TENANCY TRIBUNAL - [Event location suppressed]

APPLICANT / RESPONDENT:	Si (Judy) Gao, Sabina Jeyasingham Tenants
APPLICANT / RESPONDENT:	[The respondent/s] Landlord
TENANCY ADDRESS:	44B Bay Road, St Heliers, Auckland 1071

ORDER

1. The Tribunal orders that the name of the landlord (both the owner and property manager), and their identifying details, are suppressed. No suppression orders apply in relation to the details for the tenants.

2. The Tribunal declares that the maximum number of occupants that may ordinarily reside in the premises are two. The tenants are ordered to reduce the number of ordinary residents in the premises to two, no later than by 28 April 2022.

3. Sabina Jeyasingham (Sabby Jey) and Si (Judy) Gao to pay [The property management company] as agent for [The landlord/s], the sum of $1,780.44 immediately, calculated as follows:

Exemplary damages for a breach of section 40(3)	$400.00
Rent arrears as of 20 April 2022	$1,360.00
Filing fee	$20.44
Total payable by the tenants to the landlord	**$1,780.44**

4. The landlord's application for a termination on the basis of overcrowding (a breach of section 40(3)) is adjourned. The landlord may apply for a continuance of the hearing after 28 April 2022, if the tenants have not reduced the number of people ordinarily residing in the premises by that date. If an application is made, the Tribunal will then consider whether to grant the application for termination of the tenancy.

5. Any application for costs must be filed with the Tribunal no later than 20 May 2022. If an application is made, further directions will be provided at that time.

6. All of the tenant's claims are dismissed.

REASONS

1. The Tribunal must consider applications filed by both the landlord and tenant. Each party has filed a number of claims against the other, and those will be set out below. However the tenancy is a continuing tenancy, although the landlord had applied for a termination order.

2. To provide context to the dispute, the premises is a superior quality dwelling, reflective of the weekly rental of $1,750.00. The premises have five bedrooms, but when the tenants applied to rent the premises, they applied on the basis that two people would be living there. The tenancy agreement entered into between the parties limited the tenants to having two occupants in the tenancy only. Over the course of time the tenants have had three other occupants move in, which the landlord considers a breach of the agreement.

3. Having heard from the parties, there is another factor that is relevant, and would seem the genesis of various other disputes. The tenants confirmed in their application they would be working from home. Ms Jey works as a social media influencer, and Ms Gao in couture that is produced on the premises. It is clear that this has presented various expectations that the tenants wanted to get out of the premises, which are not necessarily in concert with what a landlord of residential premises would provide. As an example, Ms Jey advised she would use the premises for product promotions as part of her business, or filming television shows. To that extent what she needed was premises that are effectively of a showroom standard – that is not the standard a landlord would be expected to provide the premises at either at the start of the tenancy or as an ongoing basis[1]. Ms Gao required large spaces for dressmaking, and I understand would use the double garage for that purpose, and also was using other rooms for her business.[2] But again the parties contracted for residential premises, not a commercial workspace. In any event it is plain the differing expectations around the premises between the tenants and landlord, has caused conflict between the parties.

BACKGROUND

4. Based on the photographs and evidence available, I have no reservation in saying that the tenancy in this case would be in the very superior quality category.

5. I understand that the premises had been empty for a period of time over the COVID restrictions, but ultimately the premises were marketed for a rental. The landlord provided invoices confirming a ranges of trades going into the premises before the tenancy commenced, addressing various requirements.

[1] The parties could have negotiated a clause in the tenancy agreement requiring that standard, but they did not do so in this case.
[2] A social media post provided by the landlord records that Ms Gao “has 3 working spaces” in the premises.

6. On 30 December 2021 an application for the tenancy was submitted by Sabby Jey and Jessica Nutley.[3] The application records "2 adults" which I take to mean that there were to be two people living in the premises.

7. On 31 December 2021 the property manager [The property manager/s] (who for brevity in this decision I will refer to as the Landlord) forwarded the draft tenancy agreement to the tenants, and noting in an email:

> Maximum occupants I have put 2 which is fine

8. Ms Jey responded:

> Under property it says the maximum occupants are 2 people, does this matter?

9. The parties entered into a written tenancy agreement on 11 January 2022[4]. As far as this dispute is concerned, the key terms of the agreement were:

    a. The landlord is [The landlord/s], by way of his agent [The Property management company].

    b. The premises is located at 44b Bay Road, Saint Heliers, Auckland.

    c. The two co-tenants are Sabby Jey[5] and Si (Judy) Gao.

    d. The tenancy is a fixed term tenancy running between 15 January 2022, and 15 April 2023.

    e. The rental for the premises is $1,750.00 per week.

    f. The lawns and gardens were the tenant's responsibility, but the trees the landlord's responsibility.

    g. Power, water, internet, and gas "is the responsibility of the tenant".

    h. The "maximum occupants: 2 adults and 0 children".

    i. "Carpark(s) available: 2"

    j. The landlord was responsible for the day-to-day maintenance of the swimming pool.

10. On 13 January 2022 the landlord attended the premises for a pre-tenancy inspection. The landlord reports taking over 1,000 photographs, some of which have been provided for the hearing.

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[3] Ultimately the Ms Gao elected to work from the premises but not live there. Ms Nutley did move in but as a flatmate. There is no reason in law a person cannot enter into a residential tenancy agreement, but not reside in those premises, as would be the case for Ms Gao.
[4] I note that [The property manager/s] evidence was that the tenancy agreement was signed on 1 January 2022. I am not certain why the date on the written agreement on file is 11 January, but nothing will turn on that.
[5] I understand Ms Jey's full name to be Sabina Jeyasingham.

11. On 14 January 2022 Ms Jey contacted the landlord, requesting that the pool be cleaned as she intended to use the pool to film a scene for a television show.

12. The landlord arranged a cleaner to attend the premises. The landlord's evidence is that the cleaner was requested to address any area of the premises that the tenants were dissatisfied with.

