[2021] NZTT Wellington 4266110, 4266355

TENANCY TRIBUNAL AT Wellington

APPLICANT: Elizabeth Kate Fryer, Jayde Patrick Thomas

Tenant

RESPONDENT: Novus Vita Limited Cassandra Gore

Landlord

TENANCY ADDRESS: 102A Barnard Street, Wadestown, Wellington 6012

ORDER

1. No application for suppression has been made in this case and no suppression orders apply around publication of this decision.
2. The Bond Centre is to pay the bond of $2,000.00 (6109751-002) immediately to Elizabeth Kate Fryer and Jayde Patrick Thomas.
3. Novus Vita Limited Cassandra Gore must pay Elizabeth Kate Fryer and Jayde Patrick Thomas $1,317.14 immediately, calculated as shown in table below.

Description	**Landlord**	**Tenant**
Rent arrears	$142.86	
Exemplary damages: failure to provide adequate locks		$200.00
Exemplary damages; unlawful entry		$200.00
Compensation: medical costs		$60.00
Legal costs		$1,000.00
Total award	**$142.86**	**$1,460.00**
Net award		$1,317.14
Total payable by Landlord to Tenant		**$1,317.14**

4. All other claims are dismissed.

Reasons:

1. This matter was heard at two hearings. The first on 22 October 2020 was adjourned part heard to 22 February 2020 as there was not enough time

available. Both parties attended both hearings, the tenants in person and the landlord by telephone. The tenants were represented by Rainey Collins.

2. There were two adjournments in between the two hearings. One granted on the application of the landlord for accepted medical reasons. The other due to a public holiday in the landlord's region.

3. The tenants originally applied on 29 June 2020 to have their bond returned and for compensation and/or exemplary damages for the following breaches of the Residential Tenancies Act 1986 ("RTA"):

   (a) Failure to provide sufficient locks;

   (b) Unlawful entry;

   (c) Failure to maintain;

   (d) Failure to comply with the smoke alarm regulations;

   (e) Threats to interfere with the tenant's utilities; and

   (f) Breach of quiet enjoyment.

4. They have also applied for compensation on the basis of stress and inconvenience of the process.

5. The landlord cross applied on 17 August for:

   (a) rent arrears;

   (b) compensation for damages;

   (c) compensation for missing items;

   (d) compensation for other breaches of the RTA including subletting;

   (e) compensation for theft from her home;

   (f) emotional damages; and

   (g) exemplary damages.

6. In response the tenants made a further application for the landlord's claims to be struck out on the basis of being frivolous or vexatious, and for costs.

7. I thank the parties for their patience in awaiting the issuing of this decision which unfortunately has taken longer than anticipated.

Burden of Proof

8. Each party has the burden to prove their respective claims. The standard of proof required is the usual civil standard of 'on the balance of probabilities'. Put another way, the applicant party must persuade me that they say is more likely than not to be the case.

9. I do not need to be completely certain, but I need to be more certain than uncertain. In deciding any particular claim I must consider all the evidence presented (including oral testimony). I must weigh this evidence to decide what is more likely. Certain types of evidence carry more weight, which must be taken into account when weighing all evidence.
10. 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.

Should I strike out the proceedings?

11. The first issue to decide is the tenant's application to strike out the landlord's cross application.
12. Section 92A of the RTA allows the Tribunal to strike out proceedings if they are frivolous or vexatious. Whether a claim is frivolous or vexatious will depend on unique factors of the case, including the relevant history. The Concise Oxford English Dictionary defines the term 'frivolous' as "*not having any serious purpose or value*". Other Tribunal decisions have considered "frivolous" as something "*trifling, futile, not serious, silly*" and "vexatious" as "*not having sufficient grounds for action and seeking only to annoy*".
13. It is a high threshold to deem a claim frivolous or vexatious and I am not satisfied that the landlord's claims are such. The landlord's concerns relate to the tenancy and have an evidential basis. There is no evidence that they were merely retaliatory in nature.
14. As I advised the parties at the hearing, this application is dismissed, and I consider each of the landlord's applications in this decision.

