[2023] NZTT 4653909

TENANCY TRIBUNAL – New Plymouth

APPLICANT:	Donna Maree Warren Tenant
RESPONDENT:	Fiona Clark And Tertius As Trustees Of The Te Ara O Pekapeka Trust, Fiona Clark Landlord
TENANCY ADDRESS:	71 Inland North Road, Tikorangi, RD 43, Waitara 4383, Cottage

ORDER

1. The Tribunal's interim name suppression order made on 20 September 2023 is lifted. There are no grounds to grant a final order.
2. Fiona Clark And Tertius As Trustees Of The Te Ara O Pekapeka Trust, Fiona Clark must pay Donna Maree Warren $670.44 immediately, calculated as shown in table below.
3. The tenant's application for compensation/exemplary damages in relation to the shower, chimney/fire, septic tank and smoke alarm is dismissed.
4. The tenant's application for compensation for breach of quiet enjoyment is dismissed
5. The tenant's application for failure to maintain the oven and a work order for the septic tank is withdrawn.
6. The tenant's application for compensation following a variation to the tenancy agreement relating to part of the garden is dismissed

7. The tenant's application for exemplary damages for failure to maintain the garden in the septic tank area is dismissed.
8. The tenant's application for exemplary damages for contracting to contravene or evade the provisions of the RTA is dismissed.

Description	Landlord	Tenant
Exemplary damages: Brick path/patio		$100.00
Compensation: Tap		$150.00
Exemplary damages: Tap		$150.00
Exemplary damages: HHS statement		$250.00
Filing fee reimbursement		$20.44
Total award		**$670.44**
Total payable by Landlord to Tenant		**$670.44**

Reasons:

1. Both parties attended the two hearings that took place for this application.
2. Both trustees attended the first hearing. Only Ms Clark attended the second hearing for the landlord with a support person.
3. At the first hearing Ms Warren had a support person. At the second hearing Ms Warren's support person spoke on her behalf. The tenant requested this in advance and I permitted representation. I allowed this due to the size of the potential claim (s93 Residential Tenancies Act 1986) (RTA). The landlord was also advised that they may have a representative but continued with Ms Clark presenting the case.
4. I must address the remainder of the tenant's claims following my order dated 20 September 2023.

SHOWER - – FAILURE TO MAINTAIN - EXEMPLARY DAMAGES AND COMPENSATION

5. Under s 45(1)(b) 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.

6. It is well settled that, the landlord's obligation under s 45 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. The tenant says the landlord failed to maintain the shower because the shower wall had a hole in it and then it was not repaired appropriately. The tenant seeks compensation and exemplary damages.

12. The tenant alerted the landlord to a problem with the shower on 12 July 2023 and repairs were undertaken to the wall within the 14-day notice period. The landlord says the shower was sufficiently patched and painted in that time and is fully waterproof and that specialist paint was used. A photograph that the landlord says was taken on 20 July shows the repair which I consider to be reasonable given the age and character of the premises.

13. The tenant says paint has bubbled since and provided a photograph of this. Additional photographs were provided at the second hearing. The tenant says, because of this bubbling, the fix undertaken by the landlord was not sufficient.

14. I consider there has been no failure to maintain because I find that the original issue was promptly repaired, and the present issue as evidenced by the tenant is presently minor. Further, and in any event, I find that the evidence presented did not establish that the tenant sufficiently told the landlord there was an issue that had arisen after the initial repair had been done.

15. This part of the claim is dismissed.

OVEN - FAILURE TO MAINTAIN - WITHDRAWN

16. The tenant withdrew her claim in relation to a failure to maintain the oven.

SEPTIC TANK - FAILURE TO MAINTAIN - EXEMPLARY DAMAGES AND WORK ORDER

17. The tenant says the landlord has not maintained the septic tank for the premises because it is smelly. The tenant seeks exemplary damages.

18. She alerted the landlord to the septic tank being smelly on 12 July 2023. The tenant's representative also says she smelt it.

