

IN THE DISTRICT COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE

[2020] NZTT Auckland 4279225

MEMORANDUM ON DISPENSING WITH SECURITY FOR COSTS

Next Event Date: security for costs hearing, 10am June 10, Auckland District Court

Apellant: Kelly Roe

Filed: 7 June, 2021

Address for service: email@kellyroe.org

Background

1. In 2020 Ms Roe complained to the tenancy tribunal that:
 - a. Her landlord, Mike Cotton, was in breach of s45 in virtue of there being a fixed wall heater that had been installed in a manner prohibited by manufacturers which was thus likely to pose a fire hazard.
 - b. When the prohibition on rent increase (to do with Covid lockdown) was lifted Ms Roe's rent was increased above market rate. She maintained that her rent had been increased by too much and this was retaliatory for her having complained about the wall heater.
 - c. When the prohibition on notice to vacate was lifted Ms Roe was given notice to vacate. Ms Roe maintained notice to vacate was retaliatory for her having complained about the wall heater.
2. Issue (a) has been heard by the tenancy tribunal three times and the third judgement on issue (a) is the subject of this appeal.

First Hearing

3. The matter was first heard by the tenancy tribunal in 2020 and the first tenancy tribunal judgment or order was issued 23 November 2020.
4. The adjudicator found that Mike Cotton was in breach of s45 and ordered him to pay Ms Roe \$1,020.44 in exemplary damages and filing fee reimbursement. The adjudicator also found the \$455.00 weekly rent to be above market rent and set weekly rent to be \$430.00 per week. The adjudicator also dismissed the claim that notice to vacate was retaliatory.

5. The judicial reasoning was given in paragraphs 3-10.
6. *'Ms Roe presented evidence at today's hearing showing that a panel heater had been installed at the premises in a way that is contrary to the manufacturer's instructions'* (paragraph 5).
7. *'I was unable to garner why GVPML did not provide evidence as to the safety of its installation method and I note that the only response to Ms Roe's concerns was a building report dated 2 September 2020, some 15 months after Ms Roe raised her concern, which states only that a panel heater had been installed. There was no evidence as to whether the installation was safe.'* (Paragraph 8).
8. *'I accept Ms Roe's evidence that not being provided with any appropriate reassurance as to the safety of the installation, meant that she was frightened as to whether the heater constituted a safety hazard.'* (Paragraph 9).
9. *'Exemplary damages are intended to be punitive in nature, and taking into account all of the above as well as the strong public interest in landlords abiding by their obligations to tenants, particularly where safety is concerned, I am ordering GVPML and Mr Cotton to pay Ms Roe \$1,000.00 in exemplary damages for this breach.'* (Paragraph 10).

Second Hearing

10. Mike Cotton applied for a re-hearing on the grounds that the *'landlord had further evidence that it had not been able to produce at the hearing on 25 November 2020'* (paragraph 3). The re-hearing of issue (a) only was granted.
11. There was a rehearing by the tenancy tribunal in 2021 and the second tenancy tribunal judgement or order was issued 11 March 2021.

12. The adjudicator found that Mike Cotton was in breach of s45 and ordered him to pay Ms Roe \$1,020.44 in exemplary damages and filing fee reimbursement.
13. *'When the tenant went to turn on the heater, she read the manufacturer's instructions, which had been left for her, and noted that the instructions specifically told the installers to ensure that the cord was not positioned between the heater panel and the wall, as this was a fire hazard.'* (Paragraph 6.)
14. *'Ms Roe's heater had the cord between the heated panel and the wall. She contacted GVPML on or about July 2019 about this issue.'* (Paragraph 7.)
15. *The landlord submitted that after it was notified of the issue, that it inspected the heater, that neither the compliance contractors nor the landlord thought that the heater was installed incorrectly and was therefore safe to use. That the heater had been installed by a registered electrician who had produced a certificate for the work, and that Auckland Council has visited the site to ensure compliance with building warrant of fitness standards and did not raise any issues.* (Paragraph 10).
16. *I am satisfied that the landlord did not ensure that the heater was installed in compliance with the installation safety instructions and therefore was in breach of s45. My reasons include:*
 - a. *The tenant produced photographs of the wall heater and the safety instructions. The photographs show that the cord is placed in the exact position that the installation instructions warn installers not to place it in.*
 - b. *The landlord's electrical certificate and report does not mention the installation of the wall heater. This certificate is for all electrical work, but there is no reference to the installation of wall heater as being part of that scope, nor did the landlord produce any evidence from the electrician who completed the certificate which showed that the wall heaters installation was included in what was being certified.*