13. On 16 January 2022 the tenants contacted the landlords dissatisfied with a number of areas in the tenancy, including the pool, rubbish and cobwebs on the premises, carpet rolls having been left on the premises, the gas not working, ants in the premises, the fibre 'box' being missing. The tenants sought compensation from the landlord, and that if the landlord did not agree:

> …I will be filing for the Tribunal next week, I will also be sharing to my 60k followers, majority of whom are form New Zealand, and I will be discussing how we are being exploited by our landlords via our social media platform, naming [The property management company/s], and will further contact the media to cover this story once we go to the Tribunal.

14. On 16 January 2022 the landlord responded:

    a. The pool had been cleaned and treated professionally on 12 January 2022, and the cleaner requested to scrub the pool walls. But given this was not to the tenant's satisfaction, the landlord was arranging [Pool company] to return to undertake further work.

    b. The cleaner had been to the premises and had instructions to clean to the tenants satisfaction.

    c. The gas issues had been sorted out, but it had been the landlords understating the gas was with Vector.[6]

    d. At the time of the inspection the landlord could not see any ants at the premises, but that Ms Gao had advised she had seen 'one or two' but after that had not seen any.

    e. If there is an issue with the internet, then the tenants should raise that with their internet provider.

    f. By way of compensation

> As per your agreement the tenancy started on the 15/01/21, however we understand things did go [sic] as per plan and as a goodwill gesture, we are happy to give you one week's free rent which means to say that the for the [sic] period 15/01/22 – 22/01/22 no rent will be charged.
>
> Let us know if you are happy with this and I can get this organised.

    I note that the rent ledger confirms that one week of rental has been credited to the tenants.

[6] That as it turned out was a misunderstanding, as the premises were supplied by gas bottles.

15. An invoice is on file from [Plumber 1] recording an attendance on 17 January 2022, and that:

    a. The gas problem was likely to be the result of an empty gas bottle and the system being disconnected because of that. New gas bottles were needed.

    b. The pool plumbing problems were the result of clogging from leaves and grime.

    c. [Plumber 1] brushed around the pool as "walls of pool as there was a lot of brown staining and tenant complaining".

16. On 21 January 2022 the tenants emailed the landlord complaining of the condition of the oven, advising that she would call her cleaner in to clean the oven and stating that the cost would be deducted from the rent payments.

17. On 24 January 2022 the tenants emailed the landlord advising the following work was needed:

    a. Cleaning of the pool, which the tenants could arrange and deduct from the rent.

    b. Exterior cleaning.

    c. Ant treatment.

    d. Resolution of parking dispute with the neighbours.

    e. Plumbing to the downstairs shower (albeit not stating what the issue was).

    f. Repair of the air conditioning unit.

    g. Cleaning of the oven.

18. Ms Jey advised that:

> I would have never taken this property if I knew the lack to attention [sic] and issues that come along with it. I have cried on multiple occasions and been so stressed out dealing with you and this property.

19. The landlord responded that same day advising that:

    a. The plumber would attend to check the downstairs bathroom, recheck the pool, and check the gas cooktop.

    b. Arrangements were made for the pool contractor ([Pool company]) to attend to the pool every two weeks.

    c. Arrangements would be made to address the air conditioning.

20. On 25 January 2022 the tenants emailed the landlord complaining that the windows were "pretty bad too so we have gotten someone in and will send you the invoice for it along with pictures, there is lots of fly poo and dead insects." The tenants sent an invoice for the cleaning work to the landlords to the sum of $110.00.

21. Also on 25 January 2022, [Pest control] attended for a one-off ant treatment.

22. On 28 January 2022 [Plumber 2] attended reporting that they had found the gas hob not working as there was no power running to the cook top. The plumber addressed this by changing the power supply to another live socket. That same day the plumber recorded attending to a blocked shower waste, from which it was found that the waste was blocked. The plumber also records checking for water leaks, given a complaint about water usage, from which the plumber could not find any leakage.

23. On 28 January 2022 the landlord emailed the tenant disputing their assertions:

    a. As it relates to cleaning, the landlord had arranged a cleaner to come into the premises to do any cleaning required, and that was completed to the satisfaction of the tenants on 15 January 2022.

    b. As it relates to the oven, the landlord's photo at the start of the tenancy showed the oven to be clean, and the photographs from the tenant were taken after the tenants had been using the oven.

    c. As it relates to the parking at the premises, the landlord advised that the premises were advertised with a double internal garage "and no other parking space was promised or advertised". The landlord notes that there was a shared driveway, and therefore it could not be obstructed. The landlord also noted a complaint being received from the neighbour around the tenants parking, which resulted in a heated argument with the neighbour.

24. The landlord also advised:

    a. [Redacted] would be taking over the pool maintenance.

    b. A contractor has advised the heat pump was working fine.

    c. The downstairs toilet has been fixed.

    d. Pest control had attended for the ants, and a report from that provided [to the extent the contractor could not find evidence of any ant issue].

25. On 1 February 2022 [albeit recording 2021], the tenant sent a notice to remedy requiring the landlord to proceed with pool maintenance, and to complete that by 2 March 2022.

26. On 1 February 2022 the landlord raised an invoice for the tenants for $357.00, being the cost for the pest control attendance for the ants. This was charged on the basis that the tenants had requested pest control when there was no underlying issue.

27. On 1 February 2022 the landlord sent a 14 day notice to remedy rent arrears of $1,000.00.

28. On 1 February 2022 the landlord sent an invoice to the tenant for the cleaning of the oven.

29. Also, on 1 February 2022 the landlord filed an application with the Tribunal.

30. On 2 February 2022 Ms Nutley emailed the landlord setting out her assessment of the issues with the premises, which largely is consistent with the communications with the tenants.