19. The landlord says that the septic tank was emptied in 2020 prior to the start of the tenancy. It is septic tank that just services that property for the one person. Ms Clark and Tertius both say the septic tank is not smelly. This was supported by Mr Burglass (who undertakes maintenance for the landlord in the wider section) who attended the hearing as a witness. The landlord has since undertaken testing which she says shows the tank as being normal for methane and PH readings.

20. On the basis of the evidence provided, I find that the tenant has not proven that the septic tank requires maintenance. This part of the claim is dismissed.

21. The tenant withdrew the claim for a work order on the septic tank as the tenancy has ended.

BRICK PATIO/PATH - FAILURE TO MAINTAIN - EXEMPLARY DAMAGES

22. The tenant says the landlord has failed to maintain the brick path/patio surrounding the house. This has caused it to be slippery and for moss to build up. She seeks exemplary damages.

23. The tenant provided a photograph of the side of the property to support this part of her claim this was taken on 3 August 2023. She also had photographs to show how clean she had kept the bricks during her tenancy.

24. The tenant alerted the landlord to the brick patio needing cleaning on 12 July 2023.

25. The landlord says this is not their responsibility. The landlord said bleach or vinegar could be used or the paths could be let so wild thyme would grow. Alternatively, a product like Wet and Forget could be used or cold Surf. Ms Clark says this is needed otherwise the bricks grow mould.

26. I have carefully considered the photographic evidence provided and accept that the bricks do have a level of green moss/mould making it more likely than not to be slippery. The landlord has known about this from 12 July 2023 when the tenant served her 14 day notice.

27. A landlord is usually responsible for outside cleaning and maintenance tasks. For example, washing the house or cleaning the gutters. I find that the landlord is the responsible party for maintaining the pathway and patio in this situation.

28. I find there has been a failure to maintain the path.

29. The tenant seeks exemplary damages. 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.

30. 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.

31. Breaching the obligations in s 45 RTA, including a failure to maintain, is an unlawful act for which exemplary damages may be awarded up to a maximum of $7,200.00. See section 45(1A) and Schedule 1A Residential Tenancies Act 1986.

32. Where a party has committed an unlawful act intentionally, the Tribunal may award exemplary damages where it is satisfied it would be just to do so, having regard to the party's intent, the effect of the unlawful act, the interests of the other party, and the public interest. See section 109(3) Residential Tenancies Act 1986.

33. The landlord clearly knew the tenant wanted the path cleaned from the tenant's 14-day notice. The landlord wrongly took the view this was a tenant responsibility. Where problems are known but there is a failure to remedy, the unlawful act is intentional. This is so even where the landlord made a mistake as to the law as a party is assumed to know the law. The impact on the tenant is that she had a path would have been slippery and she was no able to clean it herself (as she had been doing) because the landlord was no longer providing an outside tap (considered below). It is in the public interest that landlords do not delegate their own responsibilities to their tenants. I award exemplary damages of $100.

TAP – FAILURE TO MAINTAIN - EXEMPLARY DAMAGES AND COMPENSATION

34. The tenant says the landlord failed to maintain a tap and seeks exemplary damages and compensation for loss of amenity.

35. The tenant says that she did not have water coming from the outside tap at the start of the tenancy, but when she asked the landlord turned it on for her, it was later turned off with no explanation. The tenant provided evidence of a text message dated 26 January 2022 referring to the water stopping. She says outside tap then remained without water.

36. The tenant referred to her tap not working in a letter to the landlord dated 12 July 2023 and the landlord responded explaining that the outside tap was not available as it is connected to a deep well pump.

37. The landlord says the tap was never part of the tenancy. The landlord says the tap is not in an area which is part of the tenancy. The landlord says she has turned off the tap because it leaks if not turned off properly, this causes a pump to run. The water is on a separate pump to the house.

38. The tenancy agreement does not set out any boundaries to the property and does not refer to the use of the tap. The landlord says this was part of a walk

around at the start of the tenancy. The tenant says there was no such discussion.

39. I have carefully considered the situation including the map provided by the landlord and the photographs showing the location of the tap.

40. I find that the landlord has not sufficiently established that the tap did not form part of the tenancy. This is due to the location of the tap, which is almost on the tenant's patio, the fact there is no other outside tap for the premises and there is no proof of the discussion between the tenant and the landlord at the start of the tenancy recording that the tap is excluded from the tenancy.

