[2023] NZTT 4610369, 4630349

TENANCY TRIBUNAL - Manukau

APPLICANT: Franchelle Elizabeth Barker, Joseph Franklin Barker

Tenant

RESPONDENT: Andrius Mitalauskas, Liyan Xie

Landlord

TENANCY ADDRESS: 50A Lewisham Street, Highland Park, Auckland 2010

ORDER

1. No application for suppression has been made in this case and no suppression orders apply around publication of this decision.
2. Andrius Mitalauskas and Liyan Xie must pay Franchelle Elizabeth Barker and Joseph Franklin Barker $20.44 immediately, being the filing fee.
3. The Bond Centre is to pay the bond of $3,160.00 (5318101-005) to Franchelle Elizabeth Barker and Joseph Franklin Barker immediately.

Description	**Landlord**	**Tenant**
Filing fee reimbursement		$20.44
Total award		**$20.44**
Bond		$3,160.00
Total payable by Landlord to Tenant		**$20.44**

4. The landlord's application is dismissed.

Reasons:

1. Both tenants attended the hearing, and Mr Mitalauskas appeared for the landlord.
2. This tenancy began on 1 June 2019 and ended on 25 February 2023. The tenants seek the return of their bond of $3,160.00 following the end of the tenancy. This is application number 4610369.
3. The landlord has filed a cross application (application number 4630349) seeking $1000.00 from the bond in compensation for damage to a garage door. This is the amount of the insurance excess. The tenants accepted responsibility for the garage door damage at the time, but state that as the landlord did not repair or replace the garage door, and the property has now been sold, they ought not to compensate the landlord for work that was not undertaken. Both applications were heard together.

The tenants' evidence and submissions

4. The tenants state in evidence that they moved out on 25 February 2023 after being given a 90 day notice by the landlord. They moved out one month before the notice period expired. Around 11 February 2023, when the house was being washed in preparation for its sale, a dent in the garage door was noticed. There was communication between the landlord and the tenants regarding the landlord's insurance claim for the garage door damage. There were delays in obtaining a claim number, The tenants also approached their own insurer.
5. The tenants state that the house was sold on 9 April 2023. While visiting a neighbour, on 9 May 2023, the tenants noticed that the garage door dent had not been repaired. They also consider that the earlier terms of their tenancy agreement, where it was noted that the insurance excess was $400.00, ought to apply to them, rather than the current excess of $1,000.00. They deny that the sale price of the premises was affected by the damage to the garage door. Photographic evidence, along with email and text communication was provided.
6. The tenants state that the garage door damage was not noted in any inspections carried out by the property managers. They were unable to identify how the damage occurred and are unsure of the likely cause. However, when made aware of it, they accepted responsibility. They were responsible tenants who looked after the premises and had good references. They had also installed a garden shed, which added value to the property. They deny damaging the walls, and noted they had always had their bond returned in full by previous landlords.

The landlord's evidence and submissions

7. The landlord states that the house was brand new when the tenants moved in, and the garage door was in perfect condition. The dent was large, the tenants

accepted responsibility and they ought to pay for the insurance excess. The landlord does not accept that the tenants were unaware of the damage, noting reference in communication to the damage being caused by the tenants work ute. The landlord was entitled to have the garage door returned to its original condition when the tenancy ended.

8. The landlord discussed the quotes obtained for the work. A quote from Response Doors for replacement of the door was $4,485.00. The tenants obtained a quote for $3,500.00. An insurance assessor attended. The landlord referred to email communication with the insurer. The damage was discovered in February 2023, but the claim was not accepted until 18 May 2023. The landlord has received the settlement amount from insurance, with deduction of the excess of $1,000.00.

9. The landlord states that the house was put on the market in less than perfect condition. The house was sold for less than the value they believe they ought to have achieved. In response to questions, the landlord provided evidence regarding the steps taken when putting the house on the market. This included getting the house professionally washed, staging the house, arranging for painting work to remove marks on the walls and some gardening. They chose not to repair the garage door as it would have taken time to repair or replace it, and the insurance position was uncertain.

10. The landlord submits that as a brand new garage door was installed, they were entitled to have the garage door returned in that condition. The house was a year old when the tenants moved in. The final inspection prior to the sale and purchase of the house was on 1 May 2023, and settlement took place soon after that. There were no conditions in the sale and purchase agreement requiring that the garage door be repaired or replaced prior to the settlement date.

