

TENANCY TRIBUNAL AT Whanganui

APPLICANT: The Chief Executive, Ministry of Business Innovation and
Employment

RESPONDENT: WANGANUI HOME MAINTENANCE LIMITED

ORDER

1. Wanganui Home Maintenance Limited is to pay the Chief Executive, Ministry of Business Innovation and Employment, the amount of \$3,563.52, immediately, calculated as follows:

Award	Amount	Orders	Total
Exemplary damages for breach of the landlord's duty on receipt of bonds	\$300.00	8	\$2,400.00
Exemplary damages for failure to maintain premises	\$500.00	1	\$500.00
Exemplary damages for failure to provide a compliant insulation statement	\$250.00	2	\$500.00
Filing fee	\$20.44	8	\$163.52
TOTAL AWARD			\$3,563.52

REASONS

1. The Tribunal must consider 8 separate but associated applications filed by the Chief Executive of the Ministry of Business Innovation and Employment ("MBIE"), in relation to 8 tenancies. All claims relate to a failure on the part of the landlord to lodge bond payments with the Bond Centre. Some applications relate to other matters, such as a failure of the landlord to comply with statutory obligations with respect to insulation statements, and maintenance.
2. All matters were heard concurrently at a hearing on 12 February 2019, and it is sensible that the outcome be recorded in a single decision. The Chief Executive was represented by Ms English. The respondent landlord is Wanganui Home Maintenance Limited, which was represented by Mr Vermeulen a co-director / shareholder of the business.

Background

3. The Landlord company owns seven rental properties in Whanganui, and one in Gisborne. The rental properties are all leased individually. The Landlord uses a standard form tenancy agreement and insulation statement.
4. In October 2017 the Tenancy Services Compliance and Investigations Team of MBIE became aware of allegations in relation to failure to lodge bonds, following which an investigation was commenced. That included interviewing the landlord. As a result MBIE determined that there had been a number of breaches, which form the basis for the instant applications to the Tribunal.
5. MBIE have filed eight applications with the Tribunal, for the following tenancies:

1. Application 4151865

This tenancy is located at 15 Hakeke Street, Whanganui East. The tenant is Shiriena Margaret Te Tau. The Tenancy commenced on 17 September 2015, and the bond of \$825.00 was lodged on 22 March 2018. The applicant seeks an order for exemplary damages for a breach of the landlord's obligations with respect to bond lodgement.

2. Application 4151838

This tenancy is located at 24 Barrack Street, Whanganui. The tenant is Mana Kararaina Neilson. The Tenancy commenced on 16 December 2016, and the bond of \$1,240.00 was lodged on 17 April 2018. The applicant seeks orders for exemplary damages for a breach of the landlord's obligations with respect to bond lodgement, and failure to provide a compliant insulation statement.

3. Application 4151887

This tenancy is located at 144 Ikitara Road, Whanganui East. The tenant is Scott Mailman. The Tenancy commenced on 11 August 2017, and the bond of \$1,100.00 was lodged on 22 March 2018. The applicant seeks orders for exemplary damages for a breach of the landlord's obligations with respect to bond lodgement, and a failure to provide an insulation statement, and failure to maintain.

4. Application 4151907

This tenancy is located at 34 Banks Street, Tolaga Bay. The tenant is Peter Brian Edward Hughes. The Tenancy commenced on 12 October 2017, and the bond of \$1,100.00 was lodged on 3 May 2018. The applicant seeks an order for exemplary damages for a breach of the landlord's obligations with respect to bond lodgement.

5. Application 4151911

This tenancy is located at 2 White Street, Whanganui East. The tenant is Laura Catherine Sherlock. The Tenancy commenced on 17 August 2017, and the bond of \$800.00 was lodged on 22 March 2018. The applicant seeks an

order for exemplary damages for a breach of the landlord's obligations with respect to bond lodgement.

6. Application 4151923

This tenancy is located at 24 Boyd Avenue, Whanganui. The tenant is Rebecca Dawn Malone. The Tenancy commenced on 28 February 2015, and the bond of \$1,000.00 was lodged on 22 March 2018. The applicant seeks an order for exemplary damages for a breach of the landlord's obligations with respect to bond lodgement.

7. Application 4151916

This tenancy is located at 70 Nixon Street, Whanganui East. The tenant is Tracy Ann White. The Tenancy commenced on 23 March 2015, and the bond of \$350.00 was lodged on 22 March 2018. The applicant seeks an order for exemplary damages for a breach of the landlord's obligations with respect to bond lodgement.