41. The landlord could have set out that the tap was excluded from the tenancy and set out the boundaries to the tenancy (by using a map such as that provided to the Tribunal) but did not do this. The landlord, as the drafter of the tenancy agreement, should make sure that any boundaries are clear where they are not obvious. I am not satisfied it is sufficiently obvious that the tap would not be available for the tenant to use. The fact the tap's water source comes from a separate source to the main water for the cottage and is pumped by a different pump does not persuade me differently.

42. A tenant can reasonably expect that if there is an outside tap there will be a supply of water to it most of the time. In a rural environment, however tenants must accept that there will be rare occasions when supply can be interrupted.

43. The tap stopped working as it was turned off - due to it leaking and running the pump. Therefore, I consider that the tap has not been reasonably maintained and the tenant has proven that this was the case since 26 January 2022.

44. The tenant seeks compensation due to a loss of amenity.

45. 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.

46. There has been some loss of amenity and I consider making an award on this basis to be fair.

47. 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.

48. I consider the sum of $150 to be reasonable to compensate the tenant for a loss of amenity. I have set out the law relating to mitigation of loss above. In this case the tenant did not provide evidence of formally raising an issue with the tap until her 14-day notice in July 2023. In setting this amount 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 some of the defects 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.

49. The tenant also seeks exemplary damages. I have already set out the test in relation to exemplary damages above and do not repeat it here.

50. Breaching the obligations in s 45 RTA, including a failure to maintain, is an unlawful act for which exemplary damages may be awarded up to a maximum of $7,200.00. See section 45(1A) and Schedule 1A Residential Tenancies Act 1986.

51. Where problems are known but there is a failure to remedy, the unlawful act is intentional. The effect of not having an outside tap was that the tenant had no access to water for her garden but also for cleaning the brick area as she would have liked. It is in the public interest that properties are maintained to the required standard. Here the landlord was under the mistaken impression that the tap did not form part of the tenancy. However, this was wrong, the landlord could have made the use clear by putting it in writing in the tenancy agreement but they did not. It is just to make an award.

52. I award the tenant $150.00 in exemplary damages in respect of this breach.

GARDEN – FAILURE TO MAINTAIN – EXEMPLARY DAMAGES

53. The tenant says the gardens around the premises have not been maintained and seeks exemplary damages.

54. The tenant says these gardens no longer form part of the tenancy following a variation to her tenancy in 2021. The tenant provided a series of photographs showing various areas - some areas she said never formed part of the tenancy and other areas she said were removed from her by way of a written variation and therefore are no longer form part of the tenancy. She says the landlord has

failed to maintain those areas. She referred to this in a 14-day notice of 12 July 2023.

55. The landlord says that the gardens are tidy from her perspective – she encourages wildlife and also points to the fact that the gardens concerned do not form part of the tenanted premises.

56. The landlord's obligation to maintain relates to the premises. This obligation extends to facilities provided for the non-exclusive use and enjoyment of the tenant, otherwise than as part of the premises. Facilities can include land and therefore can include gardens. I am not satisfied that the areas concerned have been provided for the non-exclusive use and enjoyment of the tenant. Part of the tenant's evidence is that they were not provided for her use at all following the variation.

57. The gardens therefore fall outside of the tenancy agreement and are adjacent to her property. They are not areas "provided for non-exclusive use and enjoyment of the tenant". This is different to, for example, a communal garden that has been provided for a number of tenants to use by a landlord (which a landlord would have to maintain). If the tenant's argument was correct this would mean, for example, she could even request the landlord maintain the paddock that can be seen from her property in a certain way or with a certain look. That cannot be correct.

58. In any event even if I am wrong, given the size of the section, its rural location, the fact that part of the area complained of is on the top of the septic tank and the plants that the landlord said were growing there I do not consider that there has been a failure to maintain – rather a severe clash of personality when it comes to gardening aesthetics.

