[2021] NZTT New Plymouth 4302464

TENANCY TRIBUNAL AT New Plymouth

APPLICANT: Lois Esta Steele

Tenant

RESPONDENT: Craig O'Sullivan

Landlord

TENANCY ADDRESS: 4A Maui Place, Spotswood, New Plymouth 4310

ORDER

1. The Tribunal declines to order name suppression.
2. Craig O'Sullivan must pay Lois Esta Steele $600.00 immediately, calculated as shown in table below:

Description	**Tenant**
Compensation for missing gutter	$100.00
Exemplary damages: Failure to provide underfloor insulation	$500.00
Total award	**$600.00**
Total payable by Landlord to Tenant	**$600.00**

Reasons:

1. The Tribunal must consider an application filed by the tenant against the landlord. At the time of the hearing, the tenants claim was advanced on the basis that she seeks compensation and exemplary damages around the standard and maintenance of the premises, and also for unlawful entry of the landlord into the dwelling.

Background

2. The tenancy agreement provided by the tenant is dated 20 February 2017, but does not record the tenancy commencement date. However the tenancy ended on 17 May 2021 following a notice to terminate issued by the landlord.

3. The tenancy agreement records the landlord as Craig O'Sullivan, and the tenant as Lois Campbell.

4. In August 2020 the landlord appointed Ms Grant (the landlord's partner) to be the property manager for the property. The Tribunal has been provided a copy of the notification sent to the tenant confirming that appointment.

5. I will set out the specific claims more fully below, but what is clear, is that there is considerable disagreement between the parties about what happened over the course of the tenancy. At the hearing, the parties did not agree on very much. The tenant has described what would amount to significant problems with the tenancy since she moved in, but there is no written record of this. The tenant has described raising problems with the landlord over the tenancy, but otherwise the tenant has not given any written notices to the landlord to remedy the situation. The claims before the Tribunal were filed after the tenant has left the premises.

Relevant legal considerations

6. The Tenancy Tribunal applies the usual civil law expectations around the onus for establishing the claim, and the standard to which the claim must be proven.

7. Importantly, the onus sits with the applicant (Ms Steele) to establish her claim. It is Ms Steele that must provide sufficient evidence to establish her claim, if the tenant does not establish her claim to the required standard, then it will be dismissed.

8. The standard to which the tenant must establish her claim, is to the balance of probability. The balance of probability, means that what is claimed is more likely than not to have occurred. To put that into a mathematical context, the claim needs to be established fractionally over 50% likelihood. Anything less, means that the claim has not been established, and therefore it must be dismissed.

Claims before the Tribunal

9. As indicated above, at the hearing the tenant advanced her claims in relation to compensation, and exemplary damages, and also unlawful entry. I will consider the specific claims in turn.

Compensation

Wiring and meter box

10. The tenant states that the electrical meter box was exposed without a cover. The tenant states that she needed to run extension cords because not all of the plugs in the dwelling would work.

11. The landlord agrees the meter box was exposed, but states it was around head level for an adult. The landlord states that the tenant or someone on the premises had altered the wiring in the premises. A photograph was presented showing wiring from under the house in a basement area, where electrical cable has been run to three plugs, labelled “light”. The landlord states this wiring was added during the tenancy. This wiring is not close to a tradesman like standard. The landlord also provided photographs with what appears to be plant material. The plant material is in the same location as the additional wiring, and it is the landlord’s position that the tenant had installed that wiring to supply lighting for whatever was being cultivated in the basement.

12. The landlord states that he has been undertaking renovations in the premises and found that the power is working from the plugs in the rooms, so he does not agree that there are plugs that are not operational. However to the extent that any problems have arisen, the landlord considers that account must be taken for the changes to the wiring that the tenant, or somebody on the premises with her knowledge, has undertaken.

13. The tenant disputes knowing anything about this wiring or plant material, and questioned if it was in fact the landlord who did the rewiring, and is responsible for the plant material in the tenancy basement.

Analysis

14. I find this claim has not been established. The tenant has not provided any evidence to support that the meter box does not meet any required electrical standard, nor that there were defects with the wiring that the landlord would be responsible for. For example the tenant has not provided any evidence from a qualified electrician confirming a breach as it relates to the meter box, or that there were faulty power points. As set out above the onus is on the tenant to establish her claim, and I find she has not done so. This claim is dismissed.

Heating

15. The tenant states there was no heating in the premises. While there was a gas heater in the lounge, the tenant says it did not work.

