TENANCY TRIBUNAL AT Wellington

APPLICANT: Mathew Purcell, Tina Vao, Helena Purcell

Tenant

RESPONDENT: Iron Bridge Property Management (Wgtn) Limited

Landlord

TENANCY ADDRESS: 91 Duncan Terrace, Kilbirnie, Wellington 6022

ORDER

1. Iron Bridge Property Management (Wgtn) Limited must pay Mathew Purcell, Tina Vao and Helena Purcell $1,420.44 immediately.

Description	**Landlord**	**Tenant**
Compensation: non-functioning toilet		$650.00
Exemplary damages: non-functioning toilet		$750.00
Filing fee reimbursement		$20.44
Total award		**$1,420.44**
Total payable by Landlord to Tenant		**$1,420.44**

2. All other claims are dismissed.

Reasons:

1. All parties attended the hearing.
2. The tenancy ended on 31 January 2020.
3. On 25 April 2020 the tenants applied for:
   (i) Compensation and/or exemplary damages for failure to provide a functioning toilet;
   (ii) Compensation and/or exemplary damages for failure to provide a home free from damp and odour; and

(iii) Compensation and/or exemplary damages providing contaminated premises.

4. In considering the claims, the "standard of proof" or the level or evidence required is "on the balance of probabilities." In other words, the tenants must establish with evidence that each of their claims are "more likely than not." I consider each of the claims bearing in mind the standard of proof required.

5. Whilst I may not have referred to all the evidence presented at the hearing, the parties can be assured that it has all been considered.

Did the landlord fail to maintain the toilet?

6. Section 45 of the Residential Tenancies Act 1986 (RTA) requires a landlord to provide and maintain the premises in a reasonable state of repair. The tenant claims the landlord did not provide a functioning toilet for the duration of the tenancy.

7. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $4,000.00. See section 45(1A) and Schedule 1A RTA.

Facts

8. The tenant says the toilet was sporadically prone to blocking from the outset of the tenancy. On 2 July 2019 the toilet blocked, and a plumber was called to unblock it.

9. On 4 July further investigations were undertaken and the plumber advised the landlord that the pipes were blocked.

10. On 16 July the diagnosis was changed to the issue being the toilet as opposed to the pipes.

11. On 19 July the toilet was replaced.

12. The tenant says the toilet was still blocking and they had by now taken the extreme step of not putting toilet paper down the toilet but disposing of that in the rubbish bin. Their evidence was that this was the situation until the end of the tenancy on 31 January 2020.

13. On 14 August the base of the toilet commenced leaking of which the tenant notified the landlord. The tenant followed this up with the landlord on 29 October by which time the leak was now with every flush. It was repaired on 15 November.

Findings

14. It is well settled that, the landlord's obligation under section 45 is to investigate and repair a defect brought to its attention within a timeframe which is reasonable in the circumstances, and as to what that time is, depends on the

gravity of the problem but also on the objective attempts made by the landlord to investigate, and put right, whatever the problem might be. Furthermore, a tenant has a statutory duty to advise of any defects under section 40(1)(d) of the RTA. Therefore, a tenant should promptly notify a landlord of any defects and a landlord should be given a reasonable opportunity to remedy the defect before being liable for any failure to do so.

15. After full consideration of the evidence I am satisfied that the landlord took appropriate steps to have the issue investigated and dealt with in a timely way in July 2019.

16. However, the evidence also demonstrates that the tenant advised the property manager regularly of the continuing blockage issue with the new toilet from 13 August. They say they lived with that for approximately 4 months until the end of the tenancy as nothing was done. A functioning toilet means one toilet paper can be deposited in; this toilet was therefore not functioning.

17. The issue with the leak also took 3 months to be rectified. That it too long.

18. I therefore find that the landlord breached section 45 RTA in not remedying the issues with the toilet from August within a reasonable time frame. Effectively the tenant lived with an ill-functioning toilet for at least 13 weeks. I have found 13 weeks as opposed to the 24 weeks until the end of the tenancy as there is no evidence of the tenant advising the landlord of the blocking continuing after the leak was repaired on 15 November.

