

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI**

**CIV-2018-009-002094
[2020] NZDC 17667**

BETWEEN

FAY JANET FRANCES BIRCH
Appellant

AND

ŌTAUTAHI COMMUNITY HOUSING
TRUST
Respondent

Hearing: 21 August 2019

Appearances: Appellant in person
C Olds for the Respondent

Judgment: 4 September 2020

RESERVED JUDGMENT OF JUDGE R E NEAVE

Introduction

[1] This is an appeal from a decision of the Tenancy Tribunal (“Tribunal”) dated 18 July 2018, wherein the Tribunal found the respondent (Otautahi Community Housing Trust (“OCHT”)) breached its obligations to the appellant (“Ms Birch”) under ss 48(4)(a) and 38(1) of the Residential Tenancies Act 1986 (“RTA 1986”).

[2] The respondent was ordered to pay the appellant the sum of \$400.00

[3] In the course of its decision the Tribunal held:

1. OCHT allowed the Christchurch City Council (“CCC”) staff and contractors to enter Ms Birch’s unit and that was unlawful entry.

2. OCHT breached Ms Birch's right to quiet enjoyment of the premises when CCC authorised delivery of packaging materials to Ms Birch's unit.
3. The Tribunal did not view the conduct of OCHT as intentional or calculated and therefore did not make an award for exemplary damages.

[4] The appeal was heard before me on 21 August 2019. I reserved my decision and asked the parties to provide further written submissions on the issue of damages by 27 September 2019 and 18 October 2019. Subsequently, several sets of submissions were received over the ensuing months.

Issues

[5] At the appeal hearing, the parties accepted that the issues for determination are:

- a. Whether the quantum of general damages awarded by the Tribunal is appropriate; and
- b. Whether the Tribunal should have awarded exemplary damages.

[6] There also appears to be an issue regarding the consolidation of appeals regarding this tenancy. I intend to deal with this issue at the end.

Background

Timeline

[7] The facts in this case are rather protracted. However, a complete picture of the timeline of events is useful.

[8] Ms Birch has a tenancy agreement at a social housing unit owned by CCC. The agreement began in September 2002.

[9] On 1 October 2016 OCHT became the lessee of the property from CCC and henceforth acted as the landlord for individual tenants, including Ms Birch.

[10] On 28 January 2016 the Tribunal made an order terminating the tenancy of Ms Birch on the basis that Ms Birch was in rental arrears (s 55(1)(a) RTA 1986).

[11] Ms Birch sought a rehearing but this was declined in February 2017.

[12] Ms Birch appealed that decision.

[13] Ms Birch also applied for a stay of proceedings in relation to the original decision of the Tribunal in terminating Ms Birch's tenancy at para [10].

[14] Both the stay of proceedings and rehearing application were heard before me.

[15] I granted a stay of proceedings on 19 April 2016.

[16] I heard the re-hearing application on 21 September 2016 and granted the application for a rehearing on 14 February 2017.

[17] Ms Birch made an application for an order of the Tribunal on 9 November 2016.

[18] Ms Birch then sought an order for exemplary damages on a number of grounds under the RTA 1986.

[19] Tribunal hearings took place on 11 January 2018, 24 May 2018 and 17 July 2018.

[20] At the hearing on 24 May 2018, Ms Birch withdrew many of the orders she originally sought and narrowed the core issues down to:

- a) Unlawful entry of her unit. A remedy of \$1,000 exemplary damages was sought.
- b) Breach of quiet enjoyment. A remedy of \$2,000 exemplary damages was sought.
- c) Breach of quiet enjoyment. A remedy of \$2,000 exemplary damages was sought.

[21] The Tribunal gave its decision on 18 July 2018. The details of that decision are outlined above at para [3].

[22] Ms Birch appealed the Tribunal's decision.

Facts

[23] I turn now to the facts surrounding the breaches claimed by Ms Birch.

[24] On 6 October 2016, OCHT allowed CCC staff to enter Ms Birch's unit for the purposes of asbestos repair work, believing that appropriate notice had been given to Ms Birch.

[25] Notice had not been served on Ms Birch and her unit was not identified as one that required asbestos repair.

[26] On 7 October 2016, Ms Birch returned to her unit and became aware that it had been entered without her authorisation.

[27] OCHT accepted responsibility for allowing CCC to enter the unit in the absence of proper notice being served on Ms Birch.