8. Application 4151917

This tenancy is located at 88 Anzac Parade, Whanganui East. The tenants are Bradley Young and Melissa Roass. The Tenancy commenced on 29 March 2017, and the bond of \$1,000.00 was lodged on 23 March 2018. The applicant seeks an order for exemplary damages for a breach of the landlord's obligations with respect to bond lodgement.

Mr Mailman's evidence

9. Mr Mailman was the tenant of 144 Ikitara Road, Whanganui East. Mr Mailman attended the hearing, where he provided oral evidence from a written brief provided in advance of the hearing. I summarise the tenants evidence, and response to cross examination as follows:
- a. The tenancy commenced on 11 August 2017, with the tenant moving in on 24 August 2017.
 - b. When he took the tenancy, he saw there was an insulation statement that said there was insulation.
 - c. On arrival the premises were dirty, a smoke alarm was missing, the oven was not working, and hot tap dripping. Mr Mailman referred to photographs of a text message and oral conversation where these issues were raised.
 - d. Smoke alarms were installed on 30 September 2017.
 - e. While the plumber did arrive and fix the hot tap, he did not fix the cold tap which continued to drip, on the basis that there is no separate charge for water usage in Whanganui.¹

¹ I note the text message records a dripping hot tap, but there is no mention of a problem with the cold tap. Nothing will turn on this because there is no application before the Tribunal in relation to taps.

- f. On 12 September 2017 a water leak was noted in a bedroom. The landlord attended that same day to assess the leak, and found it to be a leak from a silicon joint in the neighbouring bathroom. The landlord cut open the bedroom wall on the other side of the bath, and that cut out (into a child's bedroom) was not repaired. The tenant covered the hole with cardboard, until it was repaired on 9 February 2018.
- g. Also on 12 September 2017 the tenant entered the roof cavity in an effort to try to locate the water leak. It was then that he found there was no insulation in the ceiling.
- h. There was a problem with the oven, where two for the four elements would not work, and the oven would not heat properly, nor would the door close properly. The landlord recommended that the tenant install a window latch to keep the door closed. A replacement oven was provided on 8 February 2018 that was "a dinosaur". The oven had a fault in that it would give electric shocks if touched. As a result only the elements are used.
- i. On 3 October 2017 the drain at the rear of the house became blocked, with sewerage discharging outside the kitchen door. As a result the toilet, sink, shower and laundry could not be used. The landlord stated he would call a plumber that same day, but the plumber did not present until 5 October 2017. During communications, the landlord advised the tenant would need to pay for any afterhours call out fee, if an after-hours callout was required.
- j. A retaining block wall at the rear of the section fell down (around 600 mm high), which the tenant repaired himself.

Mr Tofts evidence

- 10. Mr Tofts is an investigator with the Tenancy Compliance and Investigations team at MBIE. A written brief had been provided in advance, and was taken as read with the landlords consent.
- 11. Mr Tofts set out the process that was undertaken with investigating the complaints, and provided a range of relevant documentation such as the interview transcript, and photographs of 144 Ikitara Road.

Statements in support of landlord

- 12. The landlord provided written statements in support of the directors, noting as will be discussed below, a problematic business venture in Fiji.
- 13. A document has been provided from current tenants (including some tenants who are tenants in tenancies that are the subject of applications before the Tribunal), supporting the tenants were happy with the maintenance of their premises.
- 14. A letter was provided from electrician Mr Johnson, recording that he had assessed the replacement stove, testing it for faults and replacing faulty elements. An Electrical Certificate of Compliance and Electrical Safety Certificate was provided dated 31 March 2018.

Relevant law

15. I will set out the relevant law that applies to bond lodgement, the landlords obligation to maintain the premises, and insulation statements, below in my discussion of the respective claims. However as all matters relate to claims for exemplary damages, I will summarise the law that applies to exemplary damages claims as follows.

Exemplary damages

16. 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.
17. The Residential Tenancies Act 1986 (“RTA”) sets maximum amounts for exemplary damages awards in Schedule 1A.

Analysis

18. The applicant has claimed for exemplary damages in relation to failure to lodge bonds, failure to provide reasonable maintenance and failure to provide a compliant insulation statement. I will consider each claim in turn.