59. This part of the claim is dismissed.

CHIMNEY / FIRE – FAILURE TO MAINTAIN - EXEMPLARY DAMAGES

60. The tenant says the landlord did not maintain her chimney/fire. The tenant says that it was cleaned in May 2021 and everything was fine. However, she says in May 2022 the fire was filling up with smoke. She reported this to the landlord in a message on 25 May 2022.

61. The landlord replied that the tenant probably needed to clean it. The tenant responded saying she had cleaned it and it is not working properly. The landlord replied asking the tenant about the type of wood she was burning. The tenant replied it was dry pine. The tenant says she felt the landlord was challenging

her use of the fire so got a friend to clean it. An invoice (for which no payment was needed) shows this was done on or before 27 May 2022.

62. I am not satisfied that the tenant has established there was a failure to maintain. There was no probative evidence showing there was a problem with the fire. Further, I find that the tenant did not allow the landlord a reasonable time frame in which to investigate and undertake maintenance prior to engaging her own tradesperson. I find the landlord's questions were justified to establish whether a tradesperson needed to be called to the property.

63. The claim is not established and is dismissed.

SMOKE ALARMS – FAILURE TO COMPLY WITH SMOKE ALARM STANDARDS - EXEMPLARY DAMAGES

64. Section 45(1)(ba) RTA provides that a landlord must comply with all requirements in respect of smoke alarms and insulation set out in the Residential Tenancies (Smoke Alarms and Insulation) Regulations 2016.

65. The tenant's claim is that no smoke alarms were ever installed at the property and she seeks exemplary damages. The tenant says that one alarm is still in its plastic, and another was not installed.

66. A tenant is under an obligation to notify a landlord if there is a maintenance issue in relation to smoke alarms (s40, RTA). The landlord was not informed of an issue with alarms in the 14-day notice the tenant served. There were no notifications that the alarms were not installed despite the other requests the tenant made in her 14 day notice in July 2023. The submission made on behalf of the tenant was that she did not know that the smoke alarm needed to be installed. I do not find this to be credible given that the tenant says they were on a shelf and one, she says, was provided in plastic.

67. The landlord says alarms were installed at the outset of the tenancy – in the bedroom and hallway. The landlord says that smoke alarms were recorded on the tenancy agreement. Smoke alarms are ticked on the property inspection report and a further box is ticked confirming there is more at least one smoke alarm in each bedroom or within three metres of a bedroom door on the tenancy agreement. That inspection report is signed by both parties. The landlord also provided evidence in the form of a photograph showing holes where she says the smoke alarm had been in the bedroom. The landlord's position is that the tenant removed it - noting that she is a smoker. She says she does not know about the smoke alarm in plastic. It is dated 2017. She says that the smoke alarm handed to her by the tenant at the end of the tenancy had fly dirt on it and she said she had changed the batteries.

68. The landlord says that it makes no sense for her to provide a fire extinguisher (as recorded on the tenancy agreement) and not provide installed smoke alarms. The landlord says that someone attended the property to retro fit insulation from a Healthy Homes perspective. This tradesperson installed the alarms and put the extinguisher in the kitchen. The landlord says that the tenant must have taken down the alarms and referred to the fact she was a smoker.

69. On the basis of the evidence presented I find it more likely than not that smoke alarms were installed at the beginning of the tenancy. The landlord has the best evidence in the form of a contemporaneous document that records the alarms being in place at the time the agreement was signed.

70. The claim is dismissed.

HEALTHY HOMES COMPLIANCE STATEMENT – EXEMPLARY DAMAGES

71. The tenant says that the landlord did not include a Healthy Homes Intent to Comply Statement (HHITC statement) in the original tenancy agreement. The tenancy began on 12 February 2020.

72. The tenant also says that when the landlord varied the tenancy agreement in December 2021 which took effect on 13 January 2022 the landlord did not then include a required Healthy Homes Compliance statement. The tenant seeks exemplary damages.

73. For all tenancies that commenced or were renewed after 1 July 2019 there had to be a signed statement of intent to comply with the Healthy Homes Standards when it came into force for that tenancy. This was required by s 4 of the Healthy Homes Guarantee Act 2017 which came into force on 1 July 2019 (s 2, Healthy Homes Guarantees Act 2017 and s 13(1CA) RTA).