[28] Two or three weeks later Ms Birch found packaging boxes outside her unit. She called the company listed on the boxes and was advised that she was moving on 15 November 2016. Ms Birch was unaware of this.

[29] As it turns out the CCC had authorised these boxes to be delivered to Ms Birch in anticipation of remedial work that was being done on several units. This work involved temporarily moving tenants out of their units while the work was carried out.

The law

Jurisdiction

[30] A Court will deal with an appeal on the basis of the evidence presented to the Tribunal and on the principles set out in *Austin, Nichols and Co Inc v Stichting Lodestar*:¹

1. The appellant has the onus to satisfy the Court that it should differ from the Tribunal's decision;
2. The Court should only interfere in the Tribunal's decision if it considers that the Tribunal's decision was wrong;
3. The Court may or may not find the reasoning of the Tribunal persuasive, for this Court has a responsibility of arriving at its own assessment on the merits of the case.

[31] Pursuant to s 118(1)(b) RTA 1986, a District Court Judge may do the following:

- a. Quash an order of the Tribunal and substitute for it any other order or orders that the Tribunal could have made in respect of the original proceedings.

The RTA 1986

[32] The RTA 1986 distinguishes between breaches of the Act, or of a tenancy agreement, and breaches occurring by virtue of unlawful acts. Section 2 defines an unlawful act as being "anything declared by any of the provisions of this Act to be unlawful." The Act specifically prescribes that various actions by either the landlord or the tenant can amount to an unlawful act. For example, entry by the landlord outside the limited situations prescribed in s 48(1) to (3), is declared to be an unlawful act by s 48(4).

¹ *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103.

[33] It therefore follows that not every breach of the Act, or of a tenancy agreement, will amount to unlawful conduct. Damages may be awarded within the Tribunal's jurisdiction for breaches of this agreement. Exemplary damages, however, can only flow from conduct which is unlawful. This distinction is important, as it dictates the type of damages that an individual will be entitled to, in the event that a breach is found to have been committed and an order is made for any damages.

General damages

[34] Section 77(2)(n) RTA 1986 provides that a Tribunal may make an order for general damages where a landlord or tenant has breached a provision of the RTA 1986. This is a discretionary power and requires the Tribunal to assess the breach.

[35] General damages are damages for "pain or suffering" or "emotional distress".

[36] The Court in *Palmer v Housing New Zealand (No 2)* held that when assessing the quantum of general damages, the Tribunal must take into account the following factors:²

- (a) The nature of the breach;
- (b) The duration of the breach; and
- (c) The effect of the breach on the party.

Exemplary damages

[37] Section 109 RTA 1986 provides that a tenant may apply to the Tribunal for an order that another person pay the applicant exemplary damages up to the maximum amount specified in Schedule 1A.

109 Unlawful acts

- (1) A landlord or a tenant, or the chief executive acting on behalf of a landlord or a tenant, or the chief executive acting as the person responsible for the general administration of this Act, may apply to the Tribunal for an order requiring any other person to pay to the applicant an amount in the nature of exemplary damages on the ground that that other person has committed an unlawful act.

² *Palmer v Housing New Zealand (No 2)* Auckland TT 2378/92, 25 August 1993.

- (2) No application may be made under subsection (1) later than—
- (a) 12 months after the termination of the tenancy in the case of—
 - (i) an unlawful act to which section 19(2) refers; or
 - (ii) a failure to keep records in respect of bonds that is an unlawful act to which section 30(2) refers; or
 - (b) 12 months after the date of commission of the unlawful act in the case of any other unlawful act.
- (3) If, on such an application (other than one referred to in subsection (3A)), the Tribunal is satisfied that the person against whom the order is sought committed the unlawful act intentionally, and that, having regard to—
- (a) the intent of that person in committing the unlawful act; and
 - (b) the effect of the unlawful act; and
 - (c) the interests of the landlord or the tenant against whom the unlawful act was committed; and
 - (d) the public interest,—
- it would be just to require the person against whom the order is sought to pay a sum in the nature of exemplary damages, the Tribunal may make an order accordingly.
- (3A) In the case of an application in respect of an unlawful act under section 54(3), the Tribunal may order the landlord to pay a sum in the nature of exemplary damages if the Tribunal is satisfied that it is just to do so having regard to the matters referred to in subsection (3)(b) to (d).
- (4) The maximum amount that a person may be ordered to pay under this section for any unlawful act referred to in any section shown in the first column of Schedule 1A is the amount shown opposite that section in the second column of that schedule.
- (4A) The Tribunal may make an order against a person on the ground that the person committed an unlawful act even though the conduct that formed part of that act also formed part of an offence or an alleged offence against section 109A(4) in respect of which the person has been charged, convicted, or acquitted.
- (5) Any amount ordered by the Tribunal to be paid under this section on the application of a landlord or a tenant, or on the application of the chief executive acting on behalf of a landlord or a tenant, shall be paid to that landlord or that tenant, and shall be in addition to any sum payable to that landlord or that tenant by way of compensation in respect of the unlawful act.