Failure to lodge bond payments

19. The position taken by MBIE is that the landlord has failed to comply with its statutory obligations with respect to bond lodgement, in relation to all eight tenancies which are the subject of the applications before the Tribunal.
20. Section 19 of the RTA sets out the “Duties of landlord on receipt of bond”, and confirms that the landlord:
- shall, within 23 working days after the payment is made, forward the amount received to the chief executive, together with a statement of particulars in the approved form signed by the landlord and the tenant.
21. For the purposes of this provision, the bond is considered to be lodged with the Chief Executive, by lodging the bond with the Bond Centre.
22. Section 19(2) confirms that failure to lodge the bond in accordance with the section 19 requirements, is declared to be an unlawful act. As will be discussed further below, when an unlawful act occurs, then the Tribunal may make an order that the tenant or landlord in this case, pay exemplary damages. The maximum level of exemplary damages for a breach of section 19(2) is \$1,000.00.
23. In this case, the landlord accepts that its obligation with respect to bond lodgement has not been met, and it is not disputed that there has been a breach of the Act. I agree

that the evidence favours a conclusion that a breach of the landlord's statutory obligation arises, and I find that must be considered an unlawful act on the part of the landlord.

24. The question then becomes whether exemplary damages should be awarded, and if so the appropriate awards.
25. The Landlord advised at the hearing that there were cash flow problems for the business, noting an investment in a business in Fiji, that had become problematic. That is consistent with some of the statements provided in support of the landlord. My understanding is that the bond payments that were received were used in a general account, and there were insufficient funds to pay the bond into the Bond Centre within the required time frames.
26. Taking into consideration the factors found in section 109 of the RTA, I reach the following conclusions:
 - a. The Landlord was aware of its obligations under the RTA to lodge bond payments as required by the Act. The failure to lodge the bond payments as required would have occurred intentionally, in that the Landlord is likely to have determined that the payments should not / could not be made for cash flow reasons.
 - b. The effect of the failure to lodge the bond, resulted in a risk that the tenants would be unable to have their security for the premises returned at the end of the tenancy. I agree with Ms English, that in circumstances where there are cash flow issues, the presenting risk is elevated. There is a risk there would be insufficient cash available from the company to repay the bond, and in the event of the Landlord becoming insolvent, the tenants would face a significant difficulty in recovering their bond, if they could at all. The effect of a Landlord not lodging bonds, defeats the protections available to tenants, to ensure their bond is held securely until the end of the tenancy.
 - c. There is a very strong interest for tenants, in having their bond held securely within the bond system. It must be emphasised that bond payments continue to be the tenant's money, unless that money is lawfully disbursed to the landlord at the end of the tenancy either by consent of the tenant, or order of the Tribunal. A landlord holding bond money beyond the 23 day period, is holding money that does not belong to them, without any lawful authority.
 - d. For similar reasons, there is a strong public interest in ensuring that bonds be lodged as required by the RTA, and for landlords who breach that requirement, to face appropriate consequences.
27. This is a case where exemplary damages should be awarded. Ms English submitted that in the circumstances an award of between \$300 and \$350 per breach would be appropriate. I agree that range would seem reasonable. Particularly taking into account the following factors, I fix the award of exemplary damages at \$300 per breach:
 - a. There being no record of this landlord appearing in the Tribunal for similar breaches in the past.

- b. The fact the rents for the relevant premises are toward the lower end of the range of rents for rental premises in New Zealand generally.
- c. The fact that the landlord has lodged the bonds after the matter was raised by MBIE, and that there appears to be no further breaches of a similar nature.

Failure to provide adequate maintenance

28. The applicant submits that the landlord has failed in its obligation to reasonably maintain the premises, particularly with respect to the:

- a. Supply of a working oven.
- b. Repairing a hole in the bedroom wall.
- c. Remediating the blocked sewer pipe

29. Section 45 of the RTA sets out the landlord's responsibilities. That includes at subsection 1(b):

(b) provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes

30. Subsection 1A confirms that failure to comply with a number of provisions, including subsection 1(b), is an unlawful Act.

Oven

31. The applicants position is that the landlord has failed to remedy the faulty oven, after the landlord was notified of the problem soon after the tenant moved into the premises, and that when the replacement oven was installed, there was an electrical fault with it causing shocks to the user.

32. Mr Mailman's evidence is that the original oven was faulty from when the tenancy commenced, and that when that oven was replaced, the replacement was also faulty. Noting that the electrical certificate was provided from the electrician in March 2018, that would support that there were problems with the oven(s) from the commencement of the tenancy to at least March 2018.

33. When the tenancy was entered into, there was an oven, and the tenant could reasonably have expected the oven to be fully functional.

34. Overall, I consider that the evidence supports that the landlord has not reasonably maintained the oven. Once the issue was raised by the tenant, it should have been addressed efficiently by the landlord. While I accept the oven was replaced in an effort to provide a fully functioning oven, this too was faulty.

