[2023] NZTT 4644987

TENANCY TRIBUNAL – New Plymouth

APPLICANT: Talia Sakura Perrett, Kaleb John Perrett

Tenant

RESPONDENT: The Rent Shop Limited, Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust Julia Rozgon

Landlord

TENANCY ADDRESS: 15 Hume Street, Waitara, Waitara 4320

ORDER

1. The Tribunal declares that Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust failed to maintain the carpet in one bedroom by the removal and non-replacement of the carpet during the course of the tenancy.
2. Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust must pay Talia Sakura Perrett and Kaleb John Perrett $4,720.44 immediately, calculated as shown in table below.
3. The tenant's claims against the Rent Shop Limited are dismissed.
4. The remainder of the tenant's claims are dismissed.

Description	**Landlord**	**Tenant**
Compensation: Failure to maintain and breach insulation standards – insulation; failure to maintain mould, windows, kitchen wall		$2,500.00
Compensation: Failure to maintain garage door		$1,500.00
Exemplary damages: Insulation statement		$700.00
Filing fee reimbursement		$20.44
Total award		**$4,720.44**
Total payable by Landlord to Tenant		**$4,720.44**

Reasons:

1. The hearing took place on two separate days. The tenants attended together. Representatives of the Rent Shop Limited also attended.
2. The tenancy began on 23 July 2020 and ended by agreement at the hearing that took place on 5 September 2023.

THE PARTIES

3. In more recent times the Rent Shop Limited managed the property for the McCourt and Rozgon Family Trust.
4. The Rent Shop Limited took over the management of the property in January 2022 following appointment by the McCourt and Rozgon Family Trust in December 2021. Initially Jason Keene of the Rent Shop Limited was the property manager who managed this property. More recently, in and about June 2023 a new property manager (Kelvin Weir) took over from Mr Keene on behalf of the Rent Shop Limited because Mr Keene left his employment.
5. At the start of the tenancy the property was managed by a property manager who has now been placed into liquidation (Kempy Trading Limited). The property manager at that time was Stacey Kemp. In this decision I will call the first property management company 'KTL'.
6. For reasons set out below, in the context of this application, the landlord is the McCourt and Rozgon Family Trust. The Rent Shop Limited is the landlord's agent.

SUMMARY OF THE CLAIMS

7. The tenants have bought their claim against both Rent Shop Limited and Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust seeking:
    a. A declaration whether there was a failure maintain in relation to the carpet;
    b. Compensation for failure to maintain a garage door;
    c. Compensation for:
        i. Breach of Healthy Homes Standards (insulation standard), Insulation Standards and failure to maintain in relation to underfloor insulation;

ii. Breach of Healthy Homes Standards (draught stopping standard) and failure to maintain in relation to gaps in the windows and kitchen wall and floor;

iii. Breach of Healthy Homes Standards (ventilation standard) and failure to maintain in relation to having no extractor fans in the bathroom and kitchen;

iv. Breach of Healthy Homes Standards (ventilation standard) and failure to maintain in relation to windows that do not open;

v. Breaches of Healthy Homes Standards and failure to maintain in relation to mould at the premises;

vi. Exemplary damages for misleading and false statements in the tenancy agreement's insulation statement.

8. With any claim before the Tenancy Tribunal, the Tribunal applies the usual civil law standards and expectations. That means that it is for the party bringing the application (in this case, the tenant) to establish their claims on the balance of probabilities. That means that they must establish that what they are claiming is more likely than not. This is referred to as the 'burden of proof'.

9. Normally independent witnesses, corroborating documents and photographs are an important part of discharging this burden.

10. As noted in *Kaipo v Clarke & McCarthy* (DC) TT233/02, in practical terms this means that:

> … [L]ike anyone who brings an application before a Tribunal or Court, it is incumbent upon the applicant to provide the evidence necessary to prove the case. If the applicant fails to do that, then their application will be dismissed whether it has merit or not because it is up to the applicant to provide the necessary evidence. It is not up to the other parties, and it is certainly not up to the Tribunal to extract evidence.

11. In adjudicating this matter, I do not need to be completely certain, but I need to be more certain than uncertain. In deciding any particular claim, I must consider all the evidence presented (including oral evidence during the hearing). I must weigh this evidence to decide what is more likely.

12. Ultimately if the tenant does not provide sufficient evidence and submissions to support their claim, it must be dismissed.

IS THERE A RIGHT OF ACTION AGAINST THE RENT SHOP LIMITED?

13. Section 2(1) of the Residential Tenancies Act 1986 (RTA) provides:

> "landlord, in relation to any residential premises that are the subject of a tenancy agreement, means the grantor of a tenancy of the premises under the agreement; and, where appropriate, includes—
>
> (a) a prospective landlord; and
>
> (b) a former landlord; and
>
> (c) a lawful successor in title of a landlord to the premises; and
>
> (d) the personal representative of a deceased landlord; and
>
> (e) an agent of a landlord."