19. This Tribunal has ruled in previous cases that as a general proposition a leak is a serious matter and must be repaired promptly. Leaks go to the very essence of a tenant's right to the use and enjoyment of the premises in consideration of the rent that the tenant pays. A leak is not a mere inconvenience; it creates an undesirable and unhealthy living environment. The same can be said for a continually blocking toilet.

20. Appellate Courts have advised of the need to adopt a global approach when considering compensation awards. They have repeatedly emphasized that the assessment of the proper amount of compensation is a question of fact in each case; it is not an exact exercise and a commonsense approach is required; that there are no general or absolute rules for calculating the amount of compensation but that the primary purpose of awarding compensation is to reflect the extent of the loss actually and reasonably suffered by the injured party.

21. Having regard to all relevant factors, I assess that an award of $650 is justified. To give some guidance as to how I have reached this figure, it equates to a weekly rent reduction of approximately $50 per week during the 13 weeks when the bathroom was not suitable for safe and hygienic use and the landlord was aware of the issue.

22. This failure to act is also an unlawful act.

23. Where a party has committed an unlawful act intentionally, the Tribunal may award exemplary damages where it is satisfied 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. See section 109(3) RTA.

24. The landlord initially took appropriate and prompt steps to deal with the issue. There was clearly however a communication break down after the toilet was replaced. The landlord's failure to act between August and November was an intentional failure because they were aware there was an issue. I do not consider the property manager's actions maliciously intended, however the impact on the tenant was significant. They were having to spend a lot of time unblocking the toilet and it was unhygienic and unsanitary. It is clearly in the public interest that landlords provide hygienic sanitary facilities. Because of the above I consider exemplary damages justified and award $750. This is at the lower end of the scale because on other matters the landlord appeared willing to engage and progress maintenance issues.

Did the landlord provide a home free from damp?

25. The tenant claims that the landlord has breached s45(1)(c) RTA because the premises is damp and smelly in contravention of the Housing Improvement Regulations 1947.

26. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $4,000.00. See section 45(1A) and Schedule 1A RTA.

Facts

27. The tenant's evidence is that for the duration of the tenancy a damp and musty smell and damp air rose from the basement which permeated through the rest of the house. This was a topic of regular discussion between the parties throughout the tenancy.

28. The basement was not advertised as part of the premises, but the tenants were not prevented from using it.

29. The landlord acknowledged at the commencement of the tenancy that there was a foul smell coming from the basement which they considered may have come from a leak. The action they took to investigate was:

    (a) 23 March insulation investigation;

    (b) 23 April second insulation investigation;

    (c) 17 July bathroom fan repaired; and

(d) Requesting the tenants use the dehumidifier constantly in the basement and ventilate. The tenants say they ventilated but did not use a dehumidifier there.

30. They did not conduct the moisture testing the tenants requested of them.

31. The tenant's evidence is that the damp caused the following issues for them:

    (a) Ill health;

    (b) Mould in the bathroom, kitchen and basement on their items and the furnishings;

    (c) The requirement for regular cleaning of the mould;

    (d) The requirement to regularly air the premises; and

    (e) The running of a dehumidifier in their daughter's bedroom each night.

32. The landlord accepts the smell in the basement but argues it did not permeate the house. They say they inspected 4 monthly and were never shown the mould. They say a previous tenant lived in the basement and the current tenants have not raised it as an issue. They did offer to let the tenants out of their tenancy early at no cost, but the tenants were not able to find suitable accommodation.

33. Photographic evidence was not provided of the mould and there was no evidence of the tenant's ill-health being related to any issues of damp.

Discussion-causes of mould

34. The tenants primary concern was the mould at the premises. Mould is problematic and will grow in a home where humidity is high. There are two ways to reduce humidity; by heating and ventilation, ventilation being the most basic requirement.

35. Responsibility for mould problems can rest with the tenant, if the tenant fails to air and heat the premises properly. On the other hand, the landlord must provide the tenants with the necessary means to heat and air the premises. If appropriate, fans and dehumidifiers should be provided. Security stays should be fitted to windows so that they can be left open but secure while tenants are away from the premises.