74. From 1 July 2021 a landlord was required to include a statement of the level of compliance with the health homes standards (HHS) for any new, varied or renewed tenancy agreement (adjudicator emphasis).

75. I find that this was not provided when the tenancy was varied in December 2021 (taking effect on 13 January 2022) (s13A(1CB), RTA).

76. There were no such statements provided by the landlord. The breaches are ongoing as the information has never been given.

77. Failing to comply with s13(1CA) or s13(1CB) is an unlawful act for which exemplary damages may be awarded up to $750. See s 13(1F) and Schedule 1A Residential Tenancies Act 1986.

78. I have set out the test for exemplary damages above and so do not repeat it here.

79. The landlord's position shows lack of knowledge of the law but a party is presumed to know the law and so I find the act was intentional. I find that the impact on the tenant was minimal as it was an administrative task rather than a need to make physical changes. There was no evidence that the home suffered from poor healthy homes standards. That said, it is in the public interest that tenants are given the required notices about Healthy Homes Standards at the correct time. Giving the required information when there are variations ensures that landlord's turn their minds to Healthy Homes Standards and tenants have notice of the standard of the home, even in older tenancies where the standards do not yet apply.

80. Taking these factors into account I award exemplary damages of $250.00.

QUIET ENJOYMENT – COMPENSATION

81. The tenant says that her privacy and right to quiet enjoyment has been breached and seeks compensation for stress, bullying and harassment by:

    a. An occasion where the maintenance man (Donald) came around 6 months ago – he was pulling something out looking for weeds.

    b. A friend observed Ms Clark and her friend walking off her property sometime prior to December 2022.

    c. A friend reported the maintenance man, Donald, being on the premises about 5 months ago. The tenant did not see him and did not know what he was doing.

    d. About 7/8 months ago Ms Clark was in the paddock looking at her while she was in the shower.

    e. Ms Clark stares in the windows when she is checking possum traps.

    f. The late-night delivery of a washing machine in August 2022. The tenant says Ms Clark told the driver she had a shotgun and would not let them down the driveway and then came up the driveway with her headlight on staring.

    g. Ms Clark told her that she did not like her mannequins which were looking out of her window.

82. The landlord says that she does not know where Donald was in relation to those allegations – he could have been away from the property on the riparian edge or

looking at a possum trap or could have just been walking back from another part of the property.

83. The woman that the tenant's friend may have seen her with might have been a possum maintenance person, but they would not have been in the tenant's area.

84. I accept that these actions do not amount to a breach of quiet enjoyment. The tenant rented a property on a section that was shared and therefore could expect some interaction from time to time with the landlord or those undertaking work on behalf of the landlord.

85. The shower incident was a situation where Ms Clark says she was trying to avoid the tenant because there had already been some hostility. She was going to check possum traps in the paddock which can be seen from the tenant's property. She says that the tenant had called out to her and the landlord thought this was strange and wanted to avoid contact and kept away. She says she does not ever stare in the windows. She says the fact she is blind in one eye means that she sometimes has to physically turn her head to see.

86. I find the tenant has not proven that Ms Clark was staring at her in the shower. The explanation given by Ms Clark is credible. I find that the tenant has not proven that Ms Clark stares in her windows.

87. Ms Clark's experience with the washing machine delivery driver was very different to the tenant's account. She says she helped him back down the driveway and the driver thanked her after he had arrived at the rural property in the dark.

88. I find the tenant has not proven that Ms Clark behaved in an inappropriate way in relation to the delivery driver. Rather, I find she went out of her way to assist with the late delivery.

89. The landlord said she was concerned that she thought the mannequins were mocking her disability (she says one had a patch over an eye in reference to the fact she is blind in one eye). The landlord also says that the tenant told her this.

90. I accept that the landlord genuinely thought that the mannequins were mocking her disability whether (or not) this was the case.

91. Landlord/tenant relationships are between individuals and that will inevitably involve some interaction between them on a personal level, even more so when one party lives on the same section and the property surrounding the tenant's premises remains under the control of the landlord. In these circumstances, and, given the fact the parties lived on the same section, I find that in these

particular circumstances, expressing a view that she did not like them does not amount to a breach of quiet enjoyment.