31. On 15 February 2022 the landlord provided a notice to remedy overcrowding of the tenancy, advising that the tenancy agreement limited occupants to 2, but that the tenants had 4 people living in the premises, and noting that the tenants were advertising for a 5th person to move in.

32. On 15 February 2022 the tenants filed an application with the Tribunal.

33. A hearing was convened by the Tribunal in Auckland on 20 April 2022. In attendance was [The property manager/s] represented by counsel, Ms Battersby and Ms Yong. The two tenants Ms Jey and Ms Gao were also in attendance. Ms Nutley was present for a short period of time, but left as she needed to start work.

EVIDENCE FROM [The property manager/s]

34. [The property manager/s] attended the hearing where she provided evidence by way of a written brief, that was read at the hearing, after which [The property manager/s] addressed questions from the tenants. I summarise that evidence as follows:

    a. [The property manager/s] was the property manager for the premises.

    b. On 30 December 2021 applications for the tenancy was filed for Ms Gao, Ms Jeyasingham and Ms Nutley. The application was however only for 2 adults to reside in the premises.

    c. The landlord elected to offer the tenancy to Ms Jey and Ms Gao only, to reduce wear and tear on the premises from additional occupants.

    d. Various agreements were reached around what would occur prior to the tenancy, that included:

        i. The pool would be addressed by a professional.
        ii. Lawns attended to.

    e. A range of work was undertaken at the tenancy before the tenants moved in.

    f. On 14 January 2022 the tenants complained the pool was not in an acceptable condition.

    g. On 16 January 2022 the tenants complained about:

        i. The pool
        ii. Cobwebs
        iii. Rubbish in the premises.
        iv. Carpet having been left inside the premises.
        v. No notification about the gas requirements.
        vi. Ants in the premises
        vii. Fibre box missing.

h. [The property manager/s] advised that she was threatened that if she did not pay compensation and a rent reduction, the tenants would notify the media, and expose her business on social media.

i. [The property manager/s] set out what work was then undertaken at the premises, including a contractor instructed to address the pool, [Pest control] to address the ants, a gas bottle was supplied by the landlord, and external cleaning undertaken.

j. On 16 January 2022 the tenants reported a dispute with the neighbours over parking, for which the tenants called the police. The tenant required that a rent reduction of $100 per week be made in relation to the parking situation. [The property manager/s] disputes misleading the tenants over the parking available.

k. On 24 January 2022 the tenants reported that:

    i. The downstairs ensuite was flooding.
    ii. Asking when the pool contractor would arrive, and
    iii. Asking to arrange for an oven clean.

l. [Plumber 2] were requested to attend to the pool and blockage. [The cleaner/s] attended to the oven and to clean the rubbish bins. [Plumber 2] later attended to the gas stove and also shower.

m. On 15 February 2022 the landlord sent a notice to remedy for exceeding the maximum number of tenants. The agreement was for only Ms Nutley and Ms Jey to be living in the premises, with Ms Gao working there but not residing there.

n. Over the course of the tenancy the rent was routinely paid late, and short. Notices to remedy the rent breaches were sent to the tenants.

o. The landlord has considered the tenants to be very aggressive and difficult to deal with.

35. The tenants cross examined [The property manager/s]. I set out the questions and then the response:

a. Did the landlord consider that three tenants could pay $600 each per week for rent considering their age and where they are in their lives, with earnings each ‘just under 6 figures’ as small business owners? [The property manager/s] advised that she did consider it reasonable to expect the tenants to be able to pay rent, based on the information in their application.

b. Did the advertisement on TradeMe indicate there could be up to 5 tenants? [The property manager/s] advised that was correct, that was advertised, but the agreement with the tenant was ultimately only for two occupants.

c. Did the agreement limit the number of flatmates? Yes, it limited it to 2 people living in the premises and it would be enforceable.

d. Why did the cleaning on 15 January only deal with the areas of concern raised by the tenants, but not a full house clean? [The property manager/s] accepted

that further cleaning work was needed, but noted that the tenants had been asked to check they were happy with the cleaning that was undertaken, before the cleaners left the premises to ensure they were satisfied, and the tenants were happy with what had been cleaned. [The property manager/s] advised that there were no issues for the landlord with the cleaner doing whatever the tenants wanted the cleaners to do. Otherwise the landlord believes the premises were provided in a reasonably clean and tidy state in any event.

e. Why was the cleaning not done before the tenants had moved in? Because it was over the holiday period.

f. Why did the landlord not invoice for cleaning the pool if there was no legitimate problem with the pool? The tenancy agreement confirmed that the pool was the landlord's responsibility. The landlord disputes that there was mould in the pool, stating it was calcium staining.

g. Why did the pool contractor attend so many times? [The property manager/s] advised the pool was first cleaned, and when the tenants said they were not happy the landlord arranged for the pool to be cleaned again. The landlord's position is that what was seen was staining, not mould. [The property manager/s] advised she was contacted by a contractor for the tenant, 'the Pool Whisperer', because the tenants wanted to improve the aesthetics of the pool to make it possible to film underwater in the pool.

h. How many times was an electrician asked to attend for the cook top? [The property manager/s] estimated there were three visits. Twice for an electrician and once for the gas fitter.

i. Did [The property manager/s] check that the cooktop was then working after the work was done. [The property manager/s] advised she did not.

j. Was the house reasonably clean at the start of the tenancy? Yes.

k. Why were cleaners sent after the tenants moved in if the premises were reasonably clean? The cleaners were supposed to do the cleaning the day prior, but they did not do that.

l. Did you say that the "gas connects to the water"? No because I did not know what the gas situation was.

m. Did you see any items like pegs or a jumper at the time of the pre-let inspection? The pegs were on the washing line, and the 'jumper' was used by the owner for cleaning.

n. Did you check inside the pool shed? [The property manager/s] advised she cannot lift it to open it.

o. Why did the landlord leave rolled up carpet in the premises? The carpet was there for the tenants to use, when they were moving in to protect the floors with the movers. If they did not want to use it the landlord would have taken it away.