- (6) Any amount ordered by the Tribunal to be paid under this section on the application of the chief executive acting as the person responsible for the general administration of this Act shall be paid to the Crown.
- (7) Notwithstanding subsection (5) and section 124(4)(d), if the chief executive is acting under section 124(3)(b), any amount ordered by the Tribunal to be paid under this section on the application of the chief executive shall be paid to the chief executive and retained by the Crown.

[38] In considering whether an order of exemplary damages should be made, the Tribunal must first look at the intention of the person against whom the order is sought. As the Tribunal in *Chief Executive, ex parte Edmondson v Walls* said:³

Before an award for exemplary damages can be made the threshold question for the Tribunal to answer is whether the unlawful act has been committed 'intentionally.' In my view negligence does not equate to intention, and for the Tribunal to be satisfied that a party has 'intentionally' committed an unlawful act evidence must exist which would justify the Tribunal in coming to the conclusion that the party committing the unlawful act has in fact turned his or her mind to the act and deliberately set about to commit it.

[39] If the Tribunal considers that the person against whom the order is sought has committed the unlawful act intentionally, the Tribunal must then consider whether it would be just to require that person to pay exemplary damages, taking into account:

- (a) The intention of the person;
- (b) The effect of the unlawful act;
- (c) The interests of the party against whom the unlawful act was committed; and
- (d) The public interest.

[40] As described by Cooke P in *Auckland City Council v Blundell*⁴:

Exemplary and punitive [damages] are different words for the same thing. The damages are exemplary because they are meant to teach an example to the guilty officer and others. They are punitive because they are meant to punish.

³ *Chief Executive, ex parte Edmondson v Walls* North Shore TT548/92, 29 June 1993 at 20.

⁴ *Auckland City Council v Blundell* [1986] 1 NZLR 732 (CA) at 704.

They are like a fine, though they go to the citizen who has been the victim of the conduct.

[41] The Tribunal found that OCHT had unlawfully entered Ms Birch's unit, pursuant to s 48(4)(a) RTA 1986 and had breached Ms Birch's entitlement to quiet enjoyment of her unit, pursuant to s 38(3) RTA 1986.

[42] Ms Birch claimed exemplary damages at the upper amount available under Schedule 1A RTA 1986 for both breaches.

[43] Section 48(4)(a) provides that intentional entry onto a tenant's premises without notice, is an unlawful act which may attract exemplary damages of up to \$1,000.

[44] Section 38(3) provides that contravention of a tenant's quiet enjoyment of the premises is an unlawful act if it amounts to harassment of the tenant. This may attract exemplary damages of up to \$2,000.

[45] Harassment is not defined in the Act. In *Macdonald v Dodds*, Judge Harland considered that the dictionary definition of "harassment" was appropriate in the context of s 38(3).⁵ In the *Concise Oxford Dictionary*, "harass" is defined as torment by subjecting to constant interference or intimidation". In *Black's Law Dictionary* "harassment" is defined as:

Words, conduct or action (usu. Repeated or persistent) that, being directed at a specific person, annoys, alarms or causes substantial emotional distress in that person and serves no legitimate purpose.

[46] While a single act of interference with a tenant's quiet enjoyment is unlikely to amount to harassment, the Adjudicator in *Whatiura v Shoulder* noted that "although the term usually refers to repeated acts of some kind, I take the view that it can extend to a single act on one occasion of sufficient seriousness".⁶

⁵ *Macdonald v Dodds* District Court Hamilton.

⁶ *Whatiura v Shoulder* TT12/87, 16 March 1987.

Ms Birch's position

[47] Unfortunately, further submissions have not been filed by Ms Birch on the issue of damages.