92. Therefore, I am not persuaded the tenant has proved the landlord breached her quiet enjoyment by way of the above interactions.

93. In any event, the tenant seeks compensation for stress. While there are a number of approaches that can be taken to compensation. Compensation is generally awarded for actual losses.

94. While the tenant said the issue was stressful I am not satisfied that she established this. Further, it is doubtful whether the Tribunal can make awards for stress, distress or emotional harm. See Tenancy Tribunal Case 4295464 for a legal discussion of this issue. The Tribunal's jurisdiction appears to be limited to making an award for costs and expenses directly flowing from an event, rather than for stress, distress, trauma or emotional harm.

95. This claim is therefore dismissed.

VARIATION TO TENANCY AGREEMENT - COMPENSATION

96. The tenant says that the area over the septic tank was part of the tenancy to start with but her ability to use it was removed. The tenant says she changed it from the 'mess' that was there, removed the grass, dug it over and made it into a vegetable garden. She did not ask the landlord if she could do this. She claims compensation for no longer being able to have a vegetable garden in that area.

97. The landlord says that the area was never part of the tenancy agreement. The tenant simply started using it. The landlord says this is why she had to prepare a variation to the tenancy agreement that set out that the tenant was not to garden in the septic tank area.

98. As set out above, the landlord is unable to prove the boundaries set in relation to this property. I am satisfied that it was not sufficiently clear to the tenant that the septic tank area did not fall within the property she was renting. Is falls adjacent to her bricked paved area and is adjacent to the retaining wall beside her double garage.

99. However, I do accept that the variation prevented the tenant from using the area. She could no longer undertake her vegetable gardening there. Her own evidence is that the area did not form part of the tenancy agreement.

100. I decline to award compensation because the tenant ultimately agreed to the variation by signing it. Her rent was adjusted at the same time so if she considered the rent was unfair, taking into account the change, that she knew

about she could have taken steps in relation to this at that time. As set out above a party is required to mitigate their loss.

101. In any event, even if I am wrong in relation to this I would, at best only have made a nominal award for compensation considering the totality of the premises making up this tenancy, the rent paid and the fact that I accept the evidence that the landlord offered the tenant an alternative area. Most significantly, I consider it wholly reasonable for a landlord not to want a tenant to create a vegetable garden on or near to a septic tank and its associated areas. I accept that digging might disturb utilities and that it could cause damage to the septic tank itself. I also accept that it is unlikely to be recommended that food is planted for human consumption in a septic tank area. Had the landlord issued a 14 day notice for the tenant to cease using the area as a vegetable garden I consider this would have been reasonable.

CONTRACTING TO CONTRAVENE OR EVADE THE PROVISIONS OF THE RTA – EXEMPLARY DAMAGES

102. Section 137(1) RTA provides that no person shall—

> (a) enter into any transaction, or make any contract or arrangement, purporting to do, whether presently or at some future time or upon the happening of any event or contingency, anything that contravenes or will contravene any of the provisions of the RTA; or
>
> (b) enter into any transaction or make any contract or arrangement, whether orally or in writing, or do anything, for the purpose of or having the effect of, in any way, whether directly or indirectly, defeating, evading, or preventing the operation of any of the provisions of the RTA.

103. Requiring any person to enter into any transaction, or to make any contract or arrangement, in contravention of this subsection is an unlawful act (s 137(2), RTA).

104. The tenant says the variation to the tenancy had three causes which contravene or evade the provisions of the RTA and seek exemplary damages.

105. The tenant refers to clauses 3, 5 and 7 which state:

3. **No gardening is permitted against the outside walls of the buildings – both the cottage and the double garage. There must be a minimum 30cm empty space between gardens and building walls –to protect the building & avoid damage to the paint work. If plants are to be grown against the walls – at the end of their season – they will be removed and the walls cleaned. If damage occurs, they will need repainting at the tenants costs.**

5. **Nothing is to be attached to the outside walls of either the cottage or the double garage. Freestanding objects are permitted – such as pots.**

7. **When outside the buildings, language is to be moderated with no swearing, abusive or foul language. Consideration must be given to others on the property.**

106. The tenant says clause 3 is imposing on the tenant more than the RTA permits because it is implying that the tenant will be responsible for damage that is not careless or intentional.

