[2022] NZTT 4337309, 4327703

TENANCY TRIBUNAL - Hutt Valley | Te Awakairangi

APPLICANT: Nalanda Properties Limited

Landlord

RESPONDENT: Ivy-Jayne Davidson

Tenant

TENANCY ADDRESS: 245A Jackson Street, Petone, Lower Hutt 5012

ORDER

1. No application for suppression has been made in this case and no suppression orders apply around publication of this decision.
2. Ivy-Jayne Davidson must pay Nalanda Properties Limited $285.00 immediately, calculated as shown in table below:
3. The Bond Centre is to pay the bond of $1,300.00 (3441311-008) to Nalanda Properties Limited immediately.

Description	**Landlord**	**Tenant**
Insurance Excess	$500.00	
Cleaning	$575.00	
Carpet Cleaning	$253.00	
Furniture removal	$207.00	
Repairs	$50.00	
Total award	**$1,585.00**	
Bond	$1,300.00	
Total payable by Tenant to Landlord	**$285.00**	

Reasons:

1. This matter consists of a landlord application, 4337309, for meth decontamination costs and post tenancy costs. It also includes a claim for loss of rental.
2. The application was originally filed in April 2022. It was premature in that the landlord had not at that time incurred the costs claimed, nor had it made application to its insurance company in relation to the matters claimed.
3. It finally came on for hearing on 17 November 2022. It appears that some matters are still unresolved with the insurer. The Tribunal requested further information, to be provided within a week. It was provided on 5 December 2022.
4. The tenant filed a cross application, 4327703. When both applications were called on 17 May 2022, she did not appear. Her application was dismissed, confirmed by order dated 1 September 2022.
5. There have been previous proceedings between the parties, *Nalanda Properties Limited v Davidson*, [2021] NZTT 4307625, 4310921, to which further reference is made in the course of this decision.

Contamination.

6. The tenancy ended on 8 March 2022. Due to previous concerns about use of methamphetamine, the premises were re-tested. Six swabs were taken and showed a level of 29.9mcg/100cm2 in the kitchen and levels between 1.56 mcg and 6.94mcg in the lounge, bathroom, bedroom and entrance. The landlord based its initial claim on levels exceeding 1.5mcg despite the Tribunal adopting in its previous decision the higher level of 15mcg recommended in what is commonly known as the Gluckmann Report (and which it now appears that the Government is proposing to adopt in Regulations to be made under the Residential Tenancies Act)
7. Against this background the landlord claims a number of costs.
8. First, it claims the cost of initial testing. This was testing to which the previous decision of the Tribunal relates. As test results were under 15mcg, the claim was dismissed. The landlord is not entitled to bring it again.
9. The second claim is for testing at the end of the tenancy. It is a claim which the insurer has declined to meet to date although the Tribunal was advised that it is still under negotiation.
10. It is not for the Tribunal to rule on disputes between insured and insurer. However the copy of the policy provided to the Tribunal baldly states that the policy covers testing and it is difficult to see how the insurer can argue that it is not liable for the cost in this case.
11. More relevantly, in *Linklater v Dickison* [2017] NZHC 2813, the High Court ruled at [39]-[40] that it is the fact that there is insurance that is relevant, not the extent of the insurance. See also *Guo v Korck* [2019] NZHC 1541 at [37]. What this means, in the opinion of the Tribunal, is that a breakdown or itemisation of the claim if the underlying event is one which is insured does not affect any limitation of liability of the tenant.
12. Both *Linklater* and *Guo* make the point that liability is not limited where damage is intentional. It is a deficiency in the legislation that it does not deal with the situation where damage is intentional but there is insurance: intentional damage is generally an exception to insurer liability. However it is also a principle that an insured cannot recover more than its loss. Where a landlord is insured, its loss is only whatever the policy does not cover. An insurer's rights of subrogation, to the extent that might be a relevant argument, are excluded by s.49C of the Act.
13. It is also not proven in this case that the tenant intended to cause damage. It is not intention to do the act that must be proved but intention to cause damage - again

consistent with insurance law. It is reasonable to assume that the contamination was caused by actions of the tenant but that is not enough to establish liability. it must also be established that she intended to cause damage by doing so. See discussion in *Guo* at [39].

14. *Linklate*r and *Guo* also contain useful discussions of what is required before damage is regarded as intentional. Where damage is not deliberate, they put the standard at higher than reckless, grossly irresponsible or grossly careless: see *Guo* at [38]. A lower standard was suggested in *Tekoa Trust v Stewart* [2016] NZDC 255578 but this must now be regarded as of doubtful authority given the later High Court decisions.
15. The literature regarding contamination by methamphetamine indicates much uncertainty about the level at which it is regarded as harmful. While adopting a level of 15mcg, the Gluckmann Report indicates that the acceptable level may be as much as 100 times that. It is difficult to conclude from the state of the scientific evidence that a tenant would have concluded that use would result in unacceptable damage.
16. The literature does suggest that the case is different where there is manufacture, but this is largely due to the by-products of manufacture which are themselves potentially harmful. There is nothing in the evidence that suggests that this is a relevant factor in this case.
17. The inclusion of cover for meth contamination in a policy could in itself be argued to be an acceptance that damage by meth contamination is not always (if ever) intentional.
18. The third claim is for decontamination which the Tribunal was advised the insurer has agreed to meet – less an excess of $500.00. While the cost is for decontamination of the whole premises, most of which is below the level adopted by the Tribunal, it remains the case that the excess would have been incurred if it was only the kitchen that was contaminated, and it is reasonable to award that sum.
19. The fourth claim is for the cost of re-testing post–decontamination. The Tribunal was advised that the insurer has declined that cost. The comments above apply. There is insurance and a limitation of liability applies.
20. The fifth claim is for a further re-test of one area, as the initial result was unclear. The evidence now provided to the Tribunal suggests that the original test result may have been incorrect – although the retest level of 157mcg does raise questions about the retest itself. It is also not apparent from the evidence that the site of this particular contamination had been tested as part of the previous tests. The comments above also apply.
21. There are also claims for employing a fire technician to isolate detectors for decontamination and later reinstate them. Again the evidence to the Tribunal is that this is still under negotiation with the insurer. The comments above apply.
22. In summary, and despite the itemisation of claims, the conclusion of the Tribunal is that in this case the landlord's claimable loss is limited to the excess, $500.00.