- c. *The landlord's evidence that the heater installation complied was given by the receptionist of CBD electrical, there was no evidence given by the electrician on what enquiries had been made with the manufacturer and what details the manufacture / supplier had been provided with (for instance was Gold air provided with the photographs provided to the tribunal?)*
 - d. *The landlord did not make any enquiry with the electrician until these tribunal hearings. The landlord relies on the compliance reports from Prestige and Auckland Council but there is no evidence that Prestige and Auckland Council were ever shown the specific issue the tenant had with the installation of the heater and therefore asked to confirm that it was compliant. Nor was there evidence that the installation of heaters in accordance with the manufacturer's instructions was something that the report writers would check or had expertise in'. (Paragraph 11)*
17. *'I am satisfied that the landlord acted intentionally as they installed the panel heater. When the tenant raised the issue with the landlord the landlord did not make the necessary enquiries, such as getting the installing electrician to inspect and confirm in writing that it complied and why it came to this conclusion, when the manufacturers installation instructions were not to install in this manner'. (Paragraph 14).*
18. *'It is in the public interest that all landlords ensure that when any work is done that it is done in accordance with manufacturer's instructions and by qualified competent tradespeople. When issues are brought to landlord's attention, especially when they are issues relating to a fire risk, these should be investigated thoroughly and quickly'. (Paragraph 17)*

Third Hearing

19. Mike Cotton applied for a re-hearing and the third tenancy tribunal judgement or order was issued 21 April 2021.

20. The adjudicator dismissed Ms Roe's claim that Mike Cotton had breached s45.
21. *'I understand the tenant's point that a literal reading of the manufacturer's instructions manual indicates that the power cord to the heater should not `run behind the heater`.' (Paragraph 5)*
22. *'Here the heater has been installed in such a manner that the power cord is running vertically behind the heater, on the right side of the panel, downward to a power point nearby. I accept that this technically goes against the manufacturer's express instructions. (Paragraph 6).*
23. *'However, I accept the opinion expressed by the importer of the Gold air heater...' (Paragraph 7).*
24. *'There is no direct evidence from electricians or other experts to show that the wall heater has been installed in an unsafe manner or that it constitutes a fire hazard.'* (Paragraph 8).
25. *'For those reasons, the tenant's complaint that the installation is unsafe and causes a fire hazard is rejected' (Paragraph 9).*
26. *'In the event the wall heater had been installed incorrectly as alleged by the tenant, I nevertheless am not satisfied that the landlord is liable to pay exemplary damages to the tenant' (Paragraph 10).*
27. *The landlord had relied on its electrician in the installation of the device and had duly engaged an electrician to re-check the heater after being notified of the tenant's concerns. The electrician advised the landlord that the heater was correctly installed and safe. The landlord was entitled to rely on its electrician's advice' (Paragraph 11).*