Relevant facts

15. The tenancy was a fixed term tenancy between 27 June 2019 and 27 June 2020. This was the first time these tenants had rented a property.
16. The tenancy premises is the bottom story of the landlord's home and has a separate entrance. For part of the tenancy the landlord lived upstairs but in September 2019 she moved away from Wellington. From that time her home was vacant.
17. The gas supply to both homes was on one meter at the start of the tenancy. The landlord paid all the gas bills as the tenancy agreement included the gas supply costs in the rental amount.
18. I deal with the tenant's applications first.

The tenant's applications

Did the landlord fail to provide sufficient locks?

19. The tenants claim the landlord has breached section 46 of the RTA by failing to provide a lock on the internal door between their premises and the landlord's home. Breach of this section is an unlawful act for which exemplary damages may be awarded if the breach was intentional, to a maximum of $1,500.

20. The tenants say they had to place their own items in front of the internal door to prevent anyone accessing from the landlord's side. They say this was unsettling for them however at no point did they ask the landlord to remedy the issue.

21. The landlord for her part says she was not aware this was a concern for the tenants and at no point did she access or attempt to access the premises that way until 8 June while undertaking maintenance.

22. Section 46(1) of the RTA says:

> *"The landlord shall provide and maintain such locks and other similar devices as are necessary to ensure that the premises are reasonably secure."*

23. Having an accessway into the tenancy premises that cannot be locked is a breach of section 46(1) RTA. This effectively allowed the landlord, or anyone in the landlord's home, entrance into the tenancy premises at any time. The tenancy premises were therefore not reasonably secure.

24. This breach is an unlawful act. 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.

25. I am satisfied that the intentional component of s109 is met. The landlord had rented out these premises previously and either did know or should have known of this obligation.

26. In considering exemplary damages I take into account the following factors:

    (a) The landlord kept her home locked so there was no possibility of the public accessing the tenancy premises in this way;

    (b) The tenants did not raise the issue with the landlord;

    (c) The tenants felt so insecure that they barricaded the door with their fridge which was obvious to the landlord; and

    (d) It is clearly in the public interest that tenants obtain the security they are entitled to with a lockable home.

27. Given the above, I find that exemplary damages are justified and consider an award of $200 reasonable.

Did the landlord enter the premises without consent or notice?

28. The tenants seek exemplary damages for three alleged instances of unlawful entry between 19 May and 8 June 2020 through the internal door.

29. 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. See section 48(1) and (2) RTA.

30. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $1,000.00. See section 48 (4)(a) and Schedule 1A RTA.

31. On the first occasion the tenants noticed that the broom they had up against the internal door had fallen over. They say this most likely was because someone from the landlord's side had attempted to access the tenancy premises.

32. I am not satisfied that the evidence establishes a breach of section 48 in this instance and dismiss this claim.

33. The second occasion occurred on 4 June. The tenants were not present but their houseguests where. Their evidence is that someone tried to open the door but could not as the fridge was in front of it. The person called out but when she was answered, she retreated.

34. The landlord denies this attendance.

35. Section 48 prohibits a landlord *entering* a premise without consent or notice. I am satisfied that the evidence does establish that someone attempted to access the tenancy premises without providing prior notice. However they did not actually enter the premises. Therefore, there is no breach in this instance.

36. The third occasion was on 8 June. The parties had been attempting to arrange a suitable time for the final inspection before the landlord left Wellington, but they had not been able to do so. On 8 June the landlord did enter the premises to undertake some maintenance work.

37. The landlord says the parties had agreed for her to do this in phone calls. The tenant says that is not possible because she had blocked the landlord's phone number as she had not wished to engage verbally with the landlord. The landlord also says that this was an emergency as the window latches were broken and needed repairing before she left.

38. A landlord may enter the premises in an emergency. They may also enter for the purposes of conducting maintenance after having provided 24 hours' notice; see section 48(2)(a)and(d) of the RTA.

39. I am not satisfied that this was an emergency. The tenant had advised the landlord of the broken locks on 22 May and the landlord had been at her home (therefore in close proximity) from 29 May. This event was some time later on 8 June. The windows were still secure and did not provide a security risk for the tenants.

40. I also consider that the evidence does not establish that the landlord gave the tenants adequate notice of her attendance. They knew she was intending to do the work but not when. This is a breach of section 48 and as such an unlawful act.

41. The fact that the tenants had for the most part vacated the premises does not affect the landlord's obligations of providing notice. The tenancy was still continuing and as such the tenants were entitled to exclusive possession.