107. The landlord says that no damage occurred and so the clause did not come to fruition. Her concern was that the cladding of the property was iron and new and therefore vulnerable.

108. The tenant says clause 5 that his implies that a blanket exclusion applies and that the tenant will never be given consent to make a minor change to the premises to attach something to the outside walls. The tenant says she would have attached ornaments. The landlord says that the house and garage were freshly painted with Colorsteel cladding. It was not like weatherboard where holes could be repaired. In any event the tenant did not seek any consent.

109. The tenant says clause 7 should not form part of a tenancy agreement. If the landlord had an issue she should have followed provisions in the RTA relating to anti-social behaviour. The landlord says the tenant would swear and use ripe language.

110. I do not find that clause 3 evades the provisions of the RTA in these particular circumstances. The evidence filed in relation to the area around the property / garage shows an area otherwise clear of plants. There was no suggestion that plants were growing in the area prior to the tenant deciding to place plants there. The position is that the tenant began gardening there. I find that the clause is warning the tenant that plants may cause damage to the cladding of the property if they are grown directly outside of it. In the face of a landlord giving a genuine warning that such action may cause damage it would be difficult for a tenant to argue that the damage is fair wear and tear or accidental damage (for which they are not liable) where they have chosen to grow plants in an area which then causes damage.

111. Further, in some circumstances, putting plants directly into the ground around a building may amount to a minor change for which the tenant would need the

landlord's consent (s 42, RTA). It could be said that this clause gives the tenant advance permission to make such plantings - but should they choose to do so they will need to make good the area (to restore the premises to substantially the same condition prior to the change) as required by s 42, RTA.

112. I therefore find that in the particular circumstances of this case the clause does not breach s137 RTA.

113. I accept that clause 5 sets out a blanket exclusion for the attachment of items to the outside of the premises whereas a landlord cannot withhold consent for minor changes. I accept that this clause therefore seeks to indirectly evade the RTA. The landlord should have considered requests on a case by case basis if they were made.

114. However, I decline to award exemplary damages for this breach. I accept the landlord's position that having screws or nails placed into new Colorsteel exterior cladding would means that it could not easily be returned to substantially the same condition (holes could not be filled and patched like weatherboard) and therefore it would not have been unreasonable for the landlord to have declined requests to attach ornaments in this way.

115. I find that the first sentence in clause 7 alone evades the provisions of the RTA. A tenant is entitled to speak in their own garden, even using swear words if they wish. At first glance it appears to be a blanket provision not allowing for flexibility: for example, so that a tenant muttering a curse word under their breath in their own garden would breach the agreement.

116. However, I consider this term must be taken in the context of the second sentence. This sets out that the tenant must give consideration to others on the property (being the landlord, her agents and the other tenant). This does not evade the provisions of the RTA but echoes s 40(2)(c), RTA – requiring the tenant to not cause or permit any interference with the reasonable peace, comfort, or privacy of any of the landlord's other tenants in the use of the premises occupied by those other tenants, or with the reasonable peace, comfort, or privacy of any other person residing in the neighbourhood.

117. I find that the first sentence must be construed in context with the second – in other words, using abusive or foul language that interferes with the comfort of others is a breach. Therefore, I find that there is no breach in these particular circumstances as this substantially mirrors s 40(2)(c), RTA.

118. This part of the application is therefore dismissed.

SUPPRESSION AND FILING FEE

119. The tenant has had some success and so I award her the filing fee.

120. The landlord did not seek name suppression but the tenant did.

121. I made an order for interim name suppression in my order dated 20 September 2023 as it was not clear at this stage if the tenant would be substantially successful.

122. At the conclusion of this case I consider that the tenant has not been substantially successful. She has received a monetary award but many of her claims have been dismissed. I consider there are no other reasons to justify a final award of name suppression.

123. Therefore, I decline to award the tenant name suppression and the interim order for suppression made in the order dated 20 September 2023 is lifted. Suppression no longer applies.

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.