14. Decisions of the Tribunal and in particular the decision in *Lovell v At Home Rentals Ltd* [2018] NZTT Tauranga 4112773 have found that the phrase "where appropriate" in s 2(1) RTA affects the orthodox common law approach to agency when considering whether an agent is liable for obligations on a landlord under the RTA. Thus, an agent may be a landlord and liable as such under the RTA where the agent would not be liable under common law. I am not bound by other decisions of the Tribunal.

15. Like Adjudicator Merrett in *The Chief Executive, Ministry of Business, Innovation and Employment v Lee Bennett Holdings Limited, Results Realty Limited, Q C Property Management Limited, Lee Paul Bennett* [2022] NZTT 4310424 I respectfully disagree with the findings in *Lovell* that the words "where appropriate" in s 2(1) RTA includes an agent for the purposes of liability in circumstances where the agent would not be liable under the common law of agency. It is, in my view, an approach that is inconsistent with *Mumby v Gary Brown Realty Ltd* [2011] DCR 420 a decision that I am bound by.

16. Adopting the explanation of the law set out by Adjudicator Merrett in [2022] NZTT 4310424:

    a. In *Mumby* the District Court held, "… the law is no different for agents acting under the Residential Tenancies Act than agents acting in any other capacity."

    b. Such an approach overreaches the purpose of s 2(1) RTA as an interpretation section within the RTA. I do not consider that the section was intended to be a statutory mechanism permitting the Tribunal to decide when it is "appropriate" to hold an agent liable as landlord, when that agent is not otherwise liable under common law. It would, in my view, require a clear expression and intent to override and limit the application of agency law to agents of landlords who come within the RTA.

    c. This is not to say that it is never appropriate for an agent to come within the definition in s 2(1). This was made clear by *Rauti v Tamaki Regeneration Ltd* [2017] NZHC 2326 In *Rauti*, the High Court rejected the submission that it was not appropriate for the agent (the property

manager for the tenancy) to act as the landlord's agent in giving the tenant a notice of termination of her tenancy. The Court considered at paragraph 45 that the words "where appropriate" in s 2(1) RTA:

> "… have a similar meaning to 'were the context makes it appropriate'. By way of example, they mean that a prospective landlord or a former landlord will come within the definition of 'landlord' for the purposes of the Act where the context makes it appropriate."

d. Thus, in *Rauti* the context made it appropriate that an agent comes within the definition of landlord in s 2(1) for the purposes of issuing a notice. However, in my view it is not appropriate for the purposes of liability under the RTA.

e. Liability, whether under the RTA or otherwise, as an agent requires a consideration of the law of agency, and it would only be appropriate for an agent to come within the definition of landlord (and therefore be liable under the RTA as landlord) where the agent is liable under the general law of agency.

17. I therefore find that the Rent Shop Limited will not come within the definition of landlord in s 2(1) RTA if, under common law agency principles, they were merely acting as agent or an intermediary for the principal, who is the owner, Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust.

18. The common law rules with respect to liability for contracts made by agents can be summarised as follows.

a. The general rule is that an agent who acts purely as an intermediary is not liable to a third party as a party to the contract that is brought about between the third party and the principal. The principal and the third party alone may sue or be sued on the contract: *W C Fowler & Sons Ltd v St Stephens College Board of Governors* [1991] 3 NZLR 304 (HC).

b. On the contrary, where an agent contracts in his or her own personal capacity he or she may be personally liable under the contract.Whether the agent acted merely as an intermediary and therefore did not contract in a personal capacity will depend upon the objective intention of the parties as shown by the construction of the contract and the circumstances when the contract was formed: *Hawkes Bay Milk Corporation v Watson* [1974] 1 NZLR 236 (SC).

c. The use of qualifying or descriptive words like "as agent", "on account of" or "on behalf of" will generally exonerate the agent from personal liability: *Mumby v Gary Brown Realty Ltd* (above).

d. Where the agent enters the contract in his or her own name <u>without qualification</u>, the agent will generally be personally liable unless a contrary intention plainly appears from the contract: *Siu Yin Kwan v Eastern*

Insurance Co Ltd [1994] 2 AC 199 (PC). In such a situation, the doctrine of the undisclosed principal (rather than unnamed principal) becomes relevant and, after the third party discovers the existence of the agency, the third party may elect to look either to the agent or the principal: *W C Fowler & Sons Ltd* (above).

19. In this case the original tenancy agreement referred to KTL as being the landlord's agent in various places. It set out that KTL were the property management firm – known as the agent for the landlord and expressly set out that: "The person/firm named in the 'property management firm/agent details', is an intermediary between the owner/principal/landlord and you as tenant. The agent is acting as 'an agent for 'or on account of' the landlord". The box intended for the landlord details, address for service and contact details did not give the landlord's (owner's) name but states 'C/O Kempy Trading Limited [address and contact numbers]'.

20. I find that it is sufficiently clear from the construction of the tenancy agreement that KTL were acting as an agent on behalf of the owner - albeit that the owner was not named (unnamed principal).

21. Therefore, it would be reasonable for the tenant to expect that the Rent Shop Limited was also acting as agent for an owner. In any event, the letter that the Rent Shop Limited sent the tenants at the outset of their appointment set out that they had been *'instructed by the owner of your property to commence management duties…'*.