Damage

23. There is also a claim for damage to the kitchen window and front door. The insurer has met these claims and the landlord seeks the excess,$500.00.
24. This issue was raised in the previous claim. The evidence of the tenant was that it occurred at a time when she was away from the premises and the police were

notified. It was noted that the landlord could not challenge that evidence. The Tribunal concluded that the evidence was insufficient to find the tenant liable.

25. The fact that there has now been a successful insurance claim does not change the situation. Insurance policies generally cover accidental damage, a term which covers damage which simply occurs and damage identifiable as due to the carelessness of a person. Under s,49B of the Act, a tenant is only liable for loss incurred as a result of its own actions or the actions of persons under its control.
26. That remains unproven. See paragraphs [34] – [35] of the Tribunal's previous decision.
27. This claim is declined.

Light Fitting.

28. A claim is also included for replacement of a broken light fitting in the bathroom. The amount is $194.56.
29. Based on the photo produced the fitting was of considerable age and in poor condition. The Tribunal is required to take into account betterment. The age of the fitting is indeterminate. The Tribunal allows $50.00 towards replacement.

Cleaning, etc.

30. There are also claims for cleaning costs and furniture removal.
31. The Tribunal is satisfied by the evidence produced that the claims are justified and the costs reasonable.

Loss of Rental.

32. The final claims are for loss of rental. They are in two parts.
33. It is noted that the claims are referred to as claims for exemplary damages but loss of rental is not as such an unlawful act which attracts exemplary damages . The underlying acts may be but exemplary damages are then claimable in relation to those acts. The applicant has also expressed its claim in terms of loss, not exemplary damages, and the Tribunal has proceeded on the basis that the claim is not in fact a claim for exemplary damages but a claim for compensation.

The First Tenancy

34. In the case of the first tenancy, the claim is that due to harassment of other tenants by the tenant and her guests, the tenants terminated their tenancy from 23 February 2022. The landlord says that it was unable to relet the premises until 22 April 2022. It claims loss of rent for 8 weeks.
35. At the request of the Tribunal, the applicant produced the tenancy agreement. It indicates a fixed term tenancy which expired on 23 February 2022. The landlord's evidence is that it was renewed but the landlord elected to release the tenants because of the activities of the tenant complained of. The landlord was under no obligation to do so. It has obligations to those tenants under, for example, s.45(1)(e) of the Act but the tenants had not taken any steps to enforce those obligations nor would they have necessarily resulted in termination.

36. For a claim for damages to succeed, an applicant must prove that a tenant has breached its obligations, the landlord has suffered a loss as a result, and the amount of the loss.
37. The first of these elements has been rejected previously and it is not sufficient that it is given as a reason by the other tenants: their perception is not persuasive evidence that a breach has been proven.
38. The Tribunal is also not satisfied that any alleged loss is necessarily attributable to the alleged breach. A causal relationship is required between breach and loss. The decision of the landlord to terminate when not obliged to do so amounts to an intervention which breaks the chain.
39. The highest the landlord's case can be put in this instance is loss of a chance to have the tenant renew. That has not been pleaded and no supporting evidence offered. In any event, the award in such cases is only for loss of chance and generally only a fraction of the actual losses proved is awarded.

The Second Tenancy.

40. The second tenancy was also a fixed term tenancy, from 27 May 2021 to 25 May 2022. The claim of the landlord is that it was entitled to increase the rent from 21 May 2021 but that because of the tenants' activities the tenants concerned were not prepared to agree to an increase. These tenants left on 17 June 2022 and it is only since that time that the landlord has been able to effect an increase. It claims the difference since 27 May 2021.
41. No reason has been given for the tenants leaving in June 2022, which it is also noted is some 3 months after the tenant complained about vacated on 8 March 2022.
42. Under s.24 of the Act the landlord could have instigated a rent review from the due date for renewal of the tenancy, 25 May 2022.
43. The analysis set out in paragraph 35 equally applies. It is not established that the tenant complained of had in fact breached the terms of her tenancy. It is also not established that the rent sought by the landlord in May 2021 was a rent obtainable in the market, irrespective of any (alleged) impact of tenant activities. A loss is not proved.

Bond.

44. The amount awarded exceeds the bond, which is awarded to the landlord.

Application Fee

45. The applicant has been partly successful, and the Tribunal has a discretion as to award of the application fee. The application has been poorly presented and pursued and the Tribunal declines to award the fee.

Suppression

46. Suppression is not sought.

A Henwood
08 December 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.