

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CIV-2016-009-001351
[2016] NZDC 21189**

BETWEEN COLIN EWINGS
Appellant

AND WON JEE LEE
Respondent

Hearing: 11 October 2016

Appearances: Appellant in person
J Yoon for Respondent

Judgment: 26 October 2016

RESERVED JUDGMENT OF JUDGE P R KELLAR

[1] This is an appeal against an order of the Tenancy Tribunal of 13 June 2016 in which the respondent Ms Lee was ordered to pay the appellant Mr Colin Ewings the sum of \$150.00 as exemplary damages for breach of duties upon receipt of a bond.

[2] Ms Lee as the landlord and Mr Colin Ewings as the tenant entered into a one year fixed term tenancy of premises situated in Merivale, Christchurch commencing on 8 September 2012. Rent was agreed at \$1,248 per week and a bond of \$3,744 was paid. The tenancy was renewed as a periodic tenancy from 9 September 2012 and continued at the same rent until 15 May 2014 when Ms Lee sold the property. Mr Ewings remained in the premises and entered into a new tenancy agreement with the new owners. The tenancy came to an end in late 2015.

[3] On 16 December 2015 Mr Ewings applied for compensation of \$56,931. The Tenancy Tribunal does not have jurisdiction to require any party to pay any sum in excess of \$50,000. Mr Ewings abandoned so much of his claim that exceeded

\$50,000. He subsequently amended his claim to include a claim for exemplary damages for non payment of the bond.

[4] Mr Ewings made claims for compensation on three bases. He claimed that the rent he paid to Ms Lee throughout the period of the tenancy unlawfully included GST. He claimed the sum of \$14,301.61 being fifteen percent of the total rent paid for the period of the tenancy. Further, Mr Ewings claimed compensation for not being able lawfully to use the premises for the purpose that he required and made known to Ms Lee before entering into the tenancy agreement. Finally Mr Ewings claimed exemplary damages for Ms Lee's failure to lodge the bond with the Bond Centre within 23 working days of receiving it.

[5] Mr Ewings advanced a number of reasons why he considered the adjudicator to have been in error.

Representation as to use of premises

[6] The premises consists of a large house in Merivale, Christchurch with approximately 15 bedrooms, three living areas and two kitchens. Before Ms Lee and her husband Mr Kim owned the premises, it had been used as a rest home for elderly care. A letter from the Christchurch City Council to the previous owners dated 13 August 2004 noted that the rest home had been closed and that the building is to be used as a single residential dwelling and occupied by a single household unit. Prior to Mr Ewings' tenancy Ms Lee had rented the property to approximately ten tenants on individual tenancy agreements. Three of those tenants remained living at the premises under agreements with Mr Ewings.

[7] Ms Lee gave evidence that she and her husband wanted to rent the premises to just one tenant rather than trying to manage several individual tenancies. The tenancy was advertised in The Press newspaper on 7 July 2012 at a rental of \$1,200 per week. Mr Ewings saw the advertisement and a meeting was held at the premises. Mr Ewings, Ms Lee, Mr Kim and Mr Jeffrey Ewings attended the meeting. The tenancy agreement was signed soon after the meeting.

[8] Mr Ewings wanted to use the premises for a Christian Ministry and to provide accommodation for ex-prisoners and for people with mental health and other issues. He claimed he told Ms Lee and Mr Kim at the meeting on the premises of his intentions and he indicated that he would only take the tenancy if he could use it in the way he wanted. Ms Lee and Mr Kim said they assumed Mr Ewings would be having other tenants or flatmates share the premises with him because of the size of the property but they did not accept having any knowledge of the specific use for which Mr Ewings wanted the premises.

[9] After entering into the tenancy agreement Mr Ewings set about establishing his Christian Ministry. By February 2013 he had a total of 11 tenants plus himself and his wife. A problem arose with one of the tenants in early 2013 that led to the Police becoming involved. Mr Ewings said that as a result of the Police visit, Police stopped tenants coming from the Department of Corrections and from Hillmorton Hospital. He said that most of his tenants came from those sources and he therefore lost rental income.

[10] On 11 April 2013 a Fire Engineering Officer from the Christchurch City Council and another person from New Zealand Fire Service Transalpine Region inspected the premises and provided a report that that premises should be investigated for compliance with the Christchurch City Council Town Plan and Local Resource Management Acts.

[11] Mr Ewings' claim for compensation is on the basis that Ms Lee misrepresented to him that the premises could be lawfully used for his stated purpose.

[12] One of Mr Ewings' grounds of appeal was that the adjudicator failed to attach sufficient weight to the letters from the Christchurch City Council. Mr Ewings acknowledged that the Christchurch City Council did not "close the operation down" (to quote from Mr Ewings' written submissions) but had every right to do so.

