THE CHANGING TIDE

WINNING A TENANCY TRIBUNAL DAMAGE CASE

KEITH POWELL

Property manager Keith Powell discusses a recent case that his company took to the Tenancy Tribunal in the light of two other cases that have implications for tenant damage, liability and landlord insurance.

Breach of tenancy agreement

Wayward tenants are a reality for most property managers in New Zealand because either they are behind on rent or they have breached a tenancy agreement in some way or another. With the case we recently took to the Tenancy Tribunal we were dealing with the latter. The tenant co-signed the agreement when she moved into the property with two others who were already living there.

Only one cat was allowed on the premises, and since one tenant already had a feline friend you can imagine my surprise to find not just one more cat, but five, all living in just one small room with the door closed. We followed the usual 14 day process to request the excess feline inhabitants be removed from the property, but to no avail. After some time we achieved a lease termination via rent arrears, a simpler and more established route in the Tribunal.

The tenant was eventually evicted from the property, but did not leave it in the 'reasonably clean' condition one would expect. This particular tenants' room was extremely filthy – the curtains had been torn and pulled and multiple cat urine stains were found across the carpet. The worst aspect was that with old cat urine in the carpet it smelt unbearable.

The new precedent – 'damage and liability' approach

There have been recent media reports concerning two Tenancy Tribunal cases (Osaki and Stewart) surrounding damage and liability. In the Osaki case the tenant left a pot of oil on the stove, which incidentally burned the entire interior of

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the house. The Court of Appeal ruled that the damage was 'unintentional', that the tenants did not have to pay for the damage, and that it should be covered by the landlord's insurance.

This case was used to develop a practice note from the Tenancy Tribunal to help clarify the rules around unintentional damage and liability. Put simply, it states that if the landlord is insured and the damage caused was unintentional then the tenant is not liable. Subsequently, this practice note has created significant turbulence between property managers/landlords and the Tenancy Tribunal. Across the country property managers/landlords are finding it difficult to win cases and reclaim costs associated with damage caused by tenants.

In the Stewart case, dogs had been left inside a rental property in Foxton and soiled the carpets to an uncleanable state. The Tribunal ruling again concluded that the damage to the carpet was 'unintentional', leaving the landlord to claim the insurance, including the cost of excess.

'Reasonably clean' condition approach

The situation we had with our tenant was similar, albeit on a smaller scale, to Osaki and Stewart. Due to the outcome of these publicised cases, as well as others that were not widely reported on by the media, we were initially apprehensive about taking our case to the Tribunal. However we decided to go ahead as the insurance claim would have almost not been worth it for the landlord. Instead of claiming 'damages' we took the tenant to the Tribunal for not leaving the room in a 'reasonably clean' condition on vacating the property, and in my view this is what made the difference.

The result

The adjudicator quite quickly established that it was undeniable that the tenant had not left the room in a 'reasonably clean' condition. Despite the fact that we had not directly claimed for damages, the adjudicator concluded that the tenant had 'made decisions about the use of the room where her actions would clearly lead to damage', making her fully liable as her 'actions' were intentional.

The tenant, not present at the Tribunal hearing, was ordered to pay for the cleaning of the carpets, curtain replacement (50% of the cost due to depreciation), the cost of installing the curtains, lock and key replacement, and reimbursement of the Tribunal filing fee, which together amounted to just under $1,000.

Insurance implications

Because the liability falls onto the landlord if first they can prove the damage was intentional and second they are insured, there are insurance implications for claiming for damages versus seeking payment for a tenant not leaving a property in a 'reasonably clean' condition. With the damages approach, we could find that tenants are less likely to take good care of the property they rent as they are protected if their landlord is insured. This potentially drives up the cost of insurance premiums, which will ultimately be passed onto the tenant.

More changes to come

Is a more balanced approach to landlord/tenant responsibility on the horizon as a result of the strong objections from the property management industry over these cases? Recently Housing Minister Nick Smith confirmed he was looking at further changes to the Residential Tenancies Act 1986, which would shift liability to the tenant for damage caused by carelessness or negligence up to the value of four weeks' rent. If these changes come into effect, it would return the responsibility to the tenant to take care of the property.

Myself and many other property managers felt like we were fighting an uphill battle following the rulings on the Osaki and Stewart cases. The consequences of the practice note left a bad taste, but now with this small win perhaps other property managers will not lose hope in taking damage cases through the Tenancy Tribunal process. We had a positive outcome in what can be a very long process. The first step is now complete and the next one is to actually have the damage costs that were awarded by the Tribunal paid by the tenant ... and so we wait

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