42. As I consider the landlord aware of her obligations under section 48, I find that this was an intentionally unlawful act. I find an award of exemplary damages justified in this instance for the following reasons:

    (a) The landlord had ample time to provide the appropriate notice and conduct the maintenance between 29 May and 9 June;

    (b) The effect on the tenants was upsetting and stressful. The relationship was already strained between the parties and this entrance exacerbated that; and

    (c) It is a tenants' fundamental right to have the security of knowing when a landlord will enter their home.

43. Taking into account all the above factors, that the visit was for the purposes of maintenance and was brief, I consider an award of $200 exemplary damages appropriate in this instance.

Did the landlord fail to maintain the premises?

44. The tenants claim that the landlord has breached her obligations under section 45 of the RTA to provide and maintain the premises in a reasonable state of repair which does not breach any relevant enactment. In particular they claim that the landlord has failed to maintain the outdoor bank and provide a home free from damp.

45. Breaching these obligations are unlawful acts for which exemplary damages may be awarded up to a maximum of $4,000.00. See section 45(1A) and Schedule 1A RTA.

46. As discussed below, (see paragraph 103) the bank was not a part of the tenancy premises. Therefore, in not maintaining the bank the landlord has not breached her obligations under section 45. This claim must therefore be dismissed.

47. The tenants also claim that the landlord has failed to comply with Housing Improvement Regulations 1947 ("the Regulations") which states that a home should be free from damp.

48. The premises have an open plan layout with the kitchen being situated in a corner of the living room. There is no extractor fan or window in the kitchen area. There are windows and bifold doors in the living room. There is a small extractor fan in the bathroom and no windows. There are safety catches in the living room window but not the bedrooms.

49. The tenants say that cooking created significant damp in the premises. They requested an extractor fan in the kitchen, but this was refused by the landlord. Therefore, they purchased and used a painter's fan to use in the kitchen while cooking.

50. The tenants purchased damp collectors which they placed in their cupboards. They showed the landlord how much water was accumulating but did not request further action. They say that Quinovick advised them that it could not be rented out with such a damp issue, but the landlord disagrees with this and it is currently rented out through Quinovick.

51. The tenants say they constantly ran a dehumidifier and wiped down the walls weekly.

52. Their evidence is that the premises constantly smelt damp and mould grew on the curtains and on their clothing in their cupboards. They had to throw out some items of clothing and dry clean others. They say that when they weren't in residence and using the dehumidifier, condensation built up on the walls.

53. In response the landlord says she has owned the premises for a number of years and never had an issue with damp. She says Quinovick advised her that because the premises are only 64sqm she did not need more ventilation in the kitchen. She says she had a Healthy Homes report which said the same.

54. She says that in response to the complaints she asked one of the tenants who is a builder to look at the upstairs extractor fan to see if that was an issue. She says she provided a dehumidifier with the tenancy that she asked always to be run.

55. Her view is that the problems occurred because the tenants did not ventilate. One of the tenants worked from home and so was often inside with the heater on.

56. I am satisfied that there is no breach of the Regulations in terms of the provision of ventilation. Whilst it is intended in the Healthy Homes Guarantee Act 2017 that specific regulations regarding ventilation are to come into force, they have not yet.

57. The question then becomes whether there is a breach of the Regulations which specify the minimum standards of fitness for houses which include a requirement that every house be free from dampness (regulation 15).

Discussion

58. 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.

59. 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.

60. 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.

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

62. 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

63. There was some form of ventilation in each room. The landlord provided a dehumidifier and appropriate heating with the tenancy, she also took steps to investigate the issue when it arose.

64. Having considered the evidence, I am not satisfied that it substantiates the claim that the premises is inherently damp or prone to mould. The premises may well have required particular care with the ventilation but the evidence does not substantiate that there was a maintenance issue which created inherent or extensive damp. I therefore must dismiss the claim.

Did the landlord provide compliant smoke alarms?

65. The tenants claim that the landlord has failed to comply with all requirements in respect of smoke alarms and insulation set out in the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016. This is a breach of section 45(1)(ba) of the RTA and an unlawful act.

66. The tenants' evidence is that at the commencement of the tenancy the alarm was faulty in that it beeped continuously. This was not remedied by their replacement batteries. They advised the landlord who delivered them another alarm and said

she would install it. She did not, and the tenants say it was also faulty. Instead of following up with the landlord the tenants installed their own alarm.