36. A landlord is also required to provide premises that are not prone to mould. If the premises have an inherent problem, the landlord has a responsibility to remedy the fault.

37. A tenant must tell the landlord where there is a problem with mould, so that appropriate action can be taken by the landlord.

38. In summary, premises must be able to be used and lived in, in a normal way, without mould developing. If this cannot be done, then it is the landlord's

problem. If the tenant fails to ventilate and heat the premises when heating and ventilation is available, then it is the tenant's problem.

Findings

39. On fully considering all the evidence provided I am satisfied that the landlord appropriately investigated the tenants' concerns. The evidence does not demonstrate on the balance of probabilities an inherent mould or damp issue. This claim is dismissed.

Did the landlord provide contaminated premises?

40. The premises were tested for methamphetamine contamination on 31 January 2020. The tenancy commenced on 1 February. The initial tests indicated a composite level of 7.2µg per 100sq cm. As a result, discrete testing was undertaken on 9 February which indicated levels up to 3.54µg per 100sq cm.

41. The tenants were concerned about the testing. They requested information about it but had to follow up several times before the landlords advised them on 19 March of the specific results. On 16 April 2019 the premises were cleaned.

42. The tenants are concerned that they lived in contaminated premises for 2.5 months and seek compensation and/or exemplary damages. They say they experienced ill-health which they attribute to the presence of methamphetamine in the premises.

Methamphetamine contamination – a discussion

43. Where premises have been tested and found to be contaminated with methamphetamine, or any other prescribed contaminant, the landlord cannot provide the premises to a tenant until they have been decontaminated. Where the premises have already been provided, the landlord may only continue to provide them if the premises are being decontaminated. See sections 45(1AA) and (1AAB) RTA.

44. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $4,000.00. See section 45(1AB) and Schedule 1A RTA.

45. The question for the Tribunal is therefore whether the premises were provided in a contaminated state. Currently there is no legislative or regulatory measure for a 'safe' level of methamphetamine contamination. Whilst that is likely to change with the Residential Tenancies Amendment Act 2019 allowing for regulations to prescribe the acceptable levels, they are not yet in place. Therefore, the Tribunal must rely on the currently prevailing remediation guideline.

46. I am therefore required to determine which of the two available 'guidelines' the Tribunal should apply in this case. They are:

(a) The New Zealand Standard 8510:2017 *Testing and decontamination of methamphetamine-contaminated properties* (the Standard); and

(b) The report of Professor Sir Peter Gluckman, the then Prime Minister's Chief Science Advisor, entitled *"Methamphetamine contamination in residential properties: Exposure, risk levels and interpretation of standards"* 29/5/18 (the Gluckman Report).

47. The standard was prepared by the P8150 committee with a stated purpose to *"provide guidance on reducing people's risk to exposure to arm caused by the presence of unacceptable levels of methamphetamine contamination in properties…".* It is largely based on the October 2016 report ESR prepared for the Ministry of Health *"Review of Remediation Standards for Clandestine Methamphetamine Labratories: Risk Assessment recommendations for a New Zealand Standard." (The ESR Report).* The standard established a decontamination level of 1.5 µg per 100sq cm for high use areas and 3.8µg per 100sq cm for limited use areas.

48. The Gluckman report reviewed the international literature on methamphetamine contamination and the risk of harm to humans from exposure to methamphetamine. The authors concluded that there is currently no evidence that third-hand exposure to methamphetamine residue on household surfaces poses a risk to humans at levels below 15µg per 100sq cm.

49. I note that the situation is different where manufacture is suspected, but that is not the case here.

50. Both reports find that methamphetamine does not accumulate in the body and that over time, and with cleaning, the level of transfer from surfaces to skin will decrease. Both reports acknowledge that there have been no reports of proven harm from third-hand exposure to methamphetamine.