11. In response to the tenants' evidence, the landlord states that they had allowed the tenants to leave the garden shed behind. There was damage to walls, so they had to spend money on the house.

The legal framework

12. Section 22B(2) of the Residential Tenancies Act 1986 (the RTA) provides that, where a tenant applies for refund of the bond, and the landlord seeks payment from the bond, the landlord must file an application setting out the details of the counterclaim.

13. In this case, the landlord has filed a counterclaim, seeking compensation for tenant damage. The landlord seeks the insurance excess of $1,000.00.

14. To be successful with the claim, the landlord must prove that damage to the premises occurred during the tenancy and is more than fair wear and tear. If this is established, to avoid liability, the tenant must prove they did not carelessly or intentionally cause or permit the damage. Tenants are liable for the actions of

people at the premises with their permission. See sections 40(2)(a), 41 and 49B of the RTA.

15. Where the damage is careless, and occurs after 27 August 2019, section 49B of the RTA applies. Where the damage is caused carelessly, and is covered by the landlord's insurance, the tenant's liability is limited to the lesser of the insurance excess or four weeks' rent (or four weeks' market rent in the case of a tenant paying income-related rent). See section 49B(3)(a) of the RTA.
16. Where the damage is careless and is not covered by the landlord's insurance, the tenant's liability is limited to four weeks' rent (or market rent). See section 49B(3)(b) of the RTA. Where insurance money is irrecoverable because of the tenant's conduct, the property is treated as if it is not insured against the damage. See section 49B(3A)(a) of the RTA.
17. Tenants are liable for the cost of repairing damage that is intentional or which results from any activity at the premises that is an imprisonable offence. This applies to anything the tenant does and anything done by a person they are responsible for. See section 49B(1) of the RTA.
18. Damage is intentional where a person intends to cause damage and takes the necessary steps to achieve that purpose. Damage is also intentional where a person does something, or allows a situation to continue, knowing that damage is a certainty. See *Guo v Korck* [2019] NZHC 1541.

Should the landlord be compensated for the garage door damage?

19. Both parties accept that the garage door damage occurred during the tenancy. The damage is more than fair wear and tear. The landlord has produced photographic evidence of the damage, and the tenants accepted responsibility for the damage at the time. There is also evidence concerning the likely cost to replace the door. It seems from this evidence that repairing the door was difficult, and replacement was a more viable option. Both parties have provided quotes for replacement of the garage door.
20. The main issue concerns the fact that the house was sold after the tenancy ended and the landlord did not attend to repair or replacement of the garage door. In this situation, the tenants argue that the landlord should not be compensated for the garage door damage.
21. 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 compensation, 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.

22. In this case, as the landlord did not attend to repair or replacement of the garage door, it is difficult to measure the actual loss, since the landlord did not incur any loss.

23. In the District Court decision of *Yin v Waitai* [2021] NZDC 3054 the Court considered a similar issue. In that case the landlord claimed compensation of $16,000.00 from the tenant for damage to the premises, but the house was sold before the damage was repaired. The landlord's compensation claim was based on a quote for painting and wallpapering. The Court found that as the landlord did not incur the cost to repair, she was not entitled to compensation, and the claim was dismissed.

24. A similar situation arises here. The landlord did not incur any loss arising from the repair or replacement of the garage door, since the work was not undertaken.

25. I have considered the landlord's submission that the damage to the garage door reduced the value of the property. However, this claim is not supported by any objective evidence. There is no evidence to show that the purchase price of the premises was reduced to take into account any anticipated repair or replacement of the garage door. The landlord also accepts that it was not a pre-condition to the sale of the premises that the garage door was to be repaired or replaced.

26. There are a number of factors that influence the value of a property, one of which is the property market at the time of sale.

27. It is also evident that while some additional work was undertaken to prepare the property for sale, the landlord chose not to repair or replace the garage door. Therefore, the significance of the garage door damage to the overall house sale may have been overstated by the landlord.

28. Furthermore, the landlord's view that the tenants ought to return the premises to exactly the same condition that it was at the start of the tenancy is not accepted. This is because this tenancy lasted three years and 8 months, and in that time, there will be an element of fair wear and tear, or in other words, damage from ordinary use. Tenants will not be liable for damage that results from ordinary use.

29. Accordingly, for the reasons stated above, the landlord's claim for compensation for the garage door damage is dismissed. Consequently, the bond is to be returned in full to the tenants.

Filing fee

30. Because the tenants have been successful, the landlord is to pay the tenants' filing fee.

V Pasupati
27 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.