Appeal

28. Ms Roe does not accept paragraph 23. That is to say in the face of what appears to be contradictory or conflicting evidence between the manufacturers of the heater's installation manual and a receptionist of the importers of the heater's opinion the adjudicator thinks the receptionist is more likely to be correct.
29. Ms Roe does not accept paragraph 24. 3/3 adjudicators agreed with Ms Roe that the heater was installed in a manner expressly prohibited by the manufacturer's instructions. The installation manual from the manufacturers of the heater does constitute '*direct evidence from electricians or other experts*' where it is plausible to think the manual written by the electrical engineers who designed and tested the heater to be safe when installed and operated in a manner consistent with their instructions only.
30. With respect to Ms Roe obtaining evidence from an electrician that the installation was unsafe Ms Roe was unable to get an electrician onto the premises without them having prior approval from her landlord and Mr Cotton refused to allow Ms Roe to engage the services of an electrician to see what could be done to bring the property into healthy home compliance.
31. As such, Ms Roe does not accept either of the reasons the third adjudicator had for rejecting the view that the installation was likely unsafe and a fire hazard.
32. At paragraph 26 and 27 the third adjudicator maintains that since Mr Cotton relied on an electrician he was not responsible for the safety of the wall heater.
33. Ms Roe accepts that if Mr Cotton relied on an electrician then he would not be responsible for the safety of the wall heater. Ms Roe maintains that there is no evidence that Mr Cotton relied on an electrician, however.

34. The only evidence of an electrician was a compliance report that makes no mention of a fixed wall heater (Paragraph 16b). The landlord supplied to the court evidence of his relying on a number of parties none of which were qualified electricians. For example, he relied on builders (paragraph 7), Auckland Council employees (paragraph 15), his own opinion (paragraph 15), building compliance contractors (paragraph 15), receptionists of importers (paragraph 16c). There is no evidence that any of these people are electricians or qualified to sign off on electrical compliance of wall heaters.

35. As the second adjudicator describes *'The landlord relies on the compliance reports from Prestige and Auckland Council but there is no evidence that Prestige and Auckland Council were ever shown the specific issue the tenant had with the installation of the heater and therefore asked to confirm that it was compliant. Nor was there evidence that the installation of heaters in accordance with the manufacturer's instructions was something that the report writers would check or had expertise in'*.

36. Insofar as Mr Cotton has refused to rely on his electrician for electrical sign off on a fixed wall heater he is liable for the fact that there was a fixed wall heater that has been installed in a manner that three out of three adjudicators agreed is expressly prohibited by the manufacturer's installation guide which would have been written by electrical engineers who had designed and tested the appliance for safety when installed and operated in accordance with their instructions only.

37. Mr Cotton has had months and months and three re-hearings and he still has not engaged the services of an electrician with respect to fixed wall-heaters for the properties where he is landlord.

Security for Costs

38. Ms Roe is incredulous that Mr Cotton wasn't immediately ordered by the court to engage the services of an electrician or prosecuted for non-compliance. Ms Roe is

incredulous that there have been three re-hearings of this issue. No new evidence was presented in the third re-hearing. Ms Roe is incredulous that the third adjudicator found against her and the courts are now instructing her to pay security for costs to proceed with an appeal of this issue when the landlord is willfully or recklessly endangering the buildings and tenants lives in the properties where he is landlord.

39. It would be preferable if the government were to do it's job and arrange for prosecution when people violate the law. Three out of three adjudicators have found that the heater had been installed contrary to manufacturer's instructions and Mr Cotton has still not contracted electricians to come out to the properties that he manages and fix up the electrical work that was not done by an electrician and has not been signed off on by an electrician for the obvious reason that the installation method employed was one prohibited by the electrical engineers who designed the heater.
40. Ms Roe requests waiver of hearing fee and punitive damages to be re-set at the maximum allowable (\$4,000) so Mr Cotton understands the more he delays the more costly it is to him to refuse to comply with the legislation. If there is a fire in a building where he is landlord and he is violating the law then is open to charges of murder. Perhaps Ms Roe is expected to try that too in the civil courts? Ms Roe requests that the government do its job of prosecuting landlords for non-compliance to the fullest extent of the law in a timely fashion. There was no reason for 3 hearings of this issue even less 4 and there is no reason why Ms Roe should be expected to bear the costs involved in holding Mr Cotton to account to the laws of New Zealand.