Respondent's position

[48] The respondent submits that the Tribunal's decision not to order exemplary damages should remain undisturbed.

[49] The respondent submits that the Tribunal's decision was appropriate given the evidence available to the Tribunal. Specifically, the respondent submits that the evidence established that the unlawful entry was unintentional, and the breach of Ms Birch's quiet enjoyment did not amount to harassment for the purposes of s 38 RTA 1986.

[50] The respondent submits that if the Court is minded to make an order for a higher quantum of damages, it should do so by increasing the quantum of general damages. It is submitted that an order for the upper limit of \$1,000 would be appropriate for each breach.

Analysis

[51] I take the view from the outset, that the threshold for exemplary damages is not made out on the evidence provided to the Court. For that reason, I do not intend to disturb the Tribunal's decision in that regard.

[52] I also do not intend to traverse the entirety of dealings between the two parties. Suffice it to say, that that these matters have been protracted and I am sure both parties will welcome some finality to these proceedings.

[53] I deal first with the Tribunal's decision on exemplary damages.

[54] With regards to the unlawful entry, the first question is whether OCHT committed the unlawful act (entry) intentionally.

[55] The Tribunal held:⁷

There is no dispute that ... [there was] unlawful entry...I accept the Trust's submissions that the incident arose by mistake and that there was not intention to enter without having given appropriate notice. There is no order for exemplary damages.

[56] I am satisfied on the following evidence, that OCHT did not commit the unlawful act intentionally.

[57] OCHT accepted responsibility for allowing CCC workers to enter Ms Birch's unit in the absence of appropriate notice provided to Ms Birch.

[58] In explanation, Mr Hardy stated, in effect, that the unlawful entry had been the result of an administrative error during the transitory period when OCHT was "taking over" from the CCC.⁸

[59] This accords with the summary of facts, which provides OCHT became the lessee of the units from the CCC on or about 1 October 2016. I note for completeness, that Mr Hardy in evidence stated that OCHT took over on 3 October 2016 and this appears to have been accepted by the Adjudicator as the takeover date. The breach occurred approximately three days later.

[60] In explaining the breach, Mr Hardy states:⁹

... we [took] the word of the landlord which was the city counsel at the time that they had issued letters to tenants advising them that they wish to enter the property to test for asbestos... [however]... we [OCHT] did not have the letter at hand to confirm that [at the time of allowing entry].

[61] As to the intention of OCHT, Mr Hardy states:¹⁰

... the trust accepts liability for what they have done... there was no intent whatsoever to cause distress.

⁷ TT19/07/2018.

⁸ TT20/09/2017 at pages 25-26.

⁹ TT20/09/2017 at page 25.

¹⁰ TT20/09/2017 at page 25.

[62] Ms Birch, accepted that she did not believe the intention of OCHT or the CCC was to be devious and when prompted as to what she believed the intention to be, Ms Birch responded that she thought the entry was the result of mismanagement.¹¹

[63] I take the view that OCHT/CCC did not act intentionally, and, as such, an award for exemplary damages is not available to Ms Birch.

[64] With regards to the breach of quiet enjoyment, the question is whether OCHT's breach amounted to harassment.

[65] On this issue, the Tribunal held:¹²

Ms Birch seeks an order for exemplary damages. I can only consider such an order if the circumstances amount to harassment. I am not satisfied however that the landlord's actions have been established to be calculated and specifically directed by the landlord against the tenant. There is no award for exemplary damages.

[66] I am satisfied on the following evidence that the OCHT/CCC's breach of Ms Birch's quiet enjoyment did not amount to harassment. The breach therefore does not amount to an unlawful act for which exemplary damages may be awarded.

[67] In explanation, Mr Hardy states that OCHT had no knowledge of the leaving of packaging items at Mr Birch's unit. Mr Hardy states that this was sanctioned by the CCC, and that OCHT was not liable for the actions of CCC. However, the Adjudicator rightfully held that from 3 October 2016, OCHT was the landlord and therefore responsible to the tenant for any arrangements concerning repairs.¹³ OCHT has since accepted this.

[68] From the hearing notes I have viewed, it is entirely unclear why the packaging boxes were left at Ms Birch's unit. There is no direct explanation. However, at the 20 September 2017 hearing, Mr Hardy states:¹⁴

We had no main arrangements whatsoever for the tenant to move out of the property and in those circumstances if the tenant was going to be moved out

¹¹ TT20/09/2017 at pages 21-22.