22. The Rent Shop Limited have clearly disclosed that they are acting for the owner, despite the owner not being named.

23. The tenant's submitted that the Rent Shop Limited should be liable under the RTA because of the level of their engagement in the day-to-day management of the tenancy. Simply carrying out the tasks required of a property manager under the agency agreement with the owner does not make the agent personally liable to a third party for those actions, whether they are the subject of a claim or not.

24. I find that the Rent Shop Limited were merely acting as an agent or as an intermediary for the owner.

25. Accordingly, it is not appropriate that they come within the definition of landlord in s 2(1) RTA.

26. The Tribunal only has jurisdiction to hear disputes between landlords and tenants (and between a landlord and a guarantor of a tenant's obligations).

27. Therefore, I dismiss the claims bought against the Rent Shop Limited.

THE LAW - FAILURE TO MAINTAIN

28. Under s 45(1)(b) Residential Tenancies Act 1986 (RTA), a landlord must provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes.

29. It is well settled that, the landlord's obligation under s45 RTA is to investigate and repair a defect brought to their attention within a timeframe which is reasonable in the circumstances, and as to what that time is, depends on the gravity of the problem but also on the objective attempts made by the landlord to investigate, and put right, whatever the problem might be. A tenant should promptly notify a landlord of any defects and a landlord should be given a reasonable opportunity to remedy the defect before being liable for any failure to do so.

30. However, I also concur with the opinion of the Tribunal in *Marks v Godfrey* 15/01390, HN 25/08/2015 and [Suppressed] [2021] NZTT 4293251 to the effect that all properties should be checked regularly and maintained as required. There should be preventative maintenance as well as repair. This is implicit in s 45(1)(b), RTA.

31. Section 40 of the RTA sets out the tenant's responsibilities, and that includes an obligation to notify the landlord, as soon as possible after the discovery of the need for repairs to the premises.

32. The RTA also provides a mechanism for tenants to raise work required at the premises more formally with the landlord, and if the landlord does not comply with that notice, to escalate the matter to the Tenancy Tribunal for orders. In particular tenants are able to provide the landlord with a breach notice (a 14 day notice and if work is not completed in a timely way, tenants can seek a work order from the Tenancy Tribunal which would require the landlord to remedy the breach. That is consistent with section 49 which places a duty to mitigate on the parties, that provision holds:

> Where any party to a tenancy agreement breaches any of the provisions of the agreement or of this Act, the other party shall take all reasonable steps to limit the damage or loss arising from that breach, in accordance with the rules of law relating to mitigation of loss or damage upon breach of contract.

FAILURE TO MAINTAIN - CARPET

33. The tenant claims that the landlord has breached their obligations under s 45 RTA by not providing and maintaining the carpet.

34. The tenant says that the landlord has breached this obligation because the living room carpet was old, dirty, damp and smelly and because the remaining rooms have no carpet.

35. The tenant says that Ms Kemp of KTL said at the start of the tenancy that the carpet would be replaced but it was not. The tenants presented limited photographs of the carpet in the living area.

36. The tenant also says that the carpet in one of the bedrooms was there at the start of the tenancy but that it had to be removed at the start of the tenancy as it was not in good condition – including the fact it had faeces on it. The tenant says Ms Kemp's husband took the carpet away at the very start of the tenancy but it was never replaced. The tenant had a photograph of the carpet in this room at the start of the tenancy. It is accepted that there is no carpet in this room now.

37. The landlord relies on property inspection reports such as those undertaken by the Rent Shop Limited in January 2022, May 2022 and November 2022 recording that the carpet in the living room is old but in good condition with no report of the carpet being recorded as an issue. By the time the Rent Shop Limited became the property managers the carpet in the bedroom had been removed. The landlord says that the carpet is old but clean and tidy.

38. The landlord says they cannot comment about representations that Ms Kemp may have made. The landlord says that the floors in the bedrooms are polyurethane tongue and groove.

39. The landlord highlights that the tenant did not raise the carpet as an issue with them and did not include it in their 14 day notice.

Analysis

40. I find that the tenant has not established there has been a failure to maintain in relation to the living room carpet. The probative evidence shows a carpet that is certainly old, but the evidence does not establish that the carpet is not in a reasonable condition. I find that the tenant has not established that there has been a breach of the landlord's obligation to provide and maintain premises in a reasonable state of repair in relation to this.

41. I also find that the tenant has not established a failure to provide and maintain the premises in a reasonable state of repair in relation to the rooms that never had carpet. The representation made by Ms Kemp is not sufficiently proven and there is no obligation in the RTA for a property to have to have carpet. I find that the probative evidence filed of the flooring in place to be reasonably maintained. It is polyurethane flooring in reasonably good condition.

42. However, I do find that there has been a failure to provide and maintain the premises in a reasonable state of repair in relation to the carpet that was removed and then not replaced. The tenant rented the property with carpet in

one bedroom. That carpet was removed and this should have been replaced after it was removed. This is a failure to provide and maintain.