16. The landlord confirmed there is a free-standing gas heater in the lounge, but states that the reason the heater does not work, is because the tenant had cut the gas off. The landlord provided a photograph showing a portable gas cylinder (a small barbeque type cylinder) attached directly to the external water heater, that the landlord states was connected by the tenant, and not meeting the necessary gas fitting requirements.

17. In response the tenant states that the gas was cut off because the level of the gas charges were so high, but that was around one year before she moved out. The tenant confirmed that she did not provide a written notice to the landlord about the gas heater, but would tell the landlord verbally when she would see him.

Analysis

18. This again, is a 'he said – she said' situation. The tenant states that the gas heater was not working, the landlord disputes that is the case, maintaining that it was operational. Of course if the gas is disconnected, the gas heater would not work, but the tenant states that it was not working before the gas was cut off.

19. Neither party has provided evidence from an independent person supporting whether or not the gas heater was operational, and when I step back and consider the evidence, I have no reason to prefer the statement from the tenant, above the statement from the landlord. That being the case, I must conclude that the tenant has not proven to the balance of probabilities, that the gas heater was not working. This claim must be dismissed.

Stove

20. The tenant states that during the course of the tenancy, the stove did not work. The tenant states that she raised this with the landlord who said it worked prior to the tenancy so he would not address it. The tenant states this was a gas cooker, and it never worked during the tenancy, and therefore a portable stove was purchased, to cook from.

21. The landlord states that the gas cooker was installed brand new some three years ago, and that the reason it would not work is because the front of the stove was kicked in.

22. The tenant advised in response that she disputes the glass was kicked in, but states about three months before she moved out her housemate reported to her that the glass was broken when the 'kids slammed it'.

Analysis

23. Again this is a claim where the tenant says that the stove did not work, but the landlord disputes that is the case, to the extent that the landlord has provided an explanation for why the stove was not operational, which is because it had been damaged either carelessly or intentionally.

24. Like the gas heater, the gas cooker will not work without a gas supply. While the tenant appears to have connected a gas cylinder to the hot water heater, there is no evidence before the Tribunal that there was any gas supply to the cooker.

25. Similarly, I have been unable to find any reason to prefer the tenant's version of events, above that of the landlords. I find that the tenant has not established this claim, which has dismissed.

Gutters

26. The tenant states that the gutters around the house was 'shot', and when it rained the water would leak through the gutters. The tenant provided photographs which show that for some of the roof, there were gutters missing.

27. The landlord agrees that the gutters were not in good condition, and missing in places.

Analysis

28. There is no dispute between the parties as to the inadequate state of the gutter system.

29. The Residential Tenancies Act 1986 (RTA) confirms that the obligation for maintenance sits with the landlord. In my view, missing guttering is plainly a maintenance issue for the landlord, and the landlord should have addressed the repair in a reasonably expeditious way. Ultimately the tenant was paying rent for the premises, and was not getting what she was paying for – that is, a properly maintained dwelling. To that extent, the landlord has breached his obligation to the tenant.

30. It would be reasonable to order compensation to be paid, in effect to compensate the tenant for not getting the maintained property she was entitled to have. It is always difficult in claims like this to determine what the appropriate level of compensation should be, because it is difficult to quantify what the precise loss to the tenant is. However I consider a nominal order should be made, to take account of the rent payments that were made, to include maintenance. I set the nominal order at $100 compensation.

Holes in bathroom floor

31. The tenant states there were holes in the bathroom floor.

32. The landlord states that the hole in the floor is from previous plumbing, but he had understood the hole had been plugged.

33. Photographs have been provided which show the hole in the bathroom floor, which I accept would be entirely consistent with a penetration from old plumbing.

Analysis

34. I accept that there is a hole in the bathroom floor, and as indicated above, would likely be from old plumbing, from a previous bathroom handbasin or similar.

35. The size of the hole is not trifling. If the application was assessed under the Healthy Homes Standards (HHS), then there would likely be a breach of the draught standard. However the HHS does not apply in this case, given the tenancy started in 2017.

36. Overall however, I declined to award compensation for this hole. While any hole should have been plugged, I am not persuaded that a material loss would have been occasioned to the tenant.

Hole in the lounge floor

37. The tenant states there was a hole in the lounge floor, and that there would be a breeze through that hole. The tenant did not have photographs to support this claim. The tenant states the hole was by the fireplace, and another in a different location, but the size of large coins.