¹² TT19/07/2018.

¹³ TT19/07/2018.

¹⁴ TT20/09/2017 at page 37.

for asbestos removal, then there's a process that goes on. The council's aware of that as much as we're aware of it... we never authorised any procedures for the tenant to be moved out of the property ... [or for] any packaging to be delivered.

[69] At the hearing on 20 May 2018, Mr Hardy states: ¹⁵

The Trust has never looked to evict Ms Birch. What the trust has done, on occasions, is approached her to do repairs for asbestos and also earthquake repairs... [those repairs] couldn't be done while the tenant was present.

[70] It is clear from the facts relating to the unlawful entry, that certain units had been flagged for asbestos testing and that Ms Birch's flat seems to have fallen into the list of units requiring asbestos repair.

[71] I consider on this evidence it is highly likely that Ms Birch's flat remained on a list of units sought to be vacated for the purpose of asbestos repairs.

[72] However, Ms Birch's concerns around this situation are not without warrant. This was noted by the Tribunal, where the Adjudicator held: ¹⁶

I consider that this situation, and the subsequent urgent need for clarification with the landlord was an interference in Ms Birch's peace in the use of the premises.

[73] I agree with this sentiment, but highlight some further aspects that, while falling short of showing an intention to specifically target Ms Birch, can, at the very least, be taken to exemplify an unacceptable level of mismanagement on behalf of CCC and as landlord, OCHT.

[74] At the hearing on 20 September 2019 Ms Birch states:

I came home and I opened the curtains and there were all these cardboard boxes...I thought the had been delivered to the wrong place because they weren't for me... I went and asked a few people, and nobody sort of noticed where they'd come from.

[75] From this evidence, I take it that Ms Birch was the only individual in, at least, that group of units that had (incorrectly) been given packaging boxes.

¹⁵ TT11/01/2018 at pages 13-14.

¹⁶ TT19/07/2018.

[76] This almost certainly would have added to Ms Birch's confusion at the situation and I appreciate that this may have made Ms Birch feel that she had been directly targeted by the actions of OCHT/CCC. This is particularly so given the current breaches took place in the context of other proceedings to which Ms Birch and the CCC were both parties.

[77] While I do not view the actions of OCHT/CCC as amounting to harassment, I observe that after the first breach, OCHT ought to have ensured that all arrangements regarding any repairs were appropriately recorded against the right units.

[78] I further observe that Ms Birch emphasised from the outset that mediation might resolve the issues that she had identified. It is abundantly clear from the material I have before me, that Ms Birch sought clarity around the actions taken by OCHT and CCC, and it was in the absence of clarity that she began to view OCHT/CCC's actions as harassment and/or intentional.

[79] I turn now to the issue of general damages.

[80] With regards to the quantum of general damages, I take the view that the Tribunal's decision was inadequate with regards to both breaches.

[81] With regard to the unlawful entry the Tribunal held:¹⁷

This situation is also most likely to result in emotional upset. I am satisfied that an award of general damages of \$200.00 is reasonable.

[82] I view the quantum awarded by the Tribunal as inadequate on the evidence.

[83] At the 20 September hearing Ms Birch states:¹⁸

... everyone's got an interest in not having their home sort of entered.

[84] The Adjudicator agreed with that proposition and so do I.

¹⁷ TT19/07/2018.

¹⁸ TT20/09/2017 at page 22.

[85] An individual has an important, fundamental, interest in preserving for themselves, access to their home.

[86] Indeed, this forms the basis for the general requirement that a landlord give their tenant notice before accessing the tenants home.

[87] With regards to the effect that the unlawful entry had on Ms Birch, she states:¹⁹

...I was frightened...it had a very bad effect on me, like anybody who has their home entered without any knowledge of whose been there or why... there were toll calls..[and] more contact with my doctor.

[88] It is clear the entry had a profound effect on Ms Birch. I observe, however, that this matter would not have affected Ms Birch in isolation. There are clearly a number of other matters which would have also affected Ms Birch at this time. While it might also be thought that Ms Birch might have reacted more adversely than other tenants, this cannot have been unknown to the landlord. At the end of the day you take a party as you find him or her. It was entirely foreseeable that Ms Birch would have a highly adverse reaction.

[89] While the entry was not intentional, nor the actions on behalf of OCHT/CCC