IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CIV-2018-019-000959
[2019] NZDC 4700

BETWEEN	HOME LET PROPERTY MANAGEMENT LIMITED Appellant/Landlord
AND	SANTARA ANITA GRINDLEY-ALOVILI Respondent/Tenant

Hearing: 13 November 2018

Appearances: C Churches and S Rennie from the Appellant
Respondent appears in person

Judgment: 15 March 2019 at 11.00 am

RESERVED JUDGMENT OF JUDGE R L B SPEAR

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[1] This is an appeal against the decision of the Tenancy Tribunal sitting at Hamilton dated 31 July 2018, requiring Home Let Property Management Ltd ("the landlord") to pay Santara Anita Grindley-Alovili ("the tenant") an amount of $355.10 as appearing in paragraph 1 of the decision.[1]

Description	**Landlord**	**Tenant**
Rent owing to 11 February 2018	330.85	
Lock/key replacement	215.00	
Rubbish removal	88.55	
Cleaning	80.50	
Repairs to painted walls	250.00	
Total award	**964.90**	
Bond (already received by landlord)	964.90	355.10
Total payable by Landlord to Tenant		**$355.10**

[1] [2018] NZTT Hamilton 4137793, 4135176.

[2] There is a mistake in respect of the breakdown of the order. The bond was in fact $1320, not $964.90, which is the amount of the damages awarded and explains how that figure of $355.10 is calculated.

[3] The appeal is against the decision not to find the tenant liable for all the claimed damage sustained by the property during the tenancy. The submitted cost to repair all areas of claimed damage amounted to $1664.05, in respect of which the Adjudicator determined that an amount of $250 was sufficient to deal with the damage for which the tenant was responsible. This appeal accordingly seeks to recover the balance of the sanding and repainting services of $1414.05 ($1664.05 less $250) which, if totally successful, would result in the tenant being liable to the landlord in the sum of $1058.95 rather than the landlord being required to pay the tenant $355.10.

[4] There were two separate applications before the Tenancy Tribunal:

(a) **TT 4135176** – *Home Let Property Management Ltd v Santara Anita Grindley-Alovili*: being the claim for outstanding rent and other loss sustained by the landlord;

(b) **TT 4137793** – *Santara Anita Grindley-Alovili v Home Let Property Management Ltd*: being the claim of the tenant for recovery of the bond of $1320.

[5] There is no issue taken with the order of the Tenancy Tribunal relating to outstanding rent, lock/key replacement, rubbish removal and cleaning.

[6] The Adjudicator considered that the two applications should be heard as one for convenience and effectively as a dispute between the parties as to the payment of the bond. Accordingly, it was for the landlord to establish that the deductions that it sought to make from the bond are appropriate on the basis that the tenant is liable for them.[2]

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[2] Section 22B Residential Tenancies Act 1986.

[7] The appeal hearing accordingly focused on the claim by the landlord that several walls in the house and three or four kitchen cupboards were damaged and had to be repaired and then painted at a total cost of $1664.05.

[8] Both before the Tribunal and before me, the tenant did not dispute that damage had occurred and proffered the following explanations:

(a) The kitchen cupboards and some skirting boards have been repainted a contrasting colour by a person who was living with her at the time;

(b) One kitchen cupboard was damaged when the tenant accidentally flooded the kitchen;

(c) Stickers and blue tack left marks or removed paint in small patches on the walls;

(d) Small bumps and dents in the paint and plaster occurred while moving furniture;

(e) Her "abusive partner" punched three or four holes in walls at a time when she was attempting to remove him from the house.

[9] The Adjudicator had approached her consideration of the landlord's claim with regard first to the Court of Appeal's decision in *Holler and Rouse v Osaki.*[3] In short, that decision and others both leading up to and following that decision confirm that s 268 and s 269 of the Property Law Act apply to residential tenancies as well as commercial tenancies. A convenient summary of how those provisions in the Property Law Act apply to tenancies can be found at para 6.14 of *Benson's "Residential Tenancy Law in New Zealand*":[4]

> A tenant must not intentionally or carelessly damage, or permit any other person to damage, the premises. Where damage to the premises (not fair wear and tear) is proved to have occurred during the tenancy, the tenant must prove that the damage was not intentional or careless. However, a tenant is

[3] *Holler and Rouse v Osaki* [2016] NZCA 130, [2016] 2 NZLR 811.
[4] Thomson Reuters.

exonerated from liability from destruction or damage to the tenancy property caused by:

1) Fire, flood, explosion, lightning, storm, earthquake, or volcanic activity, whether there is insurance or not; or

2) A peril ensured by the landlord, unless the damage is caused by an intentional act, an imprisonable offence or insurance monies are not recoverable because of the tenant's act.

[10] Given the subject matter of many appeals from Tenancy Tribunals, it is clear that the Osaki principles are not well understood, either by landlords or tenants. The rationale for this approach is clearly that the rent paid by a tenant can be expected to assist the landlord to hold the type of insurance cover appropriate for the tenanted property. Accordingly, the "*exoneration provisions*" (the term adopted in *Osaki* for ss 268 & 269 PLA), require the Tribunal to determine the case having regard to the type of damage concerned and ascertain whether that is of a kind covered by the landlord's insurance. Typically, however, disputes of this nature that reach the Tenancy Tribunal are for relatively modest amounts and there would be a natural reluctance on the part of a landlord to make an insurance claim particularly if the amount does not exceed the excess on the policy and unless it is of sufficient magnitude to justify the loss of a no claims' bonus.

