longer than expected.
- disruption with power supply and alarm going off.
- fear of property being damaged and to health and wellbeing due to asbestos discovery.
- being obliged to remove possessions from garage into living areas.

- time spent having to clean up after builders.
- noise caused by renovation.

As indicated previously, I was also not satisfied the renovation arose because of Mr Rayner's obligation to maintain the tenancy during the tenancy. The tenants had not asked for any work to be done to the property. No evidence was submitted to the tribunal that indicated the work was required to be done as standard maintenance rather than a capital improvement. No evidence was presented that indicated the work as an immediate necessity or that Mr Rayner had only just become aware of the required work after the tenancy began. In evidence Mr Rayner submitted he knew it was work that had to be done so he was aware of it before the tenants moved in. I find Mr Rayner simply choose to his advantage to keep a rental income flowing while contemporaneously having the renovation done while the property was still occupied. Therefore, it was Mr Rayner's paying tenants who incurred the stress and inconvenience of the renovation, as no appropriate rent relief was offered by him. I am satisfied Mr Rayner choose to do that primarily for his own convenience in the future and in all likelihood to ensure the cost of the work attracted tax advantages that would be lost if the work had been undertaken after he moved in. Mr Rayner (and his family) did move in when the tenancy ended, having been notified of his success in achieving a scholarship. It is likely that Mr Rayner's application for the scholarship would have proceeded his notification of success by sometime, so Mr Rayner would have been aware there was a likelihood he may well require the property for his own purposes. In addition, it was notable that the builders indicated to the tenant that they would not have wanted to undertake the renovation, had they been aware that the garage was full of stored possessions. Nevertheless, irrespective of background circumstances it is apparent from the facts that the renovation turned into a nightmare scenario for the tenants and the parents, whose entitlement to quiet enjoyment of the tenanted property and to not having their peace, comfort or privacy interfered with (S38), was severely disrupted from 31 August 2018 to 19 October 2013.

Given this breach by Mr Rayner, the tenants are entitled to an award of compensation (s 77(2) (n)). This is effectively a statutory entitlement to general compensation that is within the tribunal's jurisdiction to award (*see Mills & Murray v Auckland Property Management Solutions Ltd t/a Ray white, Application No: 4085842,*

14/08/17, para's 81 to 107). It could also be regarded as an award for general damages for stress and inconvenience pursuant to the common law. The tenant's sought $1,775.00 which is granted.

e) **Damaged possessions**. I have jurisdiction to order that Mr Raynor is liable for damage to the tenant's possessions only not the parents (also not their expenses). In addition, establishing the value of predominantly second had items is speculative. I have ordered a contribution only.

f) **Lost income**. The tribunal does not have jurisdiction to award lost income.

g) **Exemplary damages**. The landlord was obliged to comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises (s45(1) (c)). Failure to comply is an unlawful act (45(1) (1A)) that can attract an award of exemplary damages of up to $3.000.00.

I accept the tenant's submission that the landlord is in business and must ensure the health and safety of tenants and ensure that work environments are without health and safety risks. The landlord cannot simply *"put their head in the sand"* and pass that risk over to work persons who attend at the work site to undertake the work. The work site should be under the control of the landlord.

I find that the landlord did not comply with the Health and Safety at Work (Asbestos) Regulations 2016, sections 10(1): duty to ensure asbestos is identified at workplace; 12(1): duty to ensure presence and location of asbestos indicated, section 20 (2): duty to determine presence of asbestos when carrying out refurbishments. The landlord also failed to comply with the Health and Safety at Work Act 2015 i.e. sections 36(2): primary duty of care of the health and safety of tenants, section 36(3): ensure that the work environment is without risks to health and safety.

With respect to electrical work carried out at the property by the landlord that resulted in at least two power outages, I accept the landlord should not have undertaken such work as he is not a licenced electrician. To do so is a breach of the Electricity Act 1992.

Accordingly, awards of exemplary damages are made.

h) **Cleanliness**. When the tenancy began Mr Rayner was required to provide the premises in a reasonable state of cleanliness (s 45(1)(a). Such a breach can attract an award of exemplary damages of up to $1,000.00 (Schedule 1A). I accept the tenant's statements that: *"We've had to spend hours scrubbing the oven and fridge of dirt and grease, as well as the bathroom cabinets and drawers which were filthy and contained hairs and other grime from the previous tenants. No tenant should be reasonably expected to have to clean up to this extent when they enter a property".*

Accordingly, an award of exemplary damages is made.

i) **Insulation Statement.** The landlord is obliged to provide an insulation statement made by and signed by Mr Rayner in the written tenancy agreement. Such a statement was not provided, nor does it appear Mr Rayner signed the written tenancy agreement. Not to provide the installation statement is an unlawful act that can attract an exemplary damages award of up to $500.00 (s 13 (1A), (1F), Schedule 1A)**.** The landlord was an experienced landlord e.g. he had tenants prior to these tenants. Not knowing of this obligation does not relieve Mr Rayner from not doing so. The requirement for an installation statement is in the interest of all tenants. Therefore, an award of exemplary damages is made.