35. I note that the landlord requested that the tenant install a window latch on the oven door to keep it closed. That type of repair would not be ideal, but it may be adequate,

however it should be the Landlord undertaking any such installation, it should not be put on the tenant.

36. Overall I am satisfied that there has been a failure to maintain the oven.

Wall hole

37. The applicant submits that the Landlord was tardy to repair the hole in the bedroom wall (adjoining the bathroom). The hole was cut out on 12 September 2017, but not repaired until February 2018.

38. I agree with Ms English, that this repair should have been undertaken much earlier, particularly in light of the hole being in a child's bedroom wall.

39. I am satisfied this also represents a failure to maintain.

Blocked drain

40. The applicant submits that the Landlord did not adequately address the sewage blockage in a timely way, with the blockage only being addressed after a three-day period.

41. The Landlords position is that the plumber was contacted the same day, to attend the premises to unblock the drain. The Landlord submits that the delay was with the plumber, not the Landlord.

42. I conclude that there has been a failure to provide maintenance. A three-day period for a tenant to be without the use of toilet, shower and kitchen sink facilities is unacceptable. There was an obligation on the landlord to get the problem fixed without delay, and therefore it was the landlord who should have ensured that a plumber attended the premises ideally the same day or evening. If the plumber failed to attend as required, then that would be a matter between the landlord and plumber, not the tenant and plumber. Considering the period of the delay, and the significant impact to the family, I find this is a case of failure to maintain.

Conclusion on exemplary damages

43. In relation to exemplary damages for failure to maintain, I am satisfied that all breaches were likely to have been intentional. The landlord was aware of the respective issues. Ultimately the landlord made decisions, for whatever reasons, in relation to the repairs, and those decisions are likely to have been intentional decisions.

44. In relation to the impact for the tenant, I consider there would have been a significant impact in relation to the plumbing and oven issues. The plumbing issue presented potential health issues with overflowing sewage near the back door, and I accept the tenant was unable to adequately use the oven over the relevant period. However I am not persuaded that in reality the impact with the hole in the wall was significant for the tenant. The tenant effected a temporary repair (which the landlord should have done), but I am otherwise not of the view a significant detriment has been established.

45. There is a very strong interest for tenants, landlords and the general public, in having functioning sanitary drainage systems. There is also a strong interest for tenants in having a properly functioning oven and cook top.
46. In relation to maintenance in general, there is a strong interest for the public generally, in ensuring that landlords properly maintain the premises, especially when there may be health impacts arising.
47. This is a case where exemplary damages should be awarded, but only in relation to the oven and plumbing. Given the limited impact on the tenant and residents of the hole (covered as it was with cardboard), this would not be a case where exemplary damages would be indicated. The maximum level of exemplary damages for a breach of section 45 is \$4,000.00. \$4,000.00 is the highest level of exemplary damages set by Parliament, which is a reflection of the importance Parliament has placed on ensuring that landlords comply with their statutory responsibilities.
48. When I step back and evaluate significance of the breaches, I consider an award of exemplary damages of \$500.00 would be reasonable. I take into consideration the following factors:
 - a. I accept that the landlord had instructed a plumber to attend the premises without delay.
 - b. Similarly the landlord had made efforts to address the oven, albeit not sufficiently fast enough.
 - c. The impact for the tenant and residents in being limited in only cooking on the cook top (not the oven), and being unable to use facilities connected to the blocked drain.
 - d. I am unaware of any other similar cases of breaches from this landlord.

Insulation statements

49. The applicants position is that the landlord has failed to provide a compliant insulation statement for two of the tenancies, and in fact the information provided on the statements is misleading.
50. Section 13A of the Residential Tenancies Act 1986 relates to the contents of tenancy agreements. Section 13A(1A) relates to what is known as 'insulation statements' and came into force on 1 July 2016. That provision set out minimum requirements on landlords, to inform tenants of what insulation is provided in the dwelling, or if that cannot be reasonably ascertained, why. That provision holds:
 - (1A) The landlord must include in the tenancy agreement a statement, made and signed by the landlord, that provides the following information to the tenant (subject to subsections (1B) and (1C)):
 - (a) whether or not there is, as at the date of the tenancy agreement, any insulation installed in connection with any ceilings, floors, or walls that are at the premises:
 - (b) details of the location, type, and condition of all insulation that is, as at the date of the tenancy agreement, installed in connection with any ceilings, floors, or walls that are at the premises:

(c) if the tenancy is, or will be, an income-related rent tenancy and requirements in respect of insulation are imposed on the landlord as referred to in section 45(1)(bb), an explanation of how the landlord will comply with those requirements.