67. I am satisfied that the landlord did provide a replacement smoke alarm when it was requested of her. I also consider that given the opportunity she would have installed it. She was not aware of the second alarm being faulty and therefore did not have an opportunity to remedy it. This claim therefore must be dismissed.

The utilities

68. The tenants claim that the landlord has breached section 45(2) of the RTA by threatening to interfere with the tenant's gas supply.

69. The landlord was attempting to change the gas supply from one meter for both premises to two separate meters during the tenancy. She asked the tenants if they would agree to that and then be responsible for their own gas usage. When they declined she took no further steps, in essence honouring the agreement the tenancy had been based on.

70. Section 45(2) prevents actual interference with the utilities:

    "The landlord shall not interfere with the supply of gas…"

71. There is no evidence that this happened. Therefore, this claim must be dismissed.

Did the landlord breach the tenants' quiet enjoyment?

72. The tenants claim the landlord has breached their quiet enjoyment of the premises and seek $2,000 exemplary damages as a result.

73. A landlord must not interfere with the reasonable peace, comfort or privacy of the tenant in their use of the premises. See section 38(2) RTA. Breaching this obligation in circumstances that amount to harassment is an unlawful act for which exemplary damages may be awarded up to a maximum of $2,000.00. See section 38(3) and Schedule 1A RTA.

74. Harassment means "to trouble, worry or distress" or "to wear out, tire, or exhaust" and "indicates a particular pattern of behaviour directed towards another person". MacDonald v Dodds, CIV-2009-019-001524, DC Hamilton, 26 February 2010.

75. Section 38(1) is a broad statement and codifies the common law standard of a right to have quiet enjoyment of the premises without interruption. However, while s38(2) states that the landlord must not cause any interference, the duty is modified by the degree of interference being to the "reasonable peace, comfort or privacy" of the tenant. It is clear from these sections that temporary discomfort or inconvenience does not constitute a basis for breach of the covenant.

76. Generally, there must be evidence of some ongoing intentional actions directed at a specific person or persons which causes distress. Therefore, a single act of interference with the tenant's quiet enjoyment would generally be unlikely to amount to harassment. The definitions also require the act to be intentional; careless or negligence is not sufficient.

77. The examples the tenants gave of breaches of their quiet enjoyment are:

    (i) The landlord's friend water blasting on 4 June and looking in their windows;

    (ii) The landlord failing to comply with their request on 25 February to only correspond by email;

    (iii) Asking the tenants to do things outside of the realm of their relationship for example, babysitting, caring and feeding for the landlord's cat, collecting the landlord's curtains, watering the landlord's plants, lending her their car and storing an item in their freezer; and

    (iv) Advertising the premises as including some of the tenants' belongings.

    Friend

78. The landlord agrees that a friend of the family's was water blasting on the premises on 4 June. She confirms he is an older gentleman and highly doubts he would have tried to look into the tenant's windows.

79. The evidence provided does not substantiate the claim that this person intentionally looked in the windows.

    Communication

80. On 25 February the tenant sent an email to the landlord stating: "*We would also appreciate if all communication from this point was through email only*". The landlord continued to call or text them.

81. The tenants had valid reasons for this request and were not ceasing communication with the landlord. The landlord should have respected this request.

    Requests

82. Over the course of the tenancy the landlord made a number of requests of the tenants which were outside of the realm of the tenancy. Primarily they were made for practical reasons given the proximity of the two residences.

83. The landlord's evidence is that she thought they had a close relationship that meant that she could ask such things of the tenants. Her perspective was that the tenants could always refuse. She says she always respected their refusals and gave them $500 at Christmas time to thank them for being great tenants.

84. The tenants say they found it hard to refuse, especially during the initial days of the tenancy as they did not know that these types of requests were not the norm in usual tenancy arrangements.

85. The landlord should have been aware of the vulnerable position the tenants were in being young and first-time renters. Some of the requests went over and beyond what would be reasonable to ask, such as the collection of the cat from the SPCA and delivery of it to the airport.

Advertisement

86. I am not satisfied that the inaccurate advertisement was as a result of the landlord's direction. I find that more likely than not this was an error on the agent's behalf and relates to their communication with the landlord. The tenants had consented to photographs showing their belongings being used in the advertisement and this was an unfortunate derivative of that agreement.

