IN THE DISTRICT COURT
AT PALMERSTON NORTH

CIV-2016-054-000429
[2016] NZDC 25578

IN THE MATTER OF	AN APPEAL FROM THE TENANCY TRIBUNAL
BETWEEN	TEKOA TRUST Appellant
AND	AMANDA STEWART Respondent

Hearing: 12 December 2016

Judgment: 15 December 2016

DECISION OF JUDGE D G SMITH

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[1] Both parties had sought orders from the Tenancy Tribunal. The matter was determined on 23 August 2016.

[2] The respondent, Amanda Stewart, did not appear in support of her application and her application was dismissed.

[3] The appellant as landlord, sought rent arrears, cleaning costs and damages. The Tenancy Tribunal awarded the appellant rent arrears to 25 February 2016 of $353.57 and costs for repairs to a door and cleaning, totalling $190. As there was a bond of $1,100, an amount $556.43 of the bond was to be returned to the respondent in full settlement of the order of the Tenancy Tribunal. The balance of $543.57 of the bond was to be paid to the appellant.

[4] The Tenancy Tribunal refused the appellant's claim for damage caused to the carpets in the dwelling. It was accepted by the Tribunal that the carpets were damaged by animal urine and that it was due to more than fair wear and tear.

[5] The Tribunal in its decision said:

> [16] …the Court of Appeal decision *Holler & Rouse v Osaki* [2016] NZCA 130 provides that tenants are immune from a claim made by a landlord where the rental property suffers loss or damage caused intentionally or carelessly by the tenant or the tenant's guest to the extent provided in ss 268 and 269 of the Property Law Act 2007 ("PLA").
>
> [17] This means that the tenants will be immune where:
>
> a. the damage was caused by fire, flood, explosion, lightning, storm, earthquake or volcanic activity the tenant will not be liable, whether or not the landlord is insured (s 269(1)(a) PLA); or
>
> b. the damage was caused by the occurrence of any other peril which the landlord is insure for, or has agreed with the tenant to be insured for (s 258(1)(b) PLA).
>
> [18] This immunity applied unless the landlord is able to establish on the evidence that the damage was:
>
> a. intentional (s269(3)(a) PLA); or
>
> b. constitutes an imprisonable offence (s 269(3)(b) PLA; or
>
> c. any insurance money that would have been recoverable is not recoverable because of the tenant or their guests act or omission (s 269(3)(c) PLA).
>
> [19] The agreement provided that no dogs were allowed on the property. The tenant breached that agreement. The text messages however refer to "cat pee". Regardless I am satisfied that the carpet has been damaged during the tenancy by animal urine and is due to more than fair wear and tear.
>
> [20] The landlord is insured for such damage.
>
> [21] While I accept that the tenant has intentionally breached the agreement by allowing a dogs [sic] onto the property the landlord has not established that the tenant intended to damage the carpet. Nor has the landlord proven the tenant's actions amount to an imprisonable offence or that insurance is irrecoverable because of the tenant's acts or omissions.

[6] As a consequence, the cost of repairing the damage and lost rental was refused by the Tenancy Tribunal.

[7] The appellant appeals on the basis that the Tribunal has wrongly applied the law. The appellant submits that the actions of the tenant in allowing dogs on the property, was not an accidental or careless act but was clearly both an intentional and

deliberate act. It was submitted the damage should therefore be held to be an intentional act.

The law

[8] Section 269 Property Law Act 2007 ("PLA") states:

> **269 Exoneration of lessee if lessor is insured**
>
> (1) If this section applies, the lessor must not require the lessee—
>
> (a) to meet the cost of making good the destruction or damage; or
>
> (b) to indemnify the lessor against the cost of making good the destruction or damage; or
>
> (c) to pay damages in respect of the destruction or damage.
>
> (2) If this section applies, the lessor must indemnify the lessee against the cost of carrying out any works to make good the destruction or damage if the lessee is obliged by the terms of any agreement to carry out those works.
>
> (3) Subsection (1) does not excuse the lessee from any liability to which the lessee would otherwise be subject, and the lessor does not have to indemnify the lessee under subsection (2), if, and to the extent that,—
>
> (a) the destruction or damage was intentionally done or caused by the lessee or the lessee's agent; or
>
> (b) the destruction or damage was the result of an act or omission by the lessee or the lessee's agent that—
>
> (i) occurred on or about the leased premises or on or about the whole or any part of the land on which the premises are situated; and
>
> (ii) constitutes an imprisonable offence; or
>
> (c) any insurance moneys that would otherwise have been payable to the lessor for the destruction or damage are irrecoverable because of an act or omission of the lessee or the lessee's agent.