(1B) Subsection (1C) applies if, despite making all reasonable efforts to do so, the landlord has not been able to obtain some or all of the information required by subsection (1A)(a) or (b) in respect of a particular location (for example, above a ceiling, under a floor, or in a wall).

(1C) The landlord's statement under subsection (1A) does not have to provide the information that the landlord has not been able to obtain in respect of the particular location, so long as the statement instead—

(a) describes the information that the landlord has not been able to obtain in respect of the particular location; and

(b) explains why the landlord has not been able to obtain that information; and

(c) confirms that the landlord has made all reasonable efforts to obtain that information.

(1D) The requirement that the landlord's statement under subsection (1A) be signed by the landlord is in addition to the requirement under section 13(1) that the landlord sign the tenancy agreement.

(1E) The landlord's statement under subsection (1A) does not affect the landlord's duties in respect of insulation under section 45(1) or 66(1) or otherwise.

(1F) The landlord commits an unlawful act if—

(a) the landlord fails to comply with subsection (1A); or

(b) the landlord's statement under subsection (1A) includes anything that the landlord knows to be false or misleading.

51. The maximum level of exemplary damages that can be awarded for a breach of section 13A, is \$500.00.

144 Ikitara Road, Whanganui

52. This is Mr Mailman's tenancy.

53. The insulation statement records that there is insulation in the premises, being "some in the ceiling". The statement does not record any reasons why the insulation is not described in the other spaces (walls and floor). The statement also records that "More to be completed in near future".

54. The Landlord accepts that there is in fact no insulation in this dwelling. The Landlord indicated at the hearing that the premises were not checked to ascertain the situation with the insulation before the statement was produced, but Mr Vermeulen went from memory.

24 Barrack Street, Whanganui

55. This is Ms Neilson's tenancy.

56. The insulation statement records that there is insulation in the premises, but it was "minimal in ceiling in places". The statement was ticked to state there is insulation in the ceiling, but not what the type of insulation it is, nor are any reasons set out for why the insulation is not described in the other spaces (walls and floor). The statement also records that "insulation to be installed in the near future".

57. At the hearing the Landlord accepted that there was no 'typical' insulation product in the ceiling, but that clothing had been spread over some of the ceiling that would provide some insulating effect. However Mr Vermeulen accepted this would not meet the expected standard of insulation.
58. In both of these cases, I have no reservation in concluding that the insulation statement does not comply with the requirements in the Act. I also agree with Ms English that the statements are in fact misleading, given they indicate to the tenants that there was some insulation in the ceilings, which was not the case at all.
59. In addition neither insulation statement address all of the information required by section 13A, including:
- a. Details of the location, type and condition of the insulation installed in the ceiling, walls and underfloor.
 - b. If the information about the insulation could not be obtained, what information the landlord was unable to obtain was, the reasons why that could not be obtained, and confirmation that all reasonable efforts were made to obtain it.
60. Taking into consideration the section 109 considerations, I conclude as follows:
61. The Landlords conduct was intentional, in that the landlord elected not to check the actual insulation situation, but rather proceeded from memory. The preformatted insulation statement set out the information that the landlord needed to provide, which the landlord has elected not to provide.
62. It can be accepted that there would be an impact for tenants in being misguided into thinking a premises was insulated, or even partially insulated.
63. There is a strong interest in tenants having accurate insulation statements provided to them, when deciding whether to lease any particular premise.
64. There is a strong public interest in accurate and complaint insulation statements being provided. Over recent years, the Government has introduced a range of measures to ensure that New Zealand's residential premises are warm and dry, and insulation statements in one of those measures. An insulation statement allows tenants to identify premises that are insulated – and therefore more likely to be warm, and cheaper to heat. To that extent a strong public interest arises with the expectation that landlords meet their statutory obligations with regards insulation statements.
65. I consider that this is also a case where exemplary damages should be awarded. I fix the level of exemplary damages at \$250.00 (being 50% of the maximum). I take into account that there has been an element of misleading conduct, in suggesting there is insulation but without confirming that was the case. It would be reasonable for a tenant to rely on the landlord's statement. I also take into account that not only was the information that there was insulation wrong, the landlord has not complied with the other requirements in an insulation statement.

Filing fee

66. As the applicant has been successful in all claims, the filing fee paid must be reimbursed to the applicant in full.



R Woodhouse
12 February 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.