[2022] NZTT 4340482, 4339281

4339900

4340426

TENANCY TRIBUNAL - Hutt Valley

APPLICANT: Daisy Krishna, Pranil Kumar

Landlord

RESPONDENT: Jipsymol Sunny, Jacob Daly

Tenant

TENANCY ADDRESS: 60 Norana Road, Timberlea, Upper Hutt 5018

ORDER

1. No suppression orders apply around publication of this decision
2. The Bond Centre is to pay the bond of $2,070.00 (3368868-009) immediately apportioned as follows:

Daisy Krishna and Pranil Kumar: $453.14

Jipsymol Sunny and Jacob Daly: $1,616.86

Description	**Landlord**	**Tenant**
Rent arrears	$256.00	
Loss of Rent	$197.14	
Total award	**$453.14**	
Bond	$453.14	$1,616.86

Reasons:

1. Both parties attended the hearing.
2. This matter consists of 3 applications.
3. The first application is a landlord application, 4339281, which effectively sought directions in relation to entitlement to rent and costs when a tenant terminates a fixed term tenancy early.
4. The second is a tenant application, 4339900, which claimed breach of Healthy Homes Standards, sought release from the tenancy, and sought recovery of moving costs.
5. The third application is a landlord application,4340482, which claimed rent arrears, sought access to install an extractor fan, and sought directions on payment of a listing fee to find replacement tenants.
6. These applications were made in May 2022. To an extent, they have been overtaken by events in as much as the tenants moved out on 29 May 2022, and the landlord found a new tenant from 1 June 2022.
7. A hearing was held on 16 June 2022, at which time the Tribunal issued directions for provision of additional information relating to heating and insulation at the premises, to be provided by 1 July 2022.
8. The tenancy was a fixed term tenancy, which commenced on 21 February 2022, for an initial term of one year ending 21 February 2023. One of the original tenants was substituted from 20 March 2022. This was done by simple amendment of the tenancy agreement. At same time the opportunity was taken to correct the tenancy agreement to include a second named landlord.
9. The house had been extensively renovated prior to letting but at the time the property was let, there was no bathroom fan. According to the landlords, this was pointed out to the tenants who were comfortable with that situation.
10. At the time the tenancy agreement was altered, it was also amended to include a kitchen fan in the chattels.
11. On 2 May 2022, the tenants advised that they were thinking about moving out as the house was cold. The tenants say that they also gave as a reason that living in the premises had made a 3-year-old's asthma worse. They also say that they had been lied to about the condition of the property and its compliance with Healthy Homes Standards.
12. The response of the landlords was to agree to an early termination, but on conditions. Their email was not in evidence but included payment of a TradeMe listing fee which the tenant initially paid but then sought to claim back
13. The landlords say that on 9 May 2022 they sought access to install a bathroom fan but were not allowed access by the tenants.
14. The tenants moved out on 29 May 2022.

Healthy Homes Standards

15. Much of the dispute concerns compliance with healthy homes standards. The tenants say that they were given an incomplete tenancy agreement and/or it was amended after they had signed it. The landlords dispute this.

16. The landlord put in evidence an agreement of some 41 pages including schedules. The tenants say that they only received 5 pages of this agreement initially. The landlords dispute this, saying that there was always a full agreement, noting that they received the signed agreement from the tenants on 21 February, minus the signature of the other initial tenant, That was received and they emailed a copy to the tenants on 22 February 2022.
17. Subsequently, on 20 March 2022, they attended at the premises where the agreement was signed and initialled by the incoming tenant. The arrangement was that they would take the agreement away and a hardcopy would be sent to the tenants after it had been scanned. This was done on 23 March 2022. On 8 May 2022, the tenants stated that they did not receive the agreement.
18. It is not possible to resolve this issue on the basis of the evidence before the Tribunal, nor, on the view that the Tribunal takes, is it necessary to do so. However, the Tribunal prefers the landlord's evidence in this regard.
19. What is more pertinent is whether the agreement was properly and accurately completed, particularly as to Healthy Homes Standards, noting that under the relevant Regulations, the premises did not need to be compliant until 90 days after the commencement of the tenancy, something of which emails from the tenant indicated that they were aware.
20. The agreement submitted is incomplete as to compliance with heating standards.

    a. The heating statement is not completed. The tenants say that the premises were not compliant.
    b. The agreement states that some parts of the ceiling (and the floor) have ceiling insulation. It is otherwise incomplete and the R-value is not stated.
    c. Underfloor insulation is said to comply but the R-value is not stated.
    d. As to wall insulation, the answer is "I don't know."
    e. The other required fields are again not completed.
    f. The ventilation is stated to be compliant.
    g. It is stated that extractor fans were installed in all rooms. It is also stated that they were installed in some rooms. Patently, on the basis of the evidence, they were not.
    h. The moisture ingress and drainage standards is stated to be met.
    i. The draft stopping standard is stated to be met.