p. Do you consider a landlord should be responsible for pest control within the first 6 weeks? Yes.

q. Why was there carpet in the garage which meant that Ms Gao could not set up her sewing machines to work from? [The property manager/s] states that she did not know that Ms Gao was intending to work from the garage.

r. At the start of the tenancy, when Ms Jey was trying to shoot a TV show, where were they supposed to move the carpets to? [before [The property manager/s] could answer this question Ms Jey moved onto the next question].

s. Why was the invoice for the ant treatment sent to the tenants? Because the contractor ([Pest control]) could not find any ants when they attended. The landlord accepts that in the first few months if there were ants present, the landlord should address the issue.

t. When could the pool be used? From 17 January 2022, as advised by [Pool company].

u. Why was the exterior clean not undertaken prior to the tenants moving in? Because the exterior clean was not required, it was only undertaken because the tenants had requested it.

v. When we started the tenancy did you tell us how to park? Yes, the driveway is a common driveway, on a cross lease, so it was owned by more than one person.

w. Was it safe to get in the pool after the acid treatment? No acid treatment was done, so that was not relevant.

x. Is the rent up to date? No [the rent arrears will be addressed below]

y. The landlord had referred to the tenants being aggressive, who did you mean by that? Ms Jey.

z. Does the landlord consider that having some 10 – 15 service call outs to the premises was reasonable? [The property manager/s] noted that a number of the call outs attended because work had been requested by the tenants.

LANDLORDS CLAIMS

36. At the hearing the landlord's representative provided a significant volume of documents, including written submissions, pre-tenancy photographs, photographs provided by the tenant, a bundle of authorities, and a bundle of documents (emails, invoices etc). As I noted at the end of the hearing, because of the volume of documentation presented, and given the tenants were not able to consider those documents during the hearing, I would not be taking into account the written submissions or bundle of authorities. If I were to do so, that would be a breach of the tenant's natural justice expectations. At the hearing I confirmed I would decide the matter based on the oral evidence and submissions from the hearing and my understanding of the law.

37. However, I have considered the photographs and social media posts provided by the landlord, and email communications between the parties, because those would relate to matters the tenants would have had first-hand knowledge over.

38. The following submissions for the landlord were presented by Ms Battersby.

Termination of tenancy for overcrowding of the premises

39. The landlord seeks to terminate the tenancy on the ground there has been a breach of the maximum number of tenants permitted in the premises. The landlord states that the application forms from the then prospective tenants, indicated that only two tenants were applying for the premises, and given their disclosed income that they could pay the rent. It was submitted that on the basis of this understanding, the tenancy was offered to these tenants.

40. The landlord also referred to social media posts where the tenants were intending to increase the occupancy to 5.

41. The landlord referred to the RTA which allows limitations of occupancy of the premises. It was further submitted that the having an increased number of tenants increases the overall wear on the premises.

42. The landlord submits that a 14 day notice has been issued to remedy the overcrowding, and the tenants have refused to comply with that notice. The landlord seeks an order terminating the tenancy, or if that was not ordered, an alternative order that the tenants limit the occupants residing in the premises.

43. In response the tenants state that they had received advice from Tenancy Services which was that the landlord should apply some common sense[7]. The tenants state that they are leaving the premises in a better state than when they found it, and therefore should be allowed additional occupants. The tenants state that they are clean and tidy.

44. The tenants accept that there are five people now living in the premises.

45. I asked the tenants whether they would abide by an order to reduce the number of people ordinarily residing in the premises. The tenants confirmed that they would abide by that requirement.

46. The landlord confirmed the Tribunal should decide what a reasonable period of time for the additional occupants to move out would be.

Analysis

47. It is not a requirement that tenancy agreement set a maximum number of occupants in the tenancy, but the parties are able to agree to a maximum number.

[7] I note that no documentary evidence from Tenancy Services has been presented confirming this. However that would in my experience be unusual advice for Tenancy Services to provide, given the RTA has express provisions limiting occupancies as will be discussed below.

48. Section 40 of the Residential Tenancies Act 1986 (RTA) sets out the responsibilities of tenants, and that requires at subsection 3 that:

> Where the tenancy agreement specifies a maximum number of persons that may ordinarily reside in the premises during the tenancy, the tenant shall ensure that no more than that number ordinarily reside in the premises at any time during the tenancy.

49. Section 40(3A) confirms that "a contravention, without reasonable excuse, of subsection (3)" is declared to be an unlawful act. Breaches of the RTA that are declared to be unlawful can be the subject of an exemplary damages order, as will be discussed further below.

50. In any event, the law is clear that the parties can agree on a maximum number of people ordinarily residing in the premises, and if the tenants breach that number, they are committing an unlawful act. The tenants agree in this case that there are five people living in the premises, which clearly exceeds the two permitted in the tenancy agreement.

51. I note for completeness that the contemporaneous email evidence does support the landlord's position, that the tenants were well aware that they were agreeing to two occupants in the premises, and where the number of occupants are limited to two in the tenancy agreement, simply flows from that application and negotiation process.

52. I accept also that the premises were advertised as a five bedroom property. But that is not determinative, and it was open to the parties to negotiate on what the maximum number of occupants would be.

53. The landlord applies to terminate the tenancy on the basis that the landlord has given a notice to remedy the breach, but the tenants have not complied with that.

54. The Tribunal "may" order a termination under section 56 of the RTA as the breach was capable of remedy, and the tenants did not remedy the breach as the notice required.

55. In this case I have determined not to apply a discretion to terminate the tenancy on the basis that the tenants confirmed at the hearing that if the Tribunal confirmed a breach, they would abide by that decision, and require three of the occupants to move out. I consider a fair outcome to this claim would be to make a declaration as to the maximum number of occupants, and order that be remedied, being a final opportunity to remedy the breach.