43. The tenant clarified that the second hearing that they only wanted to know if there had been a breach of the landlord's maintenance obligation in relation to the carpet.

44. I therefore declare that there has been a failure by Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust to maintain in relation to the carpet in the bedroom when it was removed and not replaced.

FAILURE TO MAINTAIN - GARAGE DOOR

45. The tenant claims that the landlord has breached their obligations under s 45 RTA by not maintaining the garage door.

46. The tenant says that the garage door did not work from the outset of the tenancy. They say it is nailed shut. They say that the part that winds the door is completely bent so that the door cannot be opened. This means they cannot open the garage door to store their car but there is a side door so they can get in. The tenant says they initially reported this to Ms Kemp.

47. There is evidence of this being reported as an issue in a text message dated 17 October 2020. In that message the tenant reports damage to their car and asks how far away the shed door will be as that is the safest place for their vehicle. The tenant says Ms Kemp did nothing. A further text message sent by the tenants later to Ms Kemp on 17 May 2021 says that the tenants 'aren't too bothered' about the garage.

48. The landlord says it did not know of the issue but since they were aware of it quotes have been obtained.

Analysis

49. I find that there has been a failure to maintain the garage door.

50. Ms Kemp for KTL on behalf of the landlord clearly knew that the garage door was not operational from October 2020. This is proven by the text messages.

51. Further, the first inspection undertaken by the Rent Shop Limited took place on 19 January 2022 and this expressly notes in the report that the main roller door cannot be opened. The issue continued to be recorded in routine maintenance reports.

52. A tenant should not have to wait nearly three years to have an operational garage door so that their car can be stored in it.

53. In the context of this application, the Tribunal can award compensation where a party has been in breach of the RTA or has been in breach of the tenancy agreement, and the other party has suffered a loss because of that breach. In general, when awarding damages, the accepted principle is that the injured party should be put in the same position as they would have been but for the breach, since there is liability for losses flowing from the breach.

54. The tenant's sought compensation for damage said to be done to their car but there was no evidence of these costs or sufficient evidence of the damage occurring due to the garage door not working. This means I cannot make an award of compensation in relation to any damage the tenant says was caused to their vehicle.

55. However, the tenant also claimed that they did not get what they were paying rent for. I accept that the tenant would not have been able to store their car in the garage, but it could still be accessed via a side door for other use. There has therefore been some loss of amenity and I consider making an award on this basis to be fair.

56. Determining the level of compensation in these types of cases, is challenging. It is very difficult to determine the monetary value that would attach to the tenant's loss, and invariably what the Tribunal must do, is to step back, and evaluate what a fair level of compensation would be in the circumstances. Appellate Courts have advised of the need to adopt a global approach when considering compensation awards. They have repeatedly emphasized that the assessment of the proper amount of compensation is a question of fact in each case; it is not an exact exercise and a common-sense approach is required; that there are no general or absolute rules for calculating the amount of not having full use of what has been paid for.

57. Having done this, I consider a fair level of compensation for the tenants, would be $1,500. In fixing that amount, I note that it would comprise approximately one month of the average rent across the tenancy and I am minded that the issue impacted the tenant's enjoyment of the tenancy.

58. In making this award as set out above I am also minded, that there is an obligation on tenants to mitigate any loss, which means that the tenants could have brought an application for the defect to the Tribunal sooner than occurred in this case, and the Tribunal could, for example, have made work orders to have any necessary work remedied.

BREACHES OF HEALTHY HOMES STANDARDS

59. The tenant claims that the landlord has breached the landlord's obligations under section 45(1)(bb) RTA which requires compliance with the Residential

Tenancies (Healthy Homes Standards) 2019 (HHS). The tenant considers that the landlord has failed to comply with the HHS insulation, ventilation and draught stopping standards.

60. As explained during the hearing compliance dates for the HHS vary depending on the tenancy. All private rentals must comply within 90 days of any new or renewed tenancy after 1 July 2021, with all private rentals complying by 1 July 2025.

Analysis

61. This tenancy began in 2020. This means that the HHS do not apply to this tenancy. Therefore, the claims for breach of the HHS in relation to insulation, ventilation and draught stopping standard must fail and are dismissed.

62. However, this is not to say that the landlord has no obligations in relation to the matters raised. Other related obligations exist which the tenant also relies on. I must continue to assess the claims by reference to all of the breaches identified by the tenant.

BREACH OF INSULATION STANDARDS AND FAILURE TO MAINTAIN - INSULATION

63. Although the HHS do not apply, under s 45(1)(c) RTA and Part 2 of the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016 ("Insulation Regulations") a landlord must nevertheless ensure that the property meets minimum insulation standards.

64. From 1 July 2019, all residential premises must be insulated to a minimum standard. Where the premises were insulated before 1 July 2016 the underfloor insulation must have an R-value of at least 0.9. The insulation must be in reasonable condition. Where underfloor insulation is installed after 1 July 2016 the minimum R-value for underfloor insulation is 1.3. There are exceptions to these requirements, for example, where it is not reasonably practicable, or where there is a habitable space above or below the ceiling or floor that would otherwise have to be insulated.

