

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CIV-2018-085-000349
[2018] NZDC 20936**

BETWEEN

NICE PLACE PROPERTY
MANAGEMENT LIMITED
Applicant

AND

JEFF PATERSON
Respondent

Hearing: On the papers

Appearances: S P Gunatunga for Applicant
No appearance for Respondent

Judgment: 12 October 2018

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] The respondent (“Mr Paterson”) was the tenant under a tenancy agreement dated 1 May 2017 of the apartment at [address deleted] which was managed by the appellant (“Nice Place”), the landlords’ agent. During the tenancy, the landlords discovered that Mr Paterson was in breach of the tenancy agreement by subletting the apartment via the accommodation booking site known as Airbnb without their consent.

[2] On behalf of the landlords, Nice Place sought an account of profits in the Tenancy Tribunal¹. The Tribunal made an order awarding the landlords the sum of \$2150. In this appeal, Nice Place challenges the Tribunal’s method of calculation of the profits and seeks a further sum of \$5,437.70.

¹ This was only one of a number of orders sought by both parties.

[3] Service of the appeal on Mr Paterson was dispensed with. He has not taken any steps and did not appear.

The Tribunal's Decision

[4] The Adjudicator recorded that the landlords had claimed a total of \$13,750 based on subletting on 55 occasions at the daily rate of \$250² and ordered Mr Paterson to pay the landlords \$2150 calculated as follows:³

Noting that the [weekly] rental for the premises is \$650.00, that would mean that the rent due for the premises over that 24 month period will be \$15,600.00. The landlord claims that the Airbnb rental was \$12,450.00. When calculating the amount which could be the subject of an account of profits, it is the net figure that must be used. That means costs from any gross profit must [be] deducted, which will include the 'cost' for the rental of the premises. After deducting rental over the 6 months period, then the potential profit would reduce to \$3,150.00. It can be accepted that in commercially renting the premises, as the tenant has done, then it is likely other costs would have been incurred, such as costs for linen and servicing of the apartment, as well as the tenant's administration of the premises. In the absence of more accurate costing's being presented, I will apply a nominal amount of \$1,000.00 for those costs. The rem[a]inder (\$2,150.00) I will accept as a net profit figure for which any claim could be based.

Grounds of Appeal

[5] Nice Place submitted that the Tribunal erred in its calculation of profits to be disgorged by deducting the gross revenue received by Mr Paterson for subletting the apartment for 55 days from the rental he paid for the entire 6 months period rather than deducting the rental he paid for 55 days (calculated on a pro rata basis) from the gross revenue he received for subletting. No issue was taken with the deduction of \$1,000 for expenses, although it was pointed out that administration was undertaken by Airbnb rather than by Mr Paterson.

[6] Nice Place submitted that the correct calculation should have been as follows:

² At [39].

³ At [43].

Gross revenue from subletting for 55 days		\$13,695.00	
LESS:			
Rental paid for 55 days at \$92.86 per day	\$5,107.30		
Estimated expenses	<u>\$1,000.00</u>		
	\$6,107.30	\$ <u>6,107.30</u>	
			\$ 7,587.70

The Facts

[7] There is no dispute about these. The tenancy agreement provided for a rental of \$650 per week. It contained a standard term prohibiting the tenant from subletting the apartment without the landlords' consent which specifically covered Airbnb bookings.⁴ Between June 2017 and December 2017, the tenant listed and sublet the apartment via Airbnb on numerous occasions. The Adjudicator accepted the available evidence of Airbnb booking records that the tenant undertook this activity on at least 55 separate occasions to the value of \$249 per night. No consent was given by the landlords.

Discussion

[8] There was no suggestion that the landlords had suffered any specific loss or damage by virtue of the breach of contract constituted by the Airbnb subletting. Nevertheless, the Tribunal held that an account of profits was an available restitutionary remedy. Since the decision of the House of Lords in *Attorney-General v Blake*⁵, in principle an account of profits is available in breach of contract cases. I consider it should be available in cases like this. One can rightly view the breach of contract as cynical. The term breached was as clear as a bell. It is obvious from the figures in this case that a tenant could make several hundred dollars profit each week simply by renting the apartment and then subletting it through Airbnb continuously in blatant breach of the tenancy agreement. The maximum amount of exemplary damages under s 44 of the Residential Tenancies Act is the inadequate sum of \$1,000.

⁴ Prohibited also under s 44 of the Residential Tenancies Act whether or not there is a term in the tenancy agreement.

⁵ [2001] 1 AC 268,

That would be covered by four nights of subletting. There is also a line of authority pre-dating *Attorney-General v Blake* in which restitutionary damages have been allowed for the wrongful use of land.⁶

[9] The Tribunal was also correct in seeking to identify the net profit derived by Mr Paterson rather than awarding the gross revenue as originally sought by Nice Place. An account of profits is “*designed not to penalise the defendant but to prevent unjust enrichment*”,⁷ requiring “*the defendant to give up the gains made to the party whose rights have been infringed*”.⁸ As acknowledged by the Court of Appeal in *Adlam v Savage*⁹, an order for an account of profits is a requirement the defendant pay the net profits and not the gross profits gained.

[10] Nevertheless, it is self-evident that the Tribunal made two errors in its calculation. First it deducted the gross revenue received by Mr Paterson from the rent he paid to the landlords rather than the other way around. That resulted in a positive figure only because of the second error which was to use as the rental paid by him, the figure for the entire six months period rather than a pro rata amount equating to the rental for 55 days. Obviously, Mr Paterson was able to enjoy the use of the apartment himself when it was not sublet through Airbnb. There is no reason for him to receive a credit for the rental he paid for that benefit.

Conclusion

⁶ See Butterworth’s Laws of New Zealand, damages paras [52] and [53]

⁷ Terry Sissons “Accounting for profits” in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 895 at [31.1.3].

⁸ At [31.1.2].

⁹ [2016] NZCA 454

[11] The appeal is allowed. The order of the Tribunal dated 26 April 2018 is varied so that the amount awarded for account of profits is increased to \$7,587.70 and the total sum payable by Mr Paterson is therefore increased to \$16,950.99

C N Tuohy
District Court Judge