51. Where the reports differ, is their approach to risk. The Gluckman report concludes that currently in NZ the perception of risk is disproportionate to the actual risk. It considers in depth the concerning issues that arise when adopting a conservative approach. The ESR Report acknowledges it has recommended *"conservative guideline values"* not "*definitive thresholds above which toxicological effects will definitely occur*". The Standard is adopting a cautious risk in the face of a lack of definitive evidence

52. Finally, case law must be considered. The Tribunal is not bound to follow other Tribunal decisions but is bound by the higher courts. The most recent relevant District Court case *Full Circle Real Estate v Piper* [2019] NZDC 4947, considered an appeal from a decision of the Tribunal which adopted the Gluckman report. At paragraph [36] "*the best state of knowledge of risk to human health from methamphetamine contamination available to the adjudicator was the Gluckman report. It would have been bold for the adjudicator to have ignored that report in favour of the New Zealand Standard*

given that the Gluckman report represents the current scientific knowledge on the risk to human health from methamphetamine contamination in dwellings".

53. The Court of Appeal in *Smith v Accessible Properties New Zealand Limited* [2019] NZCA 38 also acknowledge that results below 15µg per 100sq cm are "*now considered not to raise any health and safety concerns*."

54. I am satisfied that it is appropriate to adopt the conclusions of the Gluckman report that third hand exposure to a level of methamphetamine below 15µg per 100sq cm is highly unlikely to cause adverse effects and therefore premises with readings lower than 15µg per 100sq cm are not contaminated. I make this finding on full consideration of the available evidence and literature, but in particular in summary I rely on the following:

    (i) Large safety margins were incorporated into the Standard;

    (ii) There is a clear lack of evidence that actual harm occurs from third hand exposure to methamphetamine;

    (iii) The reception to the Gluckman report by the NZ Government, in particular the Minister of Housing, was endorsing and it is more likely to influence the upcoming Regulations than the Standard; and

    (iv) The Tribunal is bound by decisions of the District Court and Court of Appeal which on the precedents noted, accept the Gluckman report as the better authority.

55. Therefore, the premises were not contaminated and as such there was no breach of s45 RTA in this respect. It was proactive and responsible of the landlord to have the premise cleaned. This claim is dismissed.

56. As the tenants have partly been successful in their claim I reimburse the filing fee.

THE SEAL OF THE TENANCY TRIBUNAL

K Lash
27 August 2020

Please read carefully:

Visit justice.govt.nz/tribunals/tenancy/rehearings-appeals for more information on rehearings and appeals.

Rehearings

You can apply for a rehearing if you believe that a substantial wrong or miscarriage of justice has happened. For example:

- you did not get the letter telling you the date of the hearing, **or**
- the adjudicator improperly admitted or rejected evidence, **or**
- new evidence, relating to the original application, has become available.

You must give reasons and evidence to support your application for a rehearing.
A rehearing will not be granted just because you disagree with the decision.
You must apply within five working days of the decision using the Application for Rehearing form: justice.govt.nz/assets/Documents/Forms/TT-Application-for-rehearing.pdf

Right of Appeal

Both the landlord and the tenant can file an appeal. You should file your appeal at the District Court where the original hearing took place. The cost for an appeal is $200. You must apply within 10 working days after the decision is issued using this Appeal to the District Court form: justice.govt.nz/tribunals/tenancy/rehearings-appeals

Grounds for an appeal

You can appeal if you think the decision was wrong, but not because you don't like the decision. For some cases, there'll be no right to appeal. For example, you can't appeal:

- against an interim order
- a final order for the payment of less than $1000
- a final order to undertake work worth less than $1000.

Enforcement

Where the Tribunal made an order about money or property this is called a **civil debt**. The Ministry of Justice Collections Team can assist with enforcing civil debt. You can contact the collections team on **0800 233 222** or go to 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.

If you require further help or information regarding this matter, visit tenancy.govt.nz/disputes/enforcing-decisions or phone Tenancy Services on 0800 836 262.

Mēna ka hiahia koe ki ētahi atu awhina, kōrero ranei mo tēnei take, haere ki tenei ipurangi tenancy.govt.nz/disputes/enforcing-decisions, waea atu ki Ratonga Takirua ma runga 0800 836 262 ranei.

A manaomia nisi faamatalaga poo se fesoasoani, e uiga i lau mataupu, asiasi ifo le matou aupega tafailagi: tenancy.govt.nz/disputes/enforcing-decisions, pe fesootai mai le Tenancy Services i le numera 0800 836 262.