[9] Section 268 of the Property Law Act 2007 states:

268 Application of sections 269 and 270

(1) Sections 269 and 270 apply if, on or after 1 January 2008, leased premises, or the whole or any part of the land on which the leased premises are situated, are destroyed or damaged by 1 or more of the following events:

(a) fire, flood, explosion, lightning, storm, earthquake, or volcanic activity:

(b) the occurrence of any other peril against the risk of which the lessor is insured or has covenanted with the lessee to be insured.

(2) Section 269 applies even though an event that gives rise to the destruction or damage is caused or contributed to by the negligence of the lessee or the lessee's agent.

(3) In this section and sections 269 and 270, **lessee's agent** means a person for whose acts or omissions the lessee is responsible.

[10] Section 270 is not relevant to this proceeding.

[11] The Court of Appeal in *Holler & Rouse v Osaki*[1] determined two questions. Question one: Whether the residential tenants are immune from a claim by the landlord where the rental property suffers loss or damage caused intentionally or carelessly by the tenant or the tenant's guests? The Court answered: Yes, to the extent provided in ss 268 and 269 of the Property Law Act 2007.

[12] The second question was: Whether, by enacting the Property Law Act 2007 Parliament has intentionally adopted different positions for commercial and residential tenancies and has expressed this clearly so that it is inappropriate for the Court to construe the Property Law Act 2007 and the Residential Tenancies Act 1986 in a manner which achieves a different effect? The Court answered: No.

[13] As a result of the Court of Appeals decision, the Tenancy Tribunal issued Practice Note 2016/1 and it summarises the position clearly as follows:

Application by Landlords for Damages

1. In any claim by the landlord for damages the landlord must first establish, on the balance of probabilities, that the damage occurred during the course of the tenancy and that it exceeds fair wear and tear.

[1] *Holler & Rouse v Osaki* [2016] NZCA 130.

2. If that is established, the tenant must show on the balance of probabilities that the damage was not intentionally caused by either the tenant or any person in or on the premises with the tenant's permission. For the purposes of section 40(4) of the Act, "the lessee" in the PLA means the tenant, and "the lessee's agent" means "a person or persons on the premises with the permission, express or implied, of the tenant", reflecting section 41 of the Act.

3. Where it is established that the damage is careless, the landlord must disclose whether or not the premises are insured for the event from which the damage arose. Where the landlord holds insurance, the landlord must provide the Tribunal with the insurance policy and the Schedule to the policy, the latter being the source of the details of coverage. As with all documents submitted as evidence, two copies of the original must be provided.

4. If the landlord has insurance for the event that caused the damage in question, the tenant is exonerated from paying for the damage cause by his or her carelessness, or that of any person on the premises with the tenant's permission.

5. If the damage is intentional, the tenant does not have the benefit of the landlord's insurance. Compensation can be awarded by the adjudicator in accordance with the provision of the Act.

The Practice Note then goes on to deal with fire, flood, explosion, lightning, storm, earthquake or volcanic activity and makes it clear that the landlord cannot be awarded the excess. Furthermore, a residential landlord cannot rely on s 271(2) and require a tenant, as a term of the tenancy agreement, to pay the excess of any claim.

[14] It is of note that s 269 of the Property Law Act 2007 is more restrictive than s 40(2)(a) of the Residential Tenancies Act. Section 40(2)(a) provides that a tenant shall not intentionally *or carelessly damage*, or permit any other person to damage, the premises. There is no reference to carelessness in s 269 PLA. The focus therefore of this appeal must be whether the damage of the carpets was intentionally done or caused by the lessee or the lessee's agent.