[13] The adjudicator declined to award Mr Ewings compensation under this head. The adjudicator was not persuaded that Ms Lee or Mr Kim made a representation

regarding the lawful use of the premises. The adjudicator considered it relevant that Mr Ewings' brother, Mr Jeffery Ewings was unable to recall whether Ms Lee or Mr Kim made any representation regarding use of the premises. He assumed that Ms Lee and Mr Kim were happy with Mr Ewings' intended use because a prayer meeting was held at the conclusion of the meeting.

[14] The adjudicator held that even if such a representation had been made, Mr Ewings had not provided sufficient evidence to establish that the representation was false. There was no objective evidence establishing whether the designated use of the premises as a single household unit influenced the Police in deciding to stop sending potential tenants from the Department of Corrections or Hillmorton Hospital. Furthermore, there was no objective evidence supporting the claim that the use to which Mr Ewings was putting the premises did not comply with its designated use. The Fire Service report of 11 April 2013 merely recommended further investigation for compliance. In fact, Mr Ewings was permitted to continue using the premises in the same manner until two years after the Fire Service report.

[15] There is no basis for concluding that the adjudicator was in error. The adjudicator had the benefit of seeing the witnesses and assessing their respective reliability. The adjudicator gave appropriate weight to the 11 April 2013 letter.

[16] Furthermore, Mr Ewings has not proved that he suffered a loss. Even if the adjudicator had been satisfied that Ms Lee misrepresented the lawful use of the premises, Mr Ewings failed to establish that he suffered any loss as a result of that misrepresentation. There is no evidence to show that the Police decided to stop sending potential tenants to the premises because the premises were being used outside their designated use.

Refund of GST

[17] Mr Ewings claimed that at the initial meeting he negotiated the rent down from \$1,200 and then GST was added to bring it to a final rental of \$1,248. In written submissions in support of the appeal Mr Ewings states that he offered \$950 per week and Ms Lee wanted \$1,200. He states that he and Ms Lee agreed to split

the difference amounting to \$1,085 per week. He says Ms Lee asked Mr Ewings if he was registered for GST. Mr Ewings himself was not registered for GST but he had a company Oxley Prams Limited which was. Oxley Prams Limited was then added to the agreement.

[18] Ms Lee denied that there was a GST component in the rental. She said that the additional amount of \$48 over and above the \$1,200 was for furnishings/chattels that the parties agreed would stay with the tenancy.

[19] The adjudicator was not satisfied that Mr Ewings had established that the agreed rental included a GST component. The adjudicator accepted Ms Lee's evidence on the point.

[20] Mr Ewings submits that the adjudicator was in error by failing to take into account that not only Mr Ewings' name but also Oxley Prams Limited was shown on the tenancy agreement. He also submits that the value of the chattels in the premises could not possibly sustain additional rental of \$48 per week.

[21] Mr Ewings gave evidence in the Tenancy Tribunal hearing that he added Oxley Prams Limited's name to the tenancy agreement "because it made it clear it was GST included" (page 43 lines 19-20 transcript of 9 February 2016 hearing). Evidence was given that there is no mention in the tenancy agreement of GST and no tax invoice supporting the claim for GST was issued. The adjudicator was aware of the evidence regarding Oxley Prams Limited being added to the tenancy agreement and concluded that Mr Ewings had not established on the balance of probabilities that the rent included GST. The adjudicator preferred the evidence of Ms Lee on that point. There is no basis on which those findings can be disturbed.

Non lodgement of bond

[22] There is no dispute that Mr Ewings paid a bond of \$3,744 at the commencement of the tenancy. Nor is there any issue that Ms Lee did not pay the bond to the Bond Centre until 8 May 2014. Failure to lodge the bond in accordance with section 19(1)(b) of the Residential Tenancies Act is an unlawful act for which

exemplary damages may be awarded up to a maximum amount of \$1,000. Section 109(3) of that Act required the adjudicator to take into account the intent of the person committing the unlawful act, the effect of the act, the interests of the person against whom the unlawful act was committed, and the public interest.

[23] The adjudicator accepted that Ms Lee did not intend to retain the bond unlawfully. The adjudicator also took into account the effect of Mr Ewings of not having the bond lodged as being minimal. She did however hold that it is in the interests of tenants and the public interest that the Bond Centre hold the bond as a protection against a landlord's unreasonable retention of the bond. Taking all of those factors into account, she ordered exemplary damages of \$150 to be paid.

[24] In his submissions in support of the appeal, Mr Ewings stated that the maximum sum of \$1,000 should have been awarded. This called for the exercise of a discretion taking into account the factors contained within s 109(3) of the Act. The adjudicator has not taken account of irrelevant considerations or failed to take account of factors that inform the exercise of her discretion. The appeal on this ground also fails.

[25] The appeal is dismissed.

P R Kellar
District Court Judge