[11] In this case, the Adjudicator found that the damage caused by stickers and blue tack, and in particular, the holes punched in the walls, were intentional acts of damage and of a nature known to cause such damage. Accordingly, the cost of repairing that damage was recoverable from the tenant.

[12] The landlord did not, however, provide details of the insurance cover held by it for the property notwithstanding the landlord had been required to do so by the Tenancy Tribunal. The hearing of the claims indeed commenced on 19 June 2018 and as a result of insufficient time to complete the hearing that day, the hearing was adjourned through to 31 July 2018. In the notice to the parties recording the adjournment circumstances, paragraph 4 specifically required the landlord *"to bring evidence confirming whether or not the landlord holds insurance for the damage to the premises"*. While the landlord did produce a cover note that related to this property and for the period during which this tenancy was in place, details of the policy were not provided and accordingly the Adjudicator was unable to determine whether the

other heads of damage, beyond that caused by the stickers and blue tack, and the holes punched in the walls, were covered under that policy. The Adjudicator said this at paragraph [15]:

> The landlord was advised at the first hearing that the Tribunal must be provided with details of any insurance held for damage to the premises. A copy of the policy cover note was provided at today's hearing, however there was no evidence to establish whether or not the landlord did hold insurance for the types of damage described in paragraph [13]. A claim has not been made to the insurer.

And further, at paragraph [17]:

> However, the damage caused by the accidental flood in the kitchen, the blue tack and dents and scratches caused when moving furniture were not intentionally caused. The landlord's insurance may cover damage caused in this way.

[13] The Adjudicator then confirmed that because she was not provided with the details of the insurance cover, she was unable to make a finding that the insurance would or would not cover those repair costs (that is, damage caused by the accidental flood in the kitchen, the blue tack and dents and scratches caused when moving furniture.)

[14] Finally, the Adjudicator then concluded the decision at paragraph [19]:

> The landlord provided a receipt for sanding and repainting services which cost $1664.05 and I am satisfied that this is reasonable for the work required. I have had to make an assessment of the amount that the tenant should contribute for the holes made by [the abusive partner] and the damage caused by the stickers, and have set this at $250.

[15] It is noted that s 85 sets out the approach required by a Tenancy Tribunal when exercising its jurisdiction:

> **85 Manner in which jurisdiction is to be exercised**
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> (1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises to which this Act applies.
>
> (2) The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and

> justice of the case but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

[16] In this case, the Tribunal specifically directed that the landlord provide copies of the insurance policy so that it could determine whether or not the various claims of damage that it did not considered to have been intentionally caused were covered under the landlord's insurance cover.

[17] It was argued for the landlord that the application of contrasting paint to the cupboards was an act of intentional damage; that is, the painting the cupboards using contrasting paint (I take this to mean that the paint did not match the surrounds). I readily accept that this was an intentional act on the part of the tenant or for which she is to be considered responsible and that the landlord contends that this caused damage. However, does this necessarily mean that it was intentional damage in the sense meant in Osaki. That surely requires the act not only to be intentional but recognised reasonably by the actor as likely to cause damage. Did this application of "contrasting" paint to the cupboards cause "damage"? Certainly, it was in breach of the tenant's covenants under the tenancy agreement and her statutory obligations but for there to be recovery for breach of contract would require an appreciation of the extent of insurance cover held for the property and the landlord has failed to provide sufficient information for that to be considered. Accordingly, that leaves this issue as to whether the painting of the cupboards with "contrasting" paint is an act of intentional damage.

[18] I have some sympathy for the landlord in this respect. What was accepted by the tenant at the appeal hearing was that the painting of the cupboards was by way of a "touch-up" and that the paint used was either lighter or darker than the primary colour of the cupboards. The tenant blames the person who was living with her at the time but of course she is responsible for that person's actions. In those circumstances, I accept that this would be intentional damage as the landlord would be entitled to reject such a touch-up job as quite unacceptable. The tenant has to be accepted as intentionally applying paint by way of touch-up to the cupboards notwithstanding that the paint used was not compatible with the primary colour of the cupboards. Clearly, that was unacceptable to the landlord who cannot be criticised for that assessment.

[19] I consider that the Adjudicator should have allowed this head of damage and I increase the award to reflect this. The increase can only be a best guess as to what the cost of repainting the cupboards would have been as against the painter's entire costs that included the work on the walls.

[20] I consider that an increase from $250 to $750 against the sanding and re-painting costs of $1,664.05 is justified.

[21] The appeal is accordingly allowed to the extent that the order of the Adjudicator to award $250 for repairs to the cupboards and walls is increased to $750.

[22] This will result in the order of the Tribunal being adjusted as follows:

Rent owing to 11 February 2018	330.85
Lock/key replacement	215.00
Rubbish removal	88.55
Cleaning	$80.50
Repairs to painted walls	**750.00**
Total award	**1 464.90**
Bond (already received by landlord)	1 320.00
Total payable by Tenant to Landlord	**$144.90**

[23] Costs – neither party was represented by counsel at the appeal hearing and so no costs are awarded.

Conclusion

[24] The respondent / tenant will pay the appellant / landlord the sum of $144.90