[15] In *Housing NZ v Takarangi*,[2] the Tribunal with reference to s 40(2)(a) of the Act, considered what must be shown to hold a tenant had a clear intention to damage the premises. It referred with approval to a passage in Brookers Summary Offence:

[2] *Housing NZ v Takarangi*, Tenancy Tribunal Wanganui, TT 199/94, August 1995.

> Conduct will be intentional when it is deliberate, and not accidental, and the [resulting damage]… will be intentional if the defendant meant to cause it or (probably) knew that it was virtually certain to result.

I am of the view that the definition put forward by the authors of Brookers Summary Offences, in relation to s 11(1) of the Summary Offences Act 1981, is equally appropriate in consideration of "intentional" in s 269(3)(a) PLA.

Approach on appeal

[16] Section 117 Residential Tenancies Act 1986 provides for appeal to the District Court.

[17] There has been judicial variance between various District Court Judges as to whether appeals should proceed as a hearing de novo or should be one which focuses on the legal interpretations or a miscarriage of justice which can lead to either the Court substituting other orders or ordering a rehearing as the case may be.

[18] I have approached this appeal on the basis that the factual findings of the Tenancy Tribunal are not disputed. It is the interpretation of the law which is the focus of this appeal and I have proceeded on that basis.

[19] The Tenancy Tribunal accepted that the damage to carpets had been caused by animal urine and that the damage was beyond fair wear and tear.

[20] Because of the conclusion the adjudicator came to in terms of s 269(3)(a) PLA and its understanding of *Holler & Rouse v Osaki*, the extent of the damage was not examined fully.

[21] In evidence to the Tribunal, photographs were provided of the damage to the carpets. They show extensive damage to the carpets. The independent reports offered from Handy Home Maintenance & Carpet Cleaning and Rentables Property Management made it clear that animal urine had affected the carpets in all carpeted areas – lounge, hallway and bedrooms – and that it was not able to be cleaned and would need to be replaced.

Decision

[22] I am of the view that the adjudicator was wrong at law in concluding that the damage was not intentional. The tenant by letting inside a dog or dogs was in breach of a specific clause in the Tenancy Agreement. That act was intentional but no loss was caused per se by the breach of that clause. However, after a dog had urinated on the carpet once or possibly twice, continuing to allow the dog to enter the property on numerous occasions, which would have been required to damage the carpets to the extent shown, was a deliberate intentional act by the tenant.

[23] Support for this approach, by way on analogy, is found in s 41(1) of the Residential Tenancies Act 1986 which places the tenant responsible for the conduct of any person who comes onto the premises with the tenant's permission. Where such a person intentionally (or carelessly) damages the premises, the tenant will be responsible for that persons actions unless he can prove that he "took all reasonable steps to prevent that person from entering the premises or, (as the case may require) to eject that person from the premises".[3]

[24] Using the definition of intentional from Brookers Summary Proceedings, it can be said that the tenant would have known that the dog(s) would continue to urinate and that the damage was virtually certain to result in the way in which it did by allowing the dog to continually enter the premises.

Conclusion

[25] It follows, in my view, that the adjudicator was wrong to decline the claim by the appellant for the cost of the damage to the carpet and the odour neutraliser totalling $3,019.

[26] The application for loss of rent to 11 March 2016 was entirely appropriate in the circumstances as a prospective tenant could not rent the property because of the damage. An additional sum of $589.34 should have been awarded.

[3] Section 41(2) Residential Tenancies Act 1986.

Summary

[27] The appeal is allowed.

[28] In addition to the sums paid by way of deduction from the bond, as required by the Tenancy Tribunal, the respondent Amanda Stewart is to pay:

(a) $589.34 for lost rental.

(b) $3,019 for replacement carpet costs.

(c) Court filing costs $200.

[29] Should the balance of the bond, $556.43 have not yet been paid to Ms Stewart, it is now to be paid to the appellant as part payment of the above amount.

D G Smith
District Court Judge