56. I have determined that the tenants should have one week in order to remedy the breach, and reduce the number of occupants residing in the premises to two. In setting the timeframe at one week, I note that had I granted a termination, it is likely that a possession date would have been set that was less than one week. I also note that the Tribunal is able to order a party remedy a breach of the tenancy agreement given section 77(2)(l) of the RTA.

57. In any event, if the tenants have not reduced the number of people ordinarily residing in the premises to two, by 29 April 2022, then the landlord may contact the Tribunal and request a continuance of the hearing, at which time I will consider the landlords application for termination further then.

Exemplary damages for overcrowding

58. The landlord seeks exemplary damages on the basis that the tenants have exceeded the number of people permitted to ordinarily reside in the premises as set out above.

59. The landlord submits that the tenants had intentionally breached the requirement of the tenancy agreement. Even when this breach was raised with the tenants, the tenants refused to address the issue stating it was enforceable.

60. The tenants state they did not intentionally set about breaching this requirement, stating that if they knew they were breaching their obligations, they would not have put the advertisement on social media as they did. The tenants state that they contacted Tenancy Services for advice. The tenants also state that they received their own legal advice and that was to the extent that it was "not really enforceable".

Analysis

61. The landlord seeks an order of exemplary damages.

62. 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.

63. 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.

64. 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.

65. The maximum levels of exemplary damages are set out in Schedule 1A of the Act, which for a breach of section 40(3) is $1,000.00.

66. I have found the tenants have breached section 40(3) being an unlawful act. Taking into account section 109 I consider that exemplary damages should be ordered for these reasons:

    a. I consider the breach was intentional. The communications with the landlord when the negotiation was occurring is clear, that the where to be a maximum of two people living in the premises. The tenants also sought clarification of that with the landlord, showing the tenants were aware of the potential issue. I have received no evidence other than the tenant's oral statements of receiving professional advise that the landlords request was not lawful. Even if the tenants had misunderstood the situation, the landlord gave them a 14 day notice to remedy which clearly put them on notice there was a breach in the eyes of the landlord. The tenants did not comply with the notice, which was I find intentional on the part of the tenants.

    b. The effect of the unlawful act was that there were more people living in the premises than the parties agreed to, and despite the submissions of the tenants, I do not accept there would be no additional wear and tear on the premises from five occupants as opposed to two.

    c. The interest of landlords and public supports maximum occupancy terms being upheld when a negotiated term of the contract.

    d. I consider it would be just to make an order in this case, taking the circumstances of the breach into account.

67. The maximum level of exemplary damages for this breach is $1,000.00. In this case I consider an order at 40% of the maximum would be a reasonable level, therefore order $400.00 of exemplary damages be paid to the landlord by the tenants.

Rent arrears

68. The landlord seeks an order for rent arrears of $1,360.00 being the rent arrears as of the day of the hearing (20 April 2022), be paid.

69. The landlord has provided a rent ledger supporting the rent arrears claim. The tenants have not disputed that the record of payments was wrong. I note that at the hearing the Tribunal cross checked the landlords rent arrears calculation (albeit as of 19 April 2022), which was correct.

70. The claim for rent arrears has been established and ordered in full.

TENANTS CLAIMS

71. The tenants presented their claim based on written submissions filed in advance.

Breach of section 13A – Tenancy agreements

72. The tenants submit that there has been a breach of multiple provisions of section 13A, and in particular:

    a. The landlord failed to notify the tenants as to the status of the internet.

    b. Failure to notify the tenants that gas was required for heating water, and having an empty gas bottle when they took over the premises.

    c. The pool was mouldy as stated by a contractor. Further the pool was unclean and did not work.

    d. Failure to notify the tenant that the owner was in a dispute with the neighbour, which impacted on the tenant's ability to park at the premises on the driveway. The tenants also state the landlord confirmed that they could park along the common driveway.

73. The tenants seek exemplary damages of $900.00.

74. In response the landlord submits that section 13A sets out the minimum standards as to what should be in a tenancy agreement and does not include the claims from the tenants. In relation to the claims:

    a. As it relates to the issue with the fibre box, it was submitted that the landlord was entirely open to doing whatever was required to get the fibre working.

    b. Gas is the responsibility of the tenant, but nevertheless a bottle of gas was arranged by the landlord when this was raised by the tenant.

    c. The landlord agrees that the pool was not in good condition at the start of the tenancy, but this was addressed by the landlord by appointing the necessary contractors, and the pool was clean and clear shortly after the tenancy commenced.

    d. In relation to parking, the landlord advised it is not clear what the alleged misrepresentation is. The landlord stated in the advertisement for the premises that there were 2 car parks, and this is correct as the premises has a double garage the tenants could use. Furthermore, the landlord confirmed that the tenants can park in front of the driveway not withstanding what the neighbour says.

Analysis

75. Section 13A as submitted by the landlord, is a provision which sets out the contents of what must be in a tenancy agreement. This provision confirms that if certain mandatory information is not provided, that is an unlawful act from which exemplary damages could be ordered.

76. However, the landlord is correct that none of the matters raised by the tenants relate to information that the landlord was required to include in the tenancy agreement. For that reason, this application for exemplary damages for a breach of section 13A must fail. This application is dismissed.

77. However, for completeness I make the following observations:

a. The tenants may have had a claim for the internet not working. If the premises had an internet service, then it should have been working with the necessary equipment attached to the fibre line. However in this case I would have been unlikely to have ordered compensation, taking into account that the landlord has already provided compensation to the tenants to the sum of $1,750.00 being one week of rent, which I consider would have included compensation for any internet issues.

b. Where premises are supplied by gas bottles, the obligation for filling the gas bottles is with the tenant (see section 39 relating to outgoings). The landlord was not legally obligated to provide a full bottle at the start of the tenancy, but I note that when the tenants raised their concerns, the landlord provided a full bottle in any event.

c. The landlord was required to maintain the pool. The landlord has accepted that, and again compensation has already been paid to the tenants being the first week of rental. The landlord has also instructed contractors to address any issues with the pool, and that was done efficiently.

d. There is no evidence that the tenants have been misled over parking. The premises were advertised as having two parks, which the premises has (the double garage). The tenant state that other statements were made about parking on the driveway. The landlord agrees that the tenants were told they could park on the driveway. If there is a dispute between the neighbours and owner around rights of way, I cannot see that the landlord was required to tell the tenants of this dispute. There is no evidence that the neighbours or anyone for that matter, precluded the tenants from accessing the double garage. The fact the tenants elect not to park their cars in the garage (it is Ms Gao's workspace), does not show any misrepresentation on the part of the landlord.