65. The tenant says that insulation is missing throughout the underfloor of the home.

66. The landlord says that only 6m^2 was missing from underneath the bathroom.

Analysis

67. A Healthy Homes report undertaken in April 2022 by Betta Property Compliance (I will call this the 'HHS Report) sets out that the estimated R value of the insulation is 1.4 and is 70mm in thickness. It sets out that the insulation type is

polyester. It notes that ‘There is large areas of insulation missing’ and records that the insulation appears to be in good condition from a distance. However, there is a large area missing by the access hatch. It sets out that when there is total coverage, the underfloor insulation will comply.

68. I find that the tenant has established that there has been a breach of insulation standards. It is not disputed that at least part of the insulation was missing. This is clear from the HHS report.

69. That said, I find that the tenant has not sufficiently proven that the entire property was missing insulation. I find that the HHS Report combined with the subsequent work of WISE to replace the missing 6m2 of insulation is the best evidence of the extent of the problem. The tenant’s photographs of other areas were unclear.

70. The insulation statement in the tenancy agreement says: ‘I have been unable to get an assessor onto the property’. The landlord should have checked the property met the requirements of the Insulation Regulations prior to the tenancy beginning.

71. I find that in not providing insulation so as to comply with the Insulation Regulations there has also been a failure to provide and maintain.

72. I have considered the tenant’s claim for compensation below.

FAILURE TO MAINTAIN - WINDOWS

73. The tenant says that the landlord did not provide and maintain the following windows in a reasonable state of repair:

    a. A window in a bedroom which is permanently drilled closed;

    b. A living room window which they say they cannot open due to a tree growing outside it;

    c. A bedroom window that had a missing handle;

    d. A dining room window that has gaps of an inch and a half;

    e. A living room window with gaps;

    f. Bedroom 1 a window had hinges that need replacement.

74. The landlord says that window repairs were done by Fernees in February 2023 and provided an invoice for work undertaken. The tenants say the work was undertaken in April or May 2023.

Analysis

75. I find that the tenant has established a breach in relation to the bedroom window that had a missing handle ((c) above); a living room window with gaps ((e) above) and that bedroom 1 needing hinges ((f) above). This is because:

    a. I do not accept the tenant has sufficiently proven that there has been a failure to maintain the window that is permanently drilled closed. Evidence presented was that it was like this when the tenants moved in and there are other windows in the room. I do not consider this to be unreasonable having regard to the age and character of the premises.

    b. I do not accept the tenant has sufficiently proven that there has been a failure to maintain in relation to the tree meaning that the window in the living room could not open. There was no probative evidence of this, and the landlord says that at the end of tenancy inspection they could still open the window. This is recorded in their end of tenancy report.

    c. The HHS Report dated April 2022 records that the bedroom window is missing a handle. It is also recorded in earlier property inspection reports. The landlord says that the window repairer went to the property under the instruction to fix all of the issues relating to windows in the HHS report in February 2023 including this handle. I prefer the tenant's estimation of when Fernees undertook work (April or May) because it is supported by the invoice which was issued in April. Also, evidence provided to the Tribunal shows that Mr Keene emailed the tenants on 28 February 2023 saying that Fernees would be in touch about window repairs. That would suggest that the windows had not been fixed in February. I find the repairs most likely were done in April 2023. This means it took from at least April 2022 to April 2023 to repair. I consider a missing handle to be a minor issue but this is still a failure to maintain – a tenant should not have to wait around a year for a replacement window handle.

    d. I do not accept the tenant has sufficiently proven that there has been a failure to maintain the window that is in the dining room. There is insufficient probative evidence to support the claim.

    e. I accept that the living room window had a gap as this is supported by the HHS Report that refers to the lounge window coming away from the framing. The landlord's most recent property inspection report records that there are no gaps. The tenant's evidence is that there is a gap. The tenant did not provide more recent probative evidence. I find that the tenant has not sufficiently proven that there is an existing a gap or need for repair, however on the landlord's own evidence there is no dispute that the gap identified in the HHS Report was not fixed until Fernees attended the property. I find that Fernees most likely attended in April 2023. A tenant should not have to wait this long to have a window repaired where it is

coming away from the framing. The landlord knew about this from at least the date of the HHS Report. I find this is a failure to maintain.

f. I accept that the tenants have established that on the date of the HHS Report's bedroom 1's window had hinges that needed replacing – this is supported by the HHS Report. This took until 2023 to remedy when Fernees undertook their work. A tenant should not have to wait this long to have a window repaired. I find this is a failure to maintain. The landlord knew about this from at least the date of the HHS Report.

76. I have considered the tenant's claim for compensation below.

GAP IN DISHWASHER SPACE AND GAPS IN FLOORS

77. The tenant says that the landlord did not provide and maintain the following in a reasonable state of repair:

    a. An area in the dishwasher space that has a gap

    b. Gaps in the wooden floors

Analysis

78. The tenant says there are holes in the wooden floors. This is disputed and I find it is not supported by the probative evidence presented by the tenant. This part of the claim is dismissed.