Overall findings

87. Having considered all the evidence I am satisfied that the landlord has breached section 38. Asking the tenants for extensive favours is a breach of their quiet enjoyment and a misuse of the power imbalance especially for first time renters. Further, disrespecting a request for specific communication lines in a situation of power imbalance is also a breach of the tenant's privacy.

88. I am satisfied that the landlord was aware of the tenants' lack of knowledge and experience and therefore vulnerability. These acts were therefore breaches of section 38 of the RTA.

89. However, I do not consider the landlord's behaviour to reach the high threshold of harassment. This was not behaviour intended to cause distress to the tenants. It was certainly inappropriate, but not harassment. Therefore, this claim for exemplary damages must be dismissed.

Are the tenants entitled to compensation?

90. The tenants have sought $12,000 compensation for emotional damage suffered as a result of this tenancy and landlord's application. This claim includes:

(a) $60 compensation for medical expenses incurred by one of the tenants;

(b) The equivalent of two weeks rent as they feel they had to vacate the premises earlier than the end of their lease ($1,000) because of the landlord's behaviour.

91. The power to make such an award is afforded to the Tribunal pursuant to section 77(n) and or section 78(1)(h) of the RTA. General damages can be for emotional distress, but the connection must be direct and secure.

92. I am satisfied that the tenants did suffer emotional distress as a result of the landlord's application, and potentially by how the tenancy was conducted in general.

93. It is a well-accepted principle when awarding damages that, so far as money can do it, the injured party shall be put in the same position as they would have been in, but for the breach of the tenancy agreement. Liability exists for foreseeable losses flowing from the breach.

94. 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 common sense 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.

95. Having regard to all relevant factors, I consider that the nature of some parts of the landlord's cross application contributory to the tenants' emotional distress. In saying that, the tenants were the original applicants and the landlord was entitled to make her cross application.

96. Evidence provided establishes that the process has been stressful for all parties. The stress of proceedings in the Tribunal is a sad and unfortunate reality of the process.

97. I find it reasonable to award the $60 the tenant claims for medical costs but dismiss the general and unspecified claims for compensation for emotional harm. The nature of the tenancy arrangement was unusual but not intentionally malicious or nasty.

98. I do not consider that the tenants should be reimbursed for the two weeks rent they incurred when they vacated the premises early. This was their choice and not one they had to make. This was a fixed term tenancy and they still had exclusive possession of the premises during that period and were still protected by the relevant provisions of the RTA.

99. I consider the tenants' applications for costs at the end of this decision.

The landlord's applications

Rent arrears

100. It was agreed at the hearing that the tenants owe the landlord $142.86, being two days, in rent arrears due to a misunderstanding. The amount ordered is agreed.

Did the tenant comply with their obligations during the tenancy?

101. During and at the end of the tenancy the tenant must keep and leave the premises reasonably clean and tidy see section 40(1)(c) RTA. The tenancy agreement also states that "*The grounds to be maintained and kept by the tenant".*

102. The landlord seeks compensation for having to hire a weed eater ($280) and water blaster ($325) in early June 2020. This was during the tenancy. The weed eater was to cut the grass on the bank which runs alongside the stairs to the premises and the water blaster was for the deck off the premises.

103. The bank is Wellington City Council land which runs alongside the stairs the tenants used to access the premises. Although the Council is supposed to maintain the land, they rarely do. There was an agreement between the parties that while the tenants were using the landlord's garage, they would maintain the bank. They did this until May 2020 when they were no longer permitted to use the garage. After this no one maintained the area of land and it became quite overgrown.

104. The costs sought by the landlord relate to her having to hire the weed eater to attend to the bank in June.

105. After hearing the evidence, I am satisfied that the bank is not part of the tenancy premises and therefore not subject to the s40(1)(c) requirement. I find that the parties did have a separate agreement regarding the tenants maintaining it, however that ceased when the agreement ended in May 2020.

106. I must therefore dismiss the claim with respect to the weed eater.

107. I now turn to the claim for the water blaster costs. Tenants are required to maintain a tenancy premises in a reasonably clean and tidy way. Landlords are responsible for maintenance. I consider the water blasting of the deck maintenance, and therefore not a tenant responsibility. The claim for compensation regarding the water blaster is dismissed.