Breach of section 38 – Quiet enjoyment

78. The tenant seeks exemplary damages and compensation for a breach of quiet enjoyment of the premises, in relation to:

a. Multiple disruption of work.

b. Multiple visits from some 15 contractors to the premises. The tenant's state:

> Multiple disruptions to work and living due to multiple service people coming in a span of two weeks. A total of seven service people on the work report within a span of 8 days between the 16th of January and 24th of January and a further six service visits within the 24th and 28th of January including plumber for pool, a plumber for gas, 3 pool cleaning visits and window clean

c. Sending notices without any basis, in retaliation to the tenants.

d. Reviewing the tenant's information on the internet in breach of the tenant's privacy, intending to discredit them. An example was given in relation to Companies Office records.

e. Applying to the tenancy Tribunal without notice.

f. Stress and anxiety in relation to the dispute with the landlord, and needing to prepare to respond to the landlords claim.

79. The tenants seek compensation in relation to:

a. Needing to accommodate contractors coming to the premises.

b. Loss of income and enjoyment of the home including threats of becoming homeless.

c. Severe stress and distress around dealing with the landlord.

d. Having to prepare a counter application against the landlord.

80. In response the landlord submits:

a. The communications from the tenants have been of a threatening and personal nature.

b. Reviewing of social media of tenants is outside the jurisdiction of the Tribunal, but in any even this type of information is publicly available information.

c. It is accepted that any additional cleaning should have occurred earlier, but the problem was the non-availability of the cleaners.

d. It is an unusual situation where the tenants have complained to the landlord wanting work to be undertaken, but then complaining when the work is done where contractors were required to attend at the tenant's request.

e. None of the notices given to the tenants were in fact termination notices, but they were legitimate anyway.

Analysis

81. Section 38 of the Act confirms that tenants have a right to quiet enjoyment of the premises. Subsection 3 confirms that exemplary damages can be ordered when the landlord contravenes the tenant's quiet enjoyment "in circumstances that amount to harassment of the tenant…"

82. The term "Harassment" is not defined in the Act. It is defined in s 3 of the Harassment Act 1997 which deals with harassment in the context of either a criminal charge or the making of a restraining order against a person. However Judge Harland in *MacDonald v Dodds* (CIV-2009-019-1524, District Court Hamilton, 26 February 2010), considered that the dictionary definition of "harassment" was more appropriate in the context of s 38(3), rather than the definition in the Harassment Act. The Court in that case adopted the definition in the Oxford English Dictionary, which defines "harassment" as "to trouble, worry, or distress" or "to wear out, tire out or exhaust". The Judge accepted that harassment indicates a particular pattern of behaviour directed towards another person.

83. In the Concise Oxford Dictionary "harass" is defined as "torment by subjecting to constant interference or intimidation". Further assistance can be obtained from the definition in Black's Law Dictionary where harassment is defined as:

> Words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.

84. From these definitions it seems that there must be evidence of some ongoing intentional actions directed at a specific person which causes distress to them. Therefore, a single act of interference with the tenant's quiet enjoyment would be unlikely to amount to harassment. However in *Whatiura v Shoulder* (Palmerston North TT 12/87, 16 March 1987) the Adjudicator noted that "although the term usually refers to repeated acts of some kind, I take the view that it can extend to a single act on one occasion of sufficient seriousness."

85. In the circumstances of this case I have seen no evidence to support that the landlord has harassed the tenant as defined above. In relation to the tenant's submissions:

    a. Any disruptions in the tenant's work appears to have arisen from contractors attending the premises. The tenants have not shown how that could be classed as harassment, particularly in circumstances where the contractors were attending because of work requests from the tenant. Furthermore, the RTA requires that the landlord maintain the tenancy, and that must logically at times mean contractors would be required to come to the premises.

    b. Around half of the visits complained of by the tenants fell within the first week of the tenancy, where the landlord has already provided compensation to the tenants, which the tenants have accepted to settle the tenant's complaints at the time.

    c. I have not seen any notices on the file sent by the landlord which did not have a lawful and factual basis. For example the tenants were in arrears of rent and in breach maximum occupancy numbers, when the notices were sent. The notices were therefore sent for a lawful reason.

    d. I am not aware of any law prohibiting the landlord from reviewing publicly available information on the internet about tenants.

    e. The landlord was not required to give notice to the tenant before applying to the Tribunal, just as the tenant was not required to.

    f. I accept that preparing for a Tribunal proceeding is stressful. If the landlord's application was brought for vexatious reasons, then it could be harassment. But in this case the landlords application was not vexatious, the landlords claims have been entirely upheld.

86. The tenants have also claimed compensation on a number of grounds, but I find that claim has not been established:

    a. I agree that the tenants would to a degree have needed to accommodate contractors. But as noted above, compensation has been provided already, which would reasonably address the tenants compensation claim.

Furthermore I consider that a number of attendances were at the request of the tenants, where there was no established breach on the part of the landlord. I will address this further below.

b. The contract between the parties is for residential premises. This is not a contract for commercial premises. There is no clause in the agreement that seamless business trade would be expected under the tenancy agreement.

c. If there were any concerns over losing the tenancy, that would only likely occur if there had first been a breach of the tenant's obligations to the landlord, and naturally would flow from any breach. This is not a case of the landlord making baseless threats to the tenants to cause them worry.

d. Based on what I have seen, the property manager has been professional and accommodating in her dealings with the tenants. There would be no basis to claim the actions of the property manager caused the tenants undue stress.

e. Whether the tenants presented their own application to the Tribunal was a decision for the tenants. But ultimately the tenant's application has not succeeded, so there would be no basis to consider compensation (normally referred to as costs in a proceeding) to the tenants for preparing that application, or their defence of the landlords successful application.

87. The application for exemplary damages and compensation is dismissed.

Breach of section 45(1A) – Landlord's responsibilities

88. The tenants seek exemplary damages for a breach of the landlord's responsibilities, and in particular (with reference to the summary table from the tenants on page 26):

a. The pool was not reasonably clean, it was mouldy and the filter broken. The tenants consider there was inadequate chemical balance. The tenants accepted that by 29 January the pool was in a reasonable state.

b. Gardens not being adequately maintained.

c. House being covered in cobwebs inside and out.

d. The outside of the premises being very dirty.

e. Gas stove broken.

f. Pest control which the landlord accepted they would be liable for within the first six weeks, in relation to the ants.

g. Impacts to work from contractors coming to the premises.

h. Owners belongings left in the premises. That included pegs, carpet, hall runners, and some other belongings.

i. Oven being unclean.

89. In response Ms Battersby submitted that the requirement on the landlord is to provide the premises reasonably clean and tidy, not at a higher level. As it relates to the claims:

    a. The landlord accepted that the gardens could have been tidier than they were but this was addressed by the landlord. The landlord submits that there no obligation on the landlord to provide a garden from weeds on a long term basis, that obligation is on the tenants.

    b. The landlord funded the exterior cleaning when raised by the tenants.

    c. Prior to the tenancy commencing the landlord arranged electrical work that was done, but on 24 January when the tenants raised the issue with the cook top, that was addressed in short order.

    d. While the tenant states there were clothing items left on the premises, they could not be seen in the pre-let photographs.

    e. It is disputed that there was one year of debris in the oven as claimed. The landlord refers to the photographs pre-tenancy, taken on 13 January, which do not support the tenants claim. Further the oven concerns were not raised on 16 January with the other tenant concerns. In any event the landlord had the oven cleaned and waived the costs for that from the tenants.

    f. In relation to the carpet, the carpet was left to assist the tenants with the move in to protect the floor, which the landlord had advised Ms Gao would be removed once they had moved in (Ms Gao confirmed that may have been stated to her).

Analysis

90. The landlord's responsibilities are set out in section 45 of the Act. One of those is to provide the premises to the tenant at the start of the tenancy in a "reasonable state of cleanliness". I emphasise that the obligation is that the premises are reasonably clean, they do no need to be immaculate, or at a standard that might be found in a hotel for example.

91. Residential premises are complex structures, and it is not particularly uncommon that a tenant will find areas where the landlord has missed cleaning. In any event, it is for the Tribunal to determine whether the premises were reasonably clean when let to these tenants. In making that determination, I must consider the photographs provided, and what the parties have said.

92. The landlord has provided quality photographs (one photograph per A4 page) showing the state of the premises on 13 January 2022, two days before the tenancy commenced. There are multiple photographs inside the oven. Having considered those photographs I consider the premise were overall reasonably clean at the start of the tenancy, but there were some areas that would not meet that standard. In particular:

    a. There was some green coloured material at the bottom of the pool.

    b. The lawns needed mowing.

c. A blue polar-fleece jersey (or similar) was left on the premises (tenants photographs).

d. Some cobwebs (tenants photographs only).

e. One windowsill has presumably dead insects on the sill (tenants photographs).

93. In my assessment the landlord has addressed those areas of deficiency promptly, and compensation has been paid to the tenants. Even if that were not the case, I would decline exemplary damages because on the scheme of things these deficiencies are minor, and given compensation has been paid and accepted by the tenants already, it would not be just to order an exemplary damages award to punish the landlord.

94. As it relates to the faulty gas stove, that is simply an issue of maintenance which the landlord addressed.

95. The tenants have not convinced me there was any pest problem as it relates to ants. The photographs the tenants provided show four individual ants. Some insects in a dwelling is a fact of life, but of itself does not prove a breach of the landlord. When [Pest control], as experts, assessed the premises, they found no evidence of any ant problem.

96. I have addressed any impact with contractors above. The claim would be better placed as a quite enjoyment issue.

97. The carpet being left in the premises, I accept was left to assist the tenants to be able to move in by using it to protect floors. The evidence supports that the landlords confirmed that if the tenants did not want to use the carpet they would remove it.

98. The fact of pegs being left on the clothes line, and a stray jersey being found outside are trivial.

99. I do not accept the oven was unclean at the tenancy handover as stated by the tenants. The landlord's photographs from 13 January show a number of images inside the oven which appears immaculately clean. That does not accord with the tenants photograph of the oven taken after then tenants had been living in the premises, showing what appears to be food spilt in the oven. I consider it more likely than not that the landlords photographs reflect the state of the oven at handover. I am also minded that Ms Gao confirmed in an email of 8 March 2022 that the tenants had used the oven once, suggesting that the oven had been used prior to the issue being reported to the landlord.

100. This claim has not been established and is dismissed.

Breach of section 48(4)(c) – Notification of test results

101. The tenants claimed exemplary damages for the landlord not notifying the tenants of any test results around the pool. As I noted to the tenants at the hearing, section 48(4)(c) only relates to testing for methamphetamine contamination, which is not relevant in this case.

102. This claim is dismissed.

Breach of section 49D - Landlord claiming compensation for maintenance exceeding the tenant's liability

103. The tenants submit that the landlord has invoiced costs for maintenance that exceeded the liability for the tenants. That included the landlord requiring reimbursement of costs for pest control, oven cleaning and window and general cleaning. The tenants consider that they have provided evidence to the landlord at the time such as photographs to support any work that was needed.

104. The tenants seek compensation for the window cleaning costs they have incurred.

105. The tenants also seek exemplary damages for a breach of the Act.

106. In response the landlord submits that section 49D relates to the landlord requiring payments around destruction or damage to the premises, which is not the case here.

Analysis

107. I agree with the landlord's interpretation of section 49D, which holds:

> **49D Unlawful acts related to liability**
>
> It is declared to be an unlawful act for a landlord—
>
> (a) to demand, request, or accept from the tenant—
>
> (i) payment of an amount related to destruction of, or damage to, the premises that exceeds the tenant's liability in accordance with section 49B; or
> (ii) the carrying out of any works to make good destruction of, or damage to, the premises the value of which exceeds the tenant's liability in accordance with section 49B:
>
> (b) to propose to, or enter into with, the tenant an agreement under which the tenant is obligated—
>
> (i) to pay an amount related to destruction of, or damage to, the premises that exceeds the tenant's liability under section 49B; or
>
> (ii) to carry out any works to make good the destruction or damage if the value of the works exceeds the tenant's liability under section 49B.

108. Section 49B of the RTA limits the tenants liability for damage, particularly careless damage. There is no evidence that the landlord in this case has made any efforts to get the tenant to pay for destruction or damage to the premises. The intention of section 49D is to provide protections to tenants where landlords seek to

recover costs for repairs to the premises, such as compensation for careless damage where the tenant is only liable to the extent of the lesser of the insurance excess, or 4 weeks of rent. Those issues do not apply here.

109. This claim is dismissed.

Breach of section 54(3) – Retaliatory termination notice

110. It is a breach of the RTA if the landlord gives the tenant a notice terminating the tenancy, if that notice is in retaliation for something the tenant has done in asserting their rights and authority in the premises.

111. This claim must be declined, because the landlord has not at any time issued a termination notice, being a pre-requisite for a retaliatory termination notice application.

Breach of section 60AA – Termination of tenancy without grounds

112. Section 60AA is a provision that prohibits landlords terminating the tenancy without reasonable grounds under the RTA. In this case the landlord has not given a termination notice.

113. However it is also a breach of section 60AA if the landlord:

> … purport[s] to apply to the Tribunal for an order terminating the tenancy knowing that they are not entitled, under this Act, to give the notice or to make the application.

114. The tenant submitted that the application filed by the landlord, under the heading on the application form of "You want the Tenancy Tribunal to make and order about something else", states:

> We are seeking termination of the tenancy of the tenancy.
> unreasonable demands
> Main intent is not to pay the rent.
> Several allegations and false information
> The property was given in a reasonably clean and tidy condition and a reasonable state of repair. Is the property primarily used as commercial space.

115. I raised with the parties that it was not entirely clear what the landlord was seeking to achieve by filling in that box.

116. [The property manager/s] provided further clarification at the hearing, advising that the landlord was receiving warning signs and was only wanting to raise with the Tribunal concerns the landlord was getting as it relates to the management of the tenancy. [The property manager/s] advised that she did not write these as grounds for termination of the tenancy, but they were broader concerns from the landlord.

117. Ms Battersby submitted that all of those grounds would be reasonable grounds to terminate the tenancy.

Analysis

118. Certainly, the landlord has applied to the Tribunal to terminate the tenancy. As it relates to the application on the basis of rent arrears or overcrowding, the Tribunal could potentially have terminated the tenancy on those grounds, as there have been breaches of the notices issued to the tenant. Those breaches would not be a ground to find a breach of section 60AA.

119. In relation to what the landlord has written in the free-form box, I am not persuaded that the landlord is saying she was wanting a termination of the tenancy on the basis of the points then set out below those words. If that was the intention, I consider the box would have been completed or worded differently. I have no reason not to accept the landlord's statement that she was simply intending to raise those matters to the attention of the Tribunal.

120. The onus is on the tenants to establish their claim, and I find they have not met that onus. This claim has not been established and is dismissed.

Plumbing request for fridge

121. The tenant seek orders that the landlord proceed with plumbing the fridge to a water supply. As I advised the tenant at the hearing, if the fridge was not plumbed at the start of the tenancy, then there is no obligation on the landlord to plumb the fridge during the tenancy, or to permit the tenant to do that work.

122. This claim must be dismissed.

Garden reinstatement

123. The tenants submit that the garden was full of weeds, and the weeds grow frequently. The tenants consider the gardens should been sprayed with weed killer, but otherwise agree they would be responsible for the work following that.

124. Ms Battersby submitted that on 15 January work was undertaken to do some gardening, which the tenants were happy with. It was also submitted that the tenancy agreement requires the tenants to be responsible for the gardens. Ms Battersby submitted that the landlord has addressed its obligations.

Analysis

125. The landlord has accepted that the gardens required work at the start of the tenancy, and have squared the ledger by undertaking the remedial gardening work and paying the tenants compensation.

126. Beyond that, the tenants are obligated under the RTA to keep the premises, which include the land of the tenancy, reasonably clean and tidy. That is also a term

of the tenancy agreement. There was no obligation on the landlord to treat the gardens in any way to avoid later weed growth, such as by spraying the gardens. I cannot see any legal basis for finding the landlord liable for further gardening work. This claim is dismissed.

NAME SUPPRESSION

127. Both parties have applied for name suppression.

128. Section 95A confirms that the Tribunal must order name suppression to any party who applies for it, and when they have been wholly or substantially successful in the proceeding.

129. In this case the landlord has been wholly successful, therefore name suppression is granted to the landlord. For the avoidance of doubt name suppression applies to the owner of the premises, the property manager, and the name of the property management company.

130. Because the tenants have not succeeded in the proceeding, the tenant's application for name suppression is dismissed.

R Woodhouse
21 April 2022

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.