79. The tenant says that there is a gap in the dishwasher space. This is supported by the HHS Report which identifies that there is an exposed area to the underfloor under the bench. The landlord says they thought this would have been addressed by Fernees when they addressed the windows.

80. I find the tenant has the better evidence here because the landlord was not able to state with any certainty that it had been fixed. Mr Keene's email to the tenant dated 28 February 2023 does not say that Fernees will be fixing the gap by the dishwasher. The issue is not addressed in the landlord's most recent property inspection report despite the matter being subject to these proceedings at the time the inspection was undertaken.

81. Fernees is a window and door repairer (as set out on their invoice). In the absence of this being expressly referred to as being fixed and appearing on a quote as part of the work undertaken (the landlord was unable to provide this) I prefer the tenant's evidence that the gap remains. This is also supported by the tenant's email dated 1 May 2023.

82. The landlord clearly was alerted to the issue by way of the HHS Report and subsequently reminded of the issue by the tenant in May 2023. The issue is reported in the tenant's 14 day notice.

83. I find that given the gap is identified as exposing the underfloor it should have been remedied sooner by the landlord – waiting from April 2022 and still not having the issue resolved by the end of the tenancy in September 2023 is an unreasonable period to wait given the nature of the problem. I find there has been a failure to maintain in relation to this defect.

84. I have considered compensation below.

FAILURE TO PROVIDE EXTRACTOR FANS – KITCHEN AND BATHROOM

85. The tenant says that the landlord did not provide and maintain the premises in a reasonable state of repair because they did not have a rangehood in the kitchen or an extractor fan in the bathroom.

86. As set out above the HHS do not apply to this tenancy. There is no obligation on a landlord to provide and maintain an extractor fan when the HHS do not apply.

87. This claim is dismissed.

FAILURE TO MAINTAIN - MOULD

88. The tenants say the premises had mould. They say that this was as a result of the landlord's failures in relation to the insulation, there being no extractor fans and there being gaps in the windows. The tenants say this was a breach of the HHS and also a failure to maintain the premises.

89. The HHS relate to the five standards in relation to heating, insulation, ventilation, moisture and drainage, and draught stopping rather than mould (although failure to comply with these standards may lead to mould). In any event, the HHS do not apply to this tenancy due to the date the tenancy started. The tenant's application for breach of HHS due to mould therefore is dismissed.

90. However, the tenant says this is also a breach of the landlord's duty to provide and maintain premises. Notably, despite the HHS not applying, the Housing Improvement Regulations 1947 (HIR) do apply to this tenancy and this specifies the minimum standards of fitness for houses which include a requirement that every house shall be free from dampness (regulation 15).

91. The tenant provided the Tribunal with a series of more recent photographs showing mould. The tenant says they told Ms Kemp about the mould and this is supported in text messages provided to the Tribunal dated 17 and 28 May 2021 which refer to mould.

92. The tenant says they frequently had to clean the premises using Exit Mould.

93. The tenant referred to their bathroom wall as being rotten. Photographs of the area were supplied. The property inspections from the start of the Rent Shop's management period also refer to the bathroom wall being rotten.

94. When referring to mould the tenant also relied upon the fact that the property did not have a moisture barrier installed as set out in the HHS report.

95. The tenant says that they had to throw out most of their belongings when they moved out recently due to not wanting to take items that were mouldy or exposed to mould. A photograph of a full skip was provided to support this claim.

96. The tenants say they first told the Rent Shop Limited about the mould in May 2022 when there was a rent increase. The tenant says that the landlord did not take any steps in relation to the mould – such as putting in the missing insulation and extractor fans.

97. The landlord says that it did not know about the mould. It says that it was not observed in any of the routine inspections. There was no mould on the curtains and also no mould after the tenant had vacated the property and the property had sat empty for around three weeks.

98. The tenant says the landlord did not see mould on inspections because they cleaned it.

Analysis

99. Many houses produce mould. Mould is usually eradicated by wiping with an appropriate cleaner. Mould will grow in a home where humidity remains high, but has difficulty surviving in low humidity. There are two ways to reduce humidity: by heating and ventilation, ventilation being the most basic requirement.

100. Responsibility for mould problems can rest with the tenant, if the tenant fails to air and heat the premises properly. If the tenant fails to heat and ventilate the premises when heating and ventilation is available, then it is the tenant's problem. On the other hand, the landlord must provide the tenants with the necessary means to heat and air the premises. If appropriate, fans and dehumidifiers should be provided.

101. There are no express obligations for landlords to install extractor fans in the kitchen and bathroom under the Housing Improvements Regulations 1947 but the landlord must still ensure the house is free from dampness and must still ensure that the home is in a reasonable condition. If a property has an inherent problem causing dampness and mould, the landlord has the responsibility to remedy the fault by addressing any defects with the premises likely to contribute to those problems.

102. In summary, the premises must be able to be used and lived in, in the normal way, without mould developing. If this cannot be done, then it is the landlord's problem.