38. The landlord states he does not know of any holes around the lounge.

Analysis

39. There is a dispute between the parties as to the existence of a hole in the lounge floor. I have considered the photographs that have been presented, and while there are pictures of the lounge, I have not been able to see in the hole in the floor. In short, the tenant has not established that there is a hole in the first instance, which could be the basis for any claim. This application must be dismissed.

Mould

40. The tenant states there was mould throughout the house, particularly noting mould in her bedroom. The tenant states that since she has not been living in the house her health has been better. The tenant provided photographs showing some areas on the ceiling that she states is mould.

41. The landlord states that he was not aware of any black mould. The landlord provided photographs taken when the premises were returned, and states they did not show mould.

42. The tenant responded by saying that the reason the photographs did not show mould, was because she had cleaned the premises before vacating the tenancy.

Analysis

43. Of itself, having mould in residential premises is not particularly unusual. All residential dwellings have mould to some degree, when the mould is of a limited extent, it is normally the responsibility of the tenant to address, given that the tenant is responsible for keeping the premises reasonably clean during the tenancy. However if there was some material deficiency with the dwelling itself, that caused mould to arise, then there may be a liability for the landlord.

44. In this case however, I am not persuaded that there are significant amounts of mould in the premises that would suggest a problem with the structure of the dwelling at self. Furthermore the tenant has not identified what the problem would be, that has caused mould to develop in the first instance. I accept there is a problem with the gutter, but that would not of itself cause a build-up of moisture inside the dwelling. This claim has not been established, and must be dismissed.

Deck

45. The tenant states that the deck at the back of the premises was dangerous, with the steps to the deck broken

46. The landlord states that the deck was close to the ground, that you would just step directly on and off the deck so no extra step was needed. The landlord states that the steps shown in the photographs were made by the tenant.

47. The tenant states that the steps were there over the duration of the tenancy, and she disputes that she put the steps in. The tenant states that the deck was too high to just step off.

48. The landlord disputes that he put the step in.

Analysis

49. In order to establish this claim, I would need to find that there was a requirement on the landlord to have a step off the deck. The photographs that have been provided show that the deck is close to the ground, and it is conceivable that when the premises were consented, that no step was required. I have not been provided any confirmation from the council, or a builder for example, showing that a step was needed to comply with some legal obligation.

50. On balance, I accept that the step was not put in by the landlord, and I cannot see that the landlord would be liable for the maintenance of the temporary steps that have been installed.

51. This claim has not been established, and is dismissed.

Windows

52. The tenant states that the windows were in poor condition, and that the rivets were “gone”. Because that the windows would not close, and could not be latched. The tenant provided photographs showing ply over the window that her nephew had installed for her to keep out the draught and cold.

53. The landlord states in reply that the reason the windows were boarded up by the tenant, was because the glass was missing, as opposed to being an issue with the frames.

54. In response the tenant states that it was in fact the wind that blew out the window and frame because of the corroded nature of the window.

Analysis

55. There is no doubt that if the windows were not closing, that would be a maintenance obligation for the landlord. However that is not necessarily the case with broken window glass. Tenants are responsible for careless or intentional damage sustained to the tenancy, which could include the breaking of windows.

56. What remains, is that the tenant states that the structure of the windows was in very poor condition, which has gone onto cause the windows to not close properly, and also for windows to fall out. But the landlord disputes there were material problems with the windows, and considers that the windows have been broken by way of careless or intentional damage on the part of the tenant.

57. I have no reason to prefer one party over the other. No evidence has been provided from a suitably qualified person sitting out an assessment of the

windows. It could be that the windows were in need of maintenance, or it could also be that the windows have been damaged carelessly or intentionally. Again the onus sits with the tenants to prove the claim, and I find she has not done so. This claim must be dismissed.

Exemplary damages

Insulation

58. The tenant says there was no insulation in the premises. However during the course of the hearing, the tenant accepted that she could not be certain whether there was insulation in the ceiling one way or the other.

59. The landlord accepts there was no underfloor insulation, but states the ceiling was insulated. I note that the photographs provided by the landlord, which were taken under the house (showing the wired in plugs mentioned above), do not show any underfloor insulation.

Analysis

60. Section 45(1) of the Residential Tenancies Act 1986 (RTA) sets out the landlord's responsibilities, and section 45(1)(c) requires that the landlord comply with all obligations that relate to buildings, health and safety for the premises. That obligation includes the legal obligations around insulation of the premises. The Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016 (the Regulations) apply. The Regulations require ceiling and underfloor insulation.