Did the tenants comply with their obligations at the end of the tenancy?

108. Tenants are responsible for the costs incurred in replacing lightbulbs and smoke alarm batteries.

109. The landlord sought reimbursement for light bulbs ($192.42) and a smoke alarm and curtain rod ($193.63) that was missing at the end of the tenancy. The tenants dispute the claims.

110. The landlord says her tradesman was sent in to attend to various items and check the premises at the end of the tenancy. His invoice claims reimbursement

for replacement of a number of light bulbs. This is the basis of her claim as she did not personally see the premises after the tenants had vacated.

111. The new property managers Quinovic advised her that a smoke alarm was missing which is the basis of the second claim.

112. The tenants' evidence in response was a video taken on the last day of the tenancy. It shows all the lights in the premises working, and the smoke alarm and curtain rail in place.

113. I find that the evidence does not establish that any light bulbs or the smoke alarm were missing. These claims are therefore dismissed.

Is the tenant responsible for the damage to the premises?

114. The landlord seeks $50.11 reimbursement for several window latches that were broken and required replacing at the end of the tenancy.

115. A landlord must prove that damage to the premises occurred during the tenancy and is more than fair wear and tear. If this is established, to avoid liability, the tenant must prove they did not carelessly or intentionally cause or permit the damage. Tenants are liable for the actions of people at the premises with their permission. See sections 40(2)(a), 40(4) and 41 RTA.

116. After considering the evidence, I am not satisfied that the damage to the window latches was anything more than fair wear and tear. Therefore, their repair costs are the responsibility of the landlord and this claim is dismissed.

Did the tenants sub-lease the premises?

117. The landlord claims that the tenants have sublet the premises without the landlord's prior written consent. This is in breach of section 44(2A) RTA. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $1,000.00. See section 44(2A)(a) and Schedule 1A RTA.

118. The landlord's view is that the tenants resided in her home (102 Barnard) and sublet the tenancy premises (102A). She bases this on the following:

(i) Advice from her electricity company saying that the usage appears to indicate someone being in her home when she was away;

(ii) Increased consumption of gas during the relevant time;

(iii) Alleged reluctance on the part of the tenants to give back the key and garage door opener;

(iv) A conversation she had with an unknown couple in June who were at the tenancy premises; and

(v) An unusual cat cage seen by a visitor in her home.

119. The landlord seeks compensation of $26,000 being the financial gain the tenants allegedly made from subleasing the tenancy premises. She also seeks $25,000 compensation for the loss of personal items from her home she attributes to the tenants, and various other damage.

120. The tenants deny this allegation and say they never entered the landlord's premises except to do the jobs she requested of them. They gave evidence that established the tenant's sister and partner were staying for a short period which coincides with the timings of the landlord's sightings of unknown people.

121. Having considered the evidence thoroughly, I am not satisfied on the balance of probabilities that the tenants sublet the tenancy premises. The evidence does substantiate this claim and as such it must be dismissed.

Allegations of theft

122. The landlord claims that the tenants have stolen items from and damaged items within 102 Barnard street, her home, and she seeks compensation for her loss.

123. The tenant's counsel submits that events in 102 Barnard St cannot be considered by the Tribunal because as it is not the subject premises, it is outside of the Tribunal's jurisdiction.

124. Section 77 of the RTA defines the Tribunal's jurisdiction as being to determine any dispute that exists between a landlord and a tenant that relates to any tenancy. This is a dispute between the landlord and the tenants, however it does not relate to the tenancy of 102A Barnard street.

125. I therefore accept the submissions of the tenants and dismiss the application. The landlord's relief for these claims lies in other jurisdictions.

Compensation for emotional damages

126. Given my findings as to the claims of sub-letting and theft, there is no basis for me to consider the landlord's claims for compensation for emotional damage.

Should costs be awarded?

127. The general position is that costs are not awarded in the Tribunal. However where the proceedings are frivolous, vexatious or ought not to have been brought, or where parties are represented by counsel the Tribunal may award a party *"the*

reasonable costs of that other party in connection with the proceedings" (section 102 RTA).