103. As set out above, a tenant must tell the landlord if there is a problem with mould so that appropriate action can be taken by the landlord. Tenants have a duty to do this (s40, RTA). Furthermore, s 49 requires that where there has been a breach, that the other party must make reasonable steps to mitigate that breach.

Analysis

104. I find that the tenants have established that there was an issue with mould at this premises beyond that caused by usual everyday living. There was no mechanical ventilation at this property, insulation was missing and a moisture barrier was not installed. The tenant has established that there was a gap in a living room window for a significant portion of the tenancy. There was a bathroom wall that has been identified in property inspection reports as being rotten.

105. The landlord could have shown that the property was free from mould despite the lack of mechanical extractor fans and the other issues that have been proven but did not do so. Mr Weir mentioned instructing a mould expert to the tenants during his email communication with the tenants. However, there is no evidence that this was done.

106. The landlord's position that no mould grew when the property was left empty by the tenants before the tenancy was terminated carries little weight because the property was not being used in the usual way at this time. I am not satisfied that it can be assumed that because there was no mould on the curtains means there can be no mould issue.

107. I find that the owner can be considered to have had knowledge of the property having a mould from May 2021 via its agent KTL and Ms Kemp. However, mould can be an issue that frequently arises as a result of the way the tenant is living and therefore it would be reasonable for the landlord to regard the issue as resolved where it was no longer being reported and/or not able to be observed (for instance, due to cleaning prior to inspections).

108. After this initial exchange with Ms Kemp about the mould there is no probative evidence of the tenants communicating with KTL, the owner or the Rent Shop Limited about a problem with mould until their 14 day notice was given.

109. Although dated May 2023 I consider it most likely that the 14 day notice was given to Mr Keene at a property inspection on 8 June 2023. That is supported by emails discussing this between Mr Weir and the tenant and also the date for the works to be remedied on the letter which is stated to be 22 June 2023

110. The tenants are not able to prove raising mould with Mr Keene for the first time in an email in May 2022. There was no probative evidence of this. The email they sent in May 2023 did not refer to mould (although it referred to other issues).

111. Here the Rent Shop Limited started actively communicating with the tenant about the mould towards the end of June when Mr Weir took over. He began asking the tenants for photographs and these were provided. When these were provided by the tenant is not clear from the screen shots provided although it must have been between 27 June 2023 and 11 August 2023 (when the tenants terminated the tenancy).

112. There was a period of around 3 months from the tenant's 14 day notice to the end of the tenancy. Given the existing problems the landlord knew existed with the property I find that insufficient action was taken – this was not a reasonable period of time to make the tenant's wait for progress. There has been a failure to maintain in relation to the mould albeit for a short period of time prior to the tenancy ending.

113. I have considered compensation below.

FAILURE TO PROGRESS TRADE VISITS

114. The landlord made submissions that the tenant was a poor communicator so this delayed tradespeople.

115. The tenant denies they were not good at communicating and denied calls being made to them. The tenant attempted to show this via email and telephone logs. The logs carry limited weight because they may not be complete records. However, when Mr Keene put this in an email to the tenant it was noted that they had not received calls and they provided a number they wanted the landlord to use.

116. On the basis of the evidence presented I do not accept this submission has been sufficiently proven by the landlord. Mr Keene did not give evidence about the efforts he had made and there was very limited probative evidence that detailing efforts made to contact the tenant. A number of the emails provided did show the tenant actively engaging with the Rent Shop Limited when it came to tradespeople visiting the property and liaising on repairs.

117. Further, and in any event, a landlord cannot simply delegate responsibility for organising trades people to the tenant. Managing tradespeople is a key part of a property manager's role. While it can be practical to try and get trades to communicate direct with the tenant to arrange access, where this fails or is

proving problematic the landlord should manage the situation and step in where necessary.

118. One example provided by the landlord to evidence this submission was an email dated from the insulation tradespeople saying they were unable to contact the tenant. The tradesperson refers in their email to making three calls. There is no other evidence that such calls were actually made to the tenant or evidence of the number used. However, the email from the trades person records them reporting that two calls were made on one day and one call made the following day. At the hearing the landlord says that trades would not go to the property unless the tenant had agreed but, in the email regarding insulation referred to above, the tradesperson says the tenant does not need to be present as the work is outside and then offers three dates. The work was not done on these dates.

119. It is not surprising that trades people do not want to spend time contacting tenants and there could be a number of reasons why a tenant may not answer a telephone: they may be at work, out of reception, driving or simply anxious to take a call from an unknown person. Arranging the tradespeople is part of the landlord's obligation to maintain the property. It follows that arranging times for trades to undertake the work and liaise with the tenant about this is ultimately the landlord's responsibility.

120. The landlord's written submissions refer to the Rent Shop Limited being busy people. That may be the case, but their job is to manage tenancies.

121. The arrangements can be made less formally where the tenant agrees and is capable, but ultimately the landlord needs to monitor this and can use the provisions in the RTA to give tenants formal notice that access is required for maintenance work on a particular day.