61. From 1 July 2019, all residential premises must be insulated to a minimum standard.

62. Failing to comply with section 45(1) is deemed in the RTA to be an unlawful act.

63. The regulations include some exceptions. Premises do not have to be insulated, if an experienced professional installer of insulation cannot access the location to install the installation without carrying out substantial building work, or causing substantial damage to the premises, or if it presented a health and safety risk to install the installation (Regulation 18). However there is no evidence before me to support this exception applying. I find as a matter of fact that the landlord has breached his obligation as it relates to underfloor insulation.

64. The question then becomes, whether exemplary damages should be awarded.

65. Exemplary damages are designed to punish and to deter. They are like a fine. In *Auckland City Council v Blundell* [1986] NZLR 732 the Court of Appeal (Cooke P) said:

> Exemplary and punitive [damages] are different words for the same thing. The damages are exemplary because they are meant to teach an example to the guilty officer and others. They are punitive because they are meant to punish. They are like a fine, though they go to the citizen who has been the victim of conduct.

66. Exemplary damages are awarded at the Tribunal's discretion when one party has proved that the other party has committed a defined unlawful act. If that is proven, and before the Tribunal may award exemplary damages, it must take account of the factors set out in section 109 RTA.

67. Section 109 of the RTA 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.
    b. The effect of the unlawful act.
    c. The interests of the landlord or tenant against whom the unlawful act was committed.
    d. The public interest; and
    e. Whether it is just to make the award.

68. The maximum levels of exemplary damages are set out in Schedule 1A of the Act. The maximum level of exemplary damages available under the RTA, over the majority of the tenancy, until the RTA was amended in February 2021, was $4,000. Following February 2021, the maximum level of exemplary damages increased to $7,200. However taking into account that only a small proportion of the tenancy extended beyond February 2021, I consider the maximum level that should apply, is the level that applied for the significant proportion of the tenancy – that is $4,000.

69. Taking into account the section 109 considerations, in my assessment the breaches must be accepted to be intentional actions on the part of the landlord. In *TMT New Zealand Limited v Sweeney and Sundahl* [2021] NZDC 16182, the District Court considered the question of what an intentional act for the purposes of exemplary damages under the RTA meant, and confirmed that:

> Like all citizens, corporate or otherwise, he and his company are deemed to know the law and on that basis a failure to provide these fundamental documents as properly seen as intentional. Parliaments intention would be subverted if landlords were able to escape consequences for the unlawful acts involved by claiming ignorance of the law.

70. When the government introduced the installation requirement into Tenancy properties, that requirement was well advertised, and prominent in the media. I

am not persuaded that the landlord did not know that there was an expectation in relation to installation. Overall I consider that the decision to rent the property with in an uninsulated floor, was likely to be an intentional decision, and intentional act.

71. I further consider that there was an effect for the tenant, in that the premises were not as warm as they could have been. The tenant has raised the premises being cold in the hearing. The reason why insulation is required in residential tenancies, is to ensure they remain warm and healthy environments, in the absence of insulation defeats achieving that purpose.

72. There is a strong interest for the tenant in this case, and the public generally to have warm and healthy homes.

73. On balance, I consider it would be just to make an order for the payment of exemplary damages. Taking into account the reasonably modest level of rent paid for the premises, and also that the only evidence of an insulated areas of the premises are the underfloor area, I consider an award of $500 exemplary damages would be a reasonable award in the circumstances.

Unlawful entry

74. The tenant states that the landlord would come around the premises ‘a lot’ particularly to collect the rent. The tenant states that the landlord would come into the house without knocking, and states that it caused her anxiety. The tenant states that the landlord would bring alcohol to the premises to consume, and would smoke, causing her to be ‘uncomfortable’. The tenant also described other activities that the landlord would undertake, when inside the dwelling.

75. In response the landlord states that he would always text or call before going around, and it would be to collect rent. The landlord states that if he did go around he would always knock first before he would enter the premises. If the tenant did not respond to the knock on the door he would call out, and the tenant would normally be in her room and call back. The landlord strongly disputed the tenants claims around what the landlord will do inside the tenant’s house. Mr O’Sullivan advised that since August 2020 the property has been managed by his partner Ms Grant. The landlord provided a copy of the confirmation from 10 August 2020 that Ms Grant was to be the property manager for the premises from that time.

76. At the hearing, I asked the landlord if he could show me the text messages, advising he was to attend the premises, but the landlord and Ms Grant advised that they had replaced the phone from which the text messages were sent, and they were not available on the new phone at the hearing.