j) **Disposing of tenant's goods.** A landlord is not entitled to seize and dispose of a tenant's goods for any reason (s 33(1)(b)). To do so is an unlawful act and can attract an award of up to $2,000.00. I accept that agents of Mr Rayner, namely the asbestos cleaners removed various possessions belonging to the tenants without the tenants being given the opportunity to examine those items prior to disposal or given notice in advance that they were being thrown away. I have mitigated the award of exemplary damages to some extent because I accept the tenants were aware that disposal of some items was likely. Therefore, an award of exemplary damages is made.

k) **Moving expenses.** As it was a fixed term tenancy, the tenants would have or could have incurred moving expenses anyway, even if this tenancy had proceeded without the renovation disruption. Accordingly, no order is made with respect to removal expenses.

l) **Future expenses.** Although the tenant's concerns about a future health risk and consequential expenses is understandable, the tribunal does not have jurisdiction to make what would essentially be a speculative order about the future.

Landlord claims

5. Following the end of the tenancy, the landlord Mr Rayner filed a claim for:

a) Rent arrears of $1,521.00;
b) Water rates $27.30;
c) Carpet cleaning $180.00;
d) Lawn mowing $70.00; and
e) Garden and yard cleaning $100.00.

6. The rent arrears were for the last 2 weeks of the tenancy being 5 October 2018 to 19 October 2019 (during the last week of this period the property was not occupied).

7. I accept the tenant's submission that given the attending asbestos expert's comment that the property should not be lived in and WorkSafe's similar comments, nobody could be expected to live in the property during that period due to the asbestos risk. Its implied that a rented property is fit for occupation. Accordingly, no order is made with respect to rent arrears.

8. The water rates of $27.30 were not disputed.

9. It was not established that the tenants stained the carpet. There were pre-existing stains and in view of the asbestos scare/fiasco for which Mr Rayner was responsible, it is appropriate that he bear the risk of cleaning what may potentially be a carpet that asbestos fibres may have infiltrated. The tenants had notified Mr Rayner that they would not be cleaning the carpet which, given the circumstances was a sensible thing to do.

10. I accept that the tenant maintained the lawns and grounds well prior to the renovation/dangerous asbestos fiasco developing. As stated, Mr Rayner was ultimately responsible for that fiasco and it was not surprising the tenants neglected the lawns and yard at the end of the tenancy.

11. In addition, claims for floor mats, curtains and boxes that had been in the garage and allegations regarding the cleanliness of the property vacated by the tenants were raised by Mr Rayner. However, these claims were not referred to in his formal application. Had they been I would have dismissed them as I was left uncertain. But predominantly again because the renovation/asbestos fiasco left the landlord more responsible for the state of the property at the end of the tenancy, than the tenants.

12. Finally, the tenants in their submissions (written and oral) referred extensively to the complete disregard Mr Rayner had to their predicament, his poor judgement and his complete inability to have any empathy with the situation they and their parents were in, or to take any real responsibility for it. That was also apparent to the tribunal at the hearing.

13. I note that following the end of the tenancy Mr Rayner was the first to file his own claim against the tenants and his stance during the hearing was to be totally defensive, with almost no acknowledgement of what a seriously unfortunate ordeal this tenancy had been for the tenants and the parents.

14. The above orders are made.

J Hogan
14 January 2019

Please read carefully:

SHOULD YOU REQUIRE ANY HELP OR INFORMATION REGARDING THIS MATTER PLEASE CONTACT **TENANCY SERVICES 0800 836 262**.

MEHEMA HE PĀTAI TĀU E PĀ ANA KI TENEI TAKE, PĀTAI ATU KI TE TARI **TENANCY SERVICES 0800 836 262**.

AFAI E TE MANA'OMIA SE FESOASOANI E UIGA I LENEI MATAUPU FA'AMOLEMOLE IA FA'AFESO'OTAI'I LOA LE OFISA O LE **TENANCY SERVICES 0800 836 262**.

Rehearings:

You may make an application to the Tenancy Tribunal for a rehearing. Such an application must be made within five working days of the order and must be lodged at the Court where the dispute was heard.

The ***only*** ground for a rehearing of an application is that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur. Being unhappy or dissatisfied with the decision is not a ground for a rehearing. (See 'Right of Appeal' below).

Right of Appeal:

If you are dissatisfied with the decision of the Tenancy Tribunal, you may appeal to the District Court. You only have 10 working days after the date of the decision to lodge a notice of appeal.

However, you may **not** appeal to the District Court:

1. Against an interim order made by the Tribunal.
2. Against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than $1,000.
3. Against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than $1,000.

There is a $200.00 filing fee payable at the time of filing the appeal.

Enforcement:

Where the Tribunal made an order that needs to be enforced then the party seeking enforcement should contact the Collections Office of the District Court on **0800 233 222** or go to www.justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc:

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.