COMPENSATION – INSULATION, WINDOWS, GAP IN WALL, MOULD

122. The tenants have proven that the landlord has breached its obligations in relation to the insulation standards for the entire tenancy, has failed to maintain the premises in relation to the three windows for a period for over a year and did not maintain the property in relation to a gaps in the dishwasher space from April 2022 to the end of the tenancy. The tenants have also established that in the final months of the tenancy the landlord failed to maintain the premises so that it was free from mould.

123. The tenants sought compensation for items they had to throw away but there was insufficient evidence to support that loss so I cannot make an award for compensation on this basis. There were very limited photographs of mould on items compared to the volume of the skip that they said they had filled with

mouldy items and no receipts or other proof to show the value of the items disposed of or the cost of replacement items.

124. The tenants also sought compensation for power consumption but there was also insufficient evidence to support that claim so I cannot award compensation on this basis. No invoices were available to the Tribunal to show inflated power use.

125. However, the tenants also say they suffered a loss because they were paying for a house that was suitably insulated and maintained and they did not get this. I accept this and consider a loss of amenity award to be fair.

126. I have already set out above the challenges the Tribunal faces when making such an award.

127. Considering matters in the round I make an award of $2,500 in respect of these breaches. In calculating this amount the factors I have considered the nature of the breaches and the tenant could have mitigated their loss in respect of these breaches by serving formal notices on the landlord or taking Tenancy Tribunal action sooner; the missing insulation accounted for 6m2 of the property; and the tenant has not proven that the mould was reported to the landlord prior to their 14 day notice provided to the landlord in June 2023. The tenants also limited their claim for compensation as a result of all of the landlord's breaches to $4,000 on their application and I have already awarded $1,500 in respect of the garage.

FALSE AND MISLEADING INSULATION STATEMENT

128. The tenants seek exemplary damages for the fact that the landlord made a false or misleading statement on the insulation statement. They say that the insulation statement says the underfloor insulation was complete - but it was not.

129. The landlord's position is that they are not responsible for the actions of KTL and /or Ms Kemp.

130. Under s 13A(1A) RTA a landlord must include a signed statement in the tenancy agreement that provides the following information:

    a. whether or not insulation is installed in any ceilings, walls and floors, and

    b. details of the location, type and condition of all insulation installed.

131. If, despite making all reasonable efforts to do so, the landlord has not been able to obtain some or all of the information required, s 13(1C) sets out what the landlord may do as an alternative to providing the information in s 13(1A).

132. Section 13A(1F) RTA provides that a landlord commits an unlawful act if they fail to comply with s 13(1A) by not including the required information or if the statement includes anything that the landlord knows to be false or misleading. The Tribunal may award exemplary damages up to $750.00 for failure to provide or up to $900.00 for knowingly providing false or misleading information.

133. 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.

134. Section 109 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.

135. I have set out agency principals above and I will not repeat them here. KTL was acting as the agent of Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust. Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust is liable as principal for the actions of her agent.

136. I am satisfied that the statement was known to be misleading. Providing correct and accurate information is expected. Ticking the box to say that the property had complete underfloor insulation led the tenants to believe that the insulation was in place and that this had been checked.

137. On the basis of the evidence presented by the landlord I cannot be satisfied what, if any, checks were made, prior to making the selection. Even just a cursory check would have revealed the obviously missing insulation – it was a portion of 6m2 immediately adjacent to the access hatch.

138. The breach occurred when the statement was signed in 2020. However, I consider that this breach is continuing because the tenants have never had a correct insulation statement.

139. I find that the misleading statement was given intentionally – to appear to be complying with the statutory requirements both to have an insulated property and to comply with the need to complete an insulation statement. The result is that the tenants relied on it and they have spent a significant time being concerned that the property did not meet the standard they had been told.

There is a public interest in compliance with these requirements. It ensures that both parties turn their minds to compliance with the law, and that rental properties are compliant with the relevant provisions.

140. I consider that an award of exemplary damages is appropriate, and I award $700.00. The award is towards the upper end of the scale to reflect the fact that this is not the first time the Tribunal has found that the landlord has misrepresented the position in relation to compliance standards (see [2023] NZTT 4673869, 4696131).

FILING FEE AND SUPPRESSION

141. Because the tenant has substantially succeeded with the claim I have reimbursed the filing fee.

142. The tenant did not want name suppression so I have not considered this.

143. The landlord and the Rent Shop Limited requested name suppression.

144. Julia Rozgon As Trustee Of The Mccourt And Rozgon Family Trust has not been substantially successful and so I have not awarded name suppression.

145. The application against the Rent Shop Limited has been dismissed so they have been substantially successful. However, I decline to award name suppression. This is because the Rent Shop Limited has been acting for a significant and most recent portion of this tenancy as the landlord's agent. Although it is not liable for the sum I have ordered (due to the application of agency principals) it has been the day to day contact for the tenants in this tenancy from 2022. Breaches of the RTA have been identified relating to the way in which the tenancy has been managed by it. The landlord is based overseas and so does not play a part in the day to day running of the premises.

146. I therefore conclude that due to the particular circumstances of the case it is in the public interest that the Rent Shop Limited's name is not suppressed (s95A, RTA).

M Kemp
24 November 2023

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.