77. The tenant states that she would receive text messages from the landlord in the evenings at time stating that he would be ‘coming around’, but advised she has deleted those messages.

78. The tenant also referred to two emails sent to her from people advising they had been at the premises, when the landlord had entered.

Analysis

79. This is a further claim where the evidence from the tenant and landlord, could not be more different. If the tenant’s evidence was correct, then the landlord has unlawfully entered the premises, because the landlord cannot enter residential premises unless notice is first provided of the intended entry, or it is with the tenant’s consent. However if the landlords version of events was correct, then the entry to the premises was with the consent of the tenant, and that would be entirely within the RTA. The landlord also disputes that he acted improperly when inside the tenancy.

80. What does distinguish this claim, is that the tenant has provided two emails, from people who state they have witnessed the landlord coming to the premises. I have considered those emails, but I am not persuaded they tip the balance in favour of support for the claim.

81. The allegations presented by the tenant are serious allegations. I consider that limited weight can be placed on emails. If weight is to be given to witness evidence, then the witness should attend the hearing to give their evidence in person, and be available for cross examination from the other party.

82. It is normally the situation that where there are serious allegations, or important matters at stake, then a decision maker will wish to see a level of supporting evidence befitting the significance of the matters to be adjudicated. This is not to say that the party needs to establish their claim at any level greater than the balance of probabilities – they do not.

83. I note the New Zealand Court of Appeal judgment in *T v M* [1984] 2 NZFLR 462, in which the principal Judgment was delivered by the then president of the Court of Appeal, Justice Woodhouse, in which his Honour stated:

> For myself I would say at once that the provision for questions of fact to be "decided on a balance of probabilities" when that is considered merely in terms of the required standard of proof is the definition of a constant. There are no gradations, whatever might happen to be the subject matter. What is required is an affirmative demonstration that the relevant and suggested inference is more probable than not. Nothing less than this will be sufficient. At the same time no more is

> necessary. But having said that it is not only usual but in any evidential context it is logically right for conclusions in the area of inference and judgment to be influenced both by the purpose to which they are directed and the significance of the assessment being made. Just as there are shades of possibility so the point at which there is satisfaction as to probability will vary depending upon the subject matter. Whether the occurrence under review will seem to be something that is probable or possible or even unlikely is bound to be affected in this way; and as a natural process of thought it has been widely accepted and acted upon throughout the common law world when attempts have been made to explain the civil onus of proof.

84. His Honour then went on to discuss other decisions of the courts, and that:

> In my view those various observations are all aimed at explaining the simple need to be careful in estimating whether or not the inference to be drawn is in truth probable rather than merely possible**. It is the principle of good common sense that the more serious the issue the greater should be the care used in assessing it**. No doubt, as Lord Scarman said in the Khawaja case, the decision in the end is "largely a matter of words". I would simply add that the exercise of that kind of caution or care must not be taken to such a stage that the level of satisfaction required by a Judge on some particular occasion really amounts to introducing a new and more stringent standard of proof than the balance of probabilities actually requires.
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> [Tribunals emphasis]

85. This approach was further confirmed in the more recent judgment of the New Zealand Court of Appeal in *AMI Insurance Limited v Devcich and others* [2011] NZCA 266, in which Justices Glazebrook, Allan and Simon France confirmed:

> It is well established that there is no intermediate standard of proof between the criminal and civil standards: see the unanimous decision to that effect of the Supreme Court in [Z v Dental Complaints Assessment Committee [2008] NZSC 55]. That is not to say that the Court may not have regard to the seriousness of the allegations in a given case in applying the ordinary civil standard of proof. That was made clear in Z v Dental Complaints by McGrath J, writing also for Blanchard and Tipping JJ:
>
> > [102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the **civil standard is flexibly applied because it accommodates serious allegations through the natural**

tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[Tribunals emphasis]

86. This claim is very finely balanced, and while I do have some concerns in relation to the situation, I have been unable to conclude, that to the balance of probability, the landlord has unlawfully entered the premises, as alleged. This claim has not been established therefore.

Name suppression

87. The tenant has applied for name suppression. Name suppression can be ordered under section 95A to any party who has been wholly or substantially successful in the hearing, on their application. The tenant has applied for name suppression. However I do not consider the tenant has been wholly or substantially successful in her application, therefore suppression cannot be ordered.

R Woodhouse
24 November 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.