128. The tenants' counsel filed extensive submissions as to why costs should be awarded to them. In particular:

(i) That the landlord's applications were frivolous and vexatious;

(ii) That some of the landlord's applications were not supported by evidence;

(iii) The delay the matter saw as a result of the late filing of the landlord's applications and the two applications for adjournment that the landlord sought which were granted; and

(iv) That the tenants were "forced" to instruct Counsel due to the nature of the landlord's accusations of criminal behaviour.

129. The tenants' actual legal costs amounted to in excess of $5,766.10 and they seek a reasonable contribution to those.

Discussion and findings

130. It is an exceptional case where solicitor client costs are awarded. They will only be awarded due to "special reasons", which could be a range of circumstances, including misconduct by a party's counsel or where a defended claim was brought frivolously or was vexatious.

131. The reasoning for this position is that the RTA is intended to provide a simple, inexpensive procedure for the resolution of disputes between tenants and landlords. The inclusion of counsel is limited to certain circumstances because of this. The Tribunal is intended to be accessible by all.

132. The RTA is silent as to the parameters of the Tribunal's discretion in awarding costs. Guidance may therefore be obtained from the rules of Court. The general principle in the District and High Court is that the unsuccessful party should make a reasonable contribution towards the successful parties' costs.

133. I note that I do not accept the landlord's late filing of her cross application or her applications for adjournments acts intended to prolong proceedings. The Tribunal is a "people's court" and these types of events are not unusual.

134. I do not consider all parts of the landlord's applications unwarranted, nor any of them frivolous or vexatious. She did have a genuine belief in her claims and some evidential basis. The applications however made by the landlord with respect to theft from her home did not come under the jurisdiction of the RTA, made criminal allegations and substantially increased the value and emotional impact of the claims. I find that these applications and those of sub-letting did increase the stakes for the tenants in these proceedings substantially. As such their instruction of counsel was unsurprising.

135. The amounts involved in the landlord's claim were large; in excess of $50,000 in compensation as well as unspecific amounts for exemplary damages. The claims exceeded the then jurisdictional amount of the Tribunal.

136. Given the above and that the tenants were young and intimidated by the cross application, it was appropriate that they were represented by counsel. I am satisfied that because the landlord was not successful in the majority of her substantive applications against the tenants, this is a situation where I can consider legal costs.

137. The RTA does not include a schedule as to costs, as such the Tribunal relies on common law case authorities that outline the principles in such awards. A party seeking costs based on actual costs must establish that the costs incurred are reasonable rather than excessive.

138. The Courts have awarded a reasonable contribution to costs based on a "shopping list" of factors, i.e. length of the hearing, amount involved, importance of the issues, complexity, urgency, preparation time, any unnecessary steps, arguments lacking substance, technical points taken in defence, degree of success and conduct of the parties – see *Holden v Architectural Finishes Lt*d [1997] 3 NZLR 143 at 148-149 ("Holden").

139. General cost principles are also set out in the leading text of Grinlinton, Residential Tenancies (4th edn, 2012), paragraph 8.3.5:

> *"The Tribunal may also order a party to pay the reasonable costs of any other party to the proceedings …What is considered "reasonable contribution" to a successful party's costs will depend on many factors, but there is authority that a figure of 60 per cent is regarded as the average, with most awards falling within the range of 40–70 per cent of actual costs (Holden v Architectural Finishes Ltd at 149–150). "*

140. I now consider the factors set out in Holden, my comments are in parentheses:

(i) Length of hearing: 1.5 days;

(ii) Sum of money involved: The result of the decision potentially gave rise to a substantial amount of money being at risk for the young tenants;

(iii) Importance of issues: The issues were very important to both parties, and involved a potentially significant amount of money and flow on legal consequences for the tenants;

(iv) Legal and factual complexity: there were significant discrepancies in the facts and a considerable number of legal issues to be resolved by both applications;

(v) Whether arguments lacking substance were advanced: There were arguments made by the landlord that could not be considered for jurisdictional

issues however the landlord did have some evidential foundation for all claims; and

(vi) Degree of success achieved by the parties: The landlord was not successful in the majority of her applications.

141. Having consider the above I find it reasonable for the landlord to make a contribution of $1,000 to the tenants' legal costs.

Filing fee

142. As both parties have been partially successful in their applications it is not appropriate to award reimbursement of the filing fee to either party; those costs should lie where they fall

K Lash
30 March 2021

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.