21. The statement is not signed. An amended and signed statement was provided dated 17 May 2022.

Heating

22. The landlord claim that the heating standard was met. In support they produced an electrical certificate dated 8 November 2021 but this is simply a certificate as to proper installation of the heat pump relied on. Nowhere does it purport to certify compliance with Healthy Homes Standards.
23. According to the landlords the capacity of the heat pump was 4.0kW.

24. The tenants produced their own calculation of the required heating capacity, using the Tenancy Services calculator. They claim 5.4 kW capacity was required. The landlords disputed this calculation.
25. The landlords were given the opportunity to provide evidence of the calculation of the heat capacity of the heat pump and its compliance, either in the form of evidence from the installer or an independent certifier.
26. The landlords produced a calculation prepared by Rent Care, property managers, who claim to have their own inhouse certifier. It is dated 1 July 2022. It shows a required capacity of 4.4 kW.
27. It is difficult to do a direct comparison of the calculations because walls have been measured in a different order. The significant difference however is that Rent Care measure the overall area as 21m2, whereas the tenants measure it as 28m2. Given its experience in these matters I prefer the evidence of Rent Care at least to this extent.
28. The choice makes no difference in any event because the capacity of the heat pump is still less than the required heating capacity, although by a much lower margin.
29. Rent Care state in their certificate that as the heat pump is within 90% of the total required heating capacity, it is compliant . The Tribunal does not agree. The tolerance only applies to heaters installed before 1 July 2019: Residential Tenancies (Healthy Homes Standards) Regulations 2019, Schedule 1, Part 1, clause 4..As the heat pump was installed in November 2021, the exception does not apply.

Insulation

30. The landlords also produced evidence relating to insulation standards.
31. As regards underfloor heating, the evidence is that the rating of insulation was 1.4. By a small margin, this is compliant.
32. No evidence was provided as to the rating of ceiling insulation. The requirement is 2.9, not 1.3 which only applies to underfloor insulation. In its certificate Rent Care state that as there is no ceiling cavity, ceiling insulation is exempt as it is not reasonably practical to access. [The requirement is that it is not reasonably practical to install.]
33. Photos of the dwelling show it to have a low pitched roof and cathedral/vaulted ceilings.
34. The landlords also provided photographic evidence that there was insulation in the ceiling, observable through a hole cut in it, but they provided no evidence of thickness or rating
35. However a landlord is not exempt from the requirement under the regulations for its statement to specify that the ceiling is exempt and the circumstances giving rise to the exemption: regulation 35(2). The landlord has not complied in this respect.

Ventilation

36. It was known and pointed out to the tenants that the dwelling did not comply with ventilation standards.
37. It was also acknowledged by the tenants in their evidence that they were aware that the landlords had 90 days to comply.
38. It is apparent also from the evidence that the landlords attempted to comply but the tenants would not agree to access except on their terms. In fact the tenants do or did not seem to be aware that they could not refuse or impose terms on access. Provided proper notice was given the landlords were entitled to access: s.48(2)(cb). The tenants are not entitled to benefit from their own error or default.

Draught Stopping

39. In respect of draught stopping the tenants' complaint is firstly that the compliance statement has not been completed.
40. In the statement provided to the Tribunal the landlords have ticked the box indicating that the building complies.
41. The complaint of the tenants appears to be that their daughter, who suffers from asthma, has been ill a number of times since moving into the premises. The argument is advanced that this is due to the condition of the premises.
42. They have provided evidence of a gap in the sliding door which the landlords counter by arguing that the door was simply not closed properly. They also provide photos of condensation on windows. These have aluminium frames, which the Tribunal notes are notorious as a source of condensation. However they are not illegal.
43. Issues such as condensation are regarded as a joint responsibility by the Tribunal. The landlord has an obligation to provide premises which are not prone to excessive moisture: the tenants have the obligation to ensure that excess moisture does not occur, by ventilation of the premises properly and wiping up condensation.
44. The onus is also on the tenants to prove the allegations made, and there is a standard which applies, the balance of probabilities. They have not satisfied the Tribunal to that standard.
45. It is mentioned that there are no double glazed windows and no internal/external walls have insulation, which it is conceded may not be a must have for rentals but is very important for the daughter's health. The Healthy Homes Standards are just that, a standard, not a guarantee.
46. The tenants are also required to establish a nexus or connection between the condition of the premises and the condition of their daughter. There is no medical or other supporting evidence to link the two and it is not possible to exclude other factors. The Tribunal is not prepared to draw the inference that the tenants make.

Drainage

47. The tenants also claim that a false declaration has been made in respect of the moisture and drainage standard.

48. Their evidence is that after moving in they found what appears to have been a blockage in a waste water pipe. They also claim there have been four leaks since they moved in.
49. The landlords' evidence is that they were not notified of a blockage in the drains until 29 May 2022, it was due to a tree root, and they arranged for it to be cleared on 30 May 2022. An invoice for the work was produced.
50. That an issue is discovered sometime after a statement is made does not make the statement untrue as at the date it is made. For that to be the case it would need to be proved that the landlords knew of the issue at the time that the statement was made. There is no evidence which supports this.
51. The same analysis applies to leaks.

Consequences of Breach

52. The finding of the Tribunal is that the standards have been breached but not to the standard or degree claimed by the tenants.
53. The landlords have also failed to provide information required by the Regulations.
54. However the tenants have not sought specific remedies in that regard such as exemplary damages: their complaint is that these breaches should have entitled them to terminate the tenancy.

Grounds for Termination?

55. The circumstances in which a tenant is entitled to early termination are set out in the Act.
56. The most usually resorted to is that the landlord has breached the terms of the tenancy agreement or the Act. In that case s. 56 of the Act applies and the tenant is required to give notice of breach and a reasonable opportunity for the landlord to remedy the situation. Even then, the Tribunal must be satisfied that it would be inequitable to refuse to make an order terminating the tenancy.
57. The tenants have not specifically relied on this ground: the claim throughout appears to be simply that the premises are unhealthy and they are entitled to move out.
58. This in turn raises the possible application of section 78A, namely that the premises are unlawful. But the requirement in this case is that the premises cannot be lawfully occupied as residential premises or failure by the landlord to comply with its obligations have made occupancy unlawful. A failure as such to comply with Healthy Homes standards does not make premises unlawful. It would also be necessary to prove that, for example, the premises did not comply with the Building Code (at time of construction) or were constructed in breach of planning requirements. There is no evidence to this effect.
59. A third possible ground is that as a result of the landlord's breaches the premises are so serious damaged or destroyed as to make them uninhabitable. But the test for uninhabitability is that the premises cannot be restored within a reasonable time, having regard to the term of the tenancy. Again this not established. Some of the breaches are technical, in the sense of failure to

supply requisite information even though the premises are compliant and , in other cases, the breaches appear capable of remedy, as in the case of the extractor fan.

60. The health of the daughter may also be argued to give rise to a claim of hardship, bringing s.66 into play. But this requires an unforeseen change in the tenant's circumstances and severe hardship relative to the hardship the landlord would suffer. The daughter's asthma was a known existing condition at the time the tenancy was entered into, the tenants had the opportunity to assess the suitability of the premises knowing of that condition and it could not be said that possibility of an attack could not be foreseen.

Termination by Agreement

61. It is of course always possible to end a tenancy by agreement. This is what, in a peremptory way, the tenant sought and the landlords agreed to, albeit on conditions which the tenants now disagree with, namely that the tenants meet the cost of advertising. In this case s.44A applies and the landlord is entitled to recover any expenses reasonably incurred by the landlord. An advertising fee is reasonable ,and the amount claimed is not unreasonable.

Assignment

62. The claim of the tenants in this regard is that they found alternative tenants to which the landlords unreasonably failed to agree and they are therefore also, on this ground, entitled to termination or, at least, release from their obligations.
63. S43B applies to assignment. Assignment requires the prior written consent of the landlord, which may impose reasonable conditions, The latter has been touched on above.
64. Three applications to assign the premises were put in evidence.
65. Of these, the landlord says that one did not proceed after viewing as the prospective tenants decide they could not afford the rent, and in the other 2 cases the prospective tenants did not respond to contact.
66. The landlords also say that two other names were supplied by the tenants but the persons did not attend viewings.
67. In the Tribunal's view the evidence is again insufficient to support the tenants' allegations.

Payments Claimed

68. In summary the finding of the Tribunal is that the request for payment of the listing fee was reasonable. The tenants were not entitled to offset payment against rent. To 29 May 2022, this resulted in a shortfall of rent paid of $256.00.
69. The premises were relet from 1 June. The landlords claim rent for the period 30 and 31 May, $197.14. The tenants had a fixed term tenancy. Despite their claims, they did not have grounds to terminate it. They are liable for loss of rent and the sum is awarded.
70. The landlord s application also refers toa credit check fee but no evidence of payment of such a fee was provided and it is not awarded.

71. Finally there is a claim for mowing of lawns. There appears to be no specific requirement for mowing of lawns in the tenancy agreement but it is a normal incident of maintaining the premises(which are, by definition, facilities and included in the definition of premises for these purposes). Evidence is given of a quote but no proof the work was carried out. The photographic evidence also does not indicate a marked difference between the standard of mowing when the premises were let and the condition in which the lawns were left. The Tribunal declines this claim.
72. The sums awarded are to be paid from the bond and the balance refunded to the tenants.

Suppression

73. The landlords did not seek a suppression order. The tenants did.
74. The Tribunal is required to suppress a party's particulars where it has wholly or substantially succeeded in proceedings. In this case the Tribunal does not consider that the tenants have. While they have been correct ins some respects, there are a greater number where they have not done so. In addition the basis of their position is that circumstances entitled them to terminate the tenancy. Circumstances did not and the actions of the tenant were in that regard high handed : it is apparent that they were prepared to ignore the law to achieve their ends. The Tribunal is not prepared to grant suppression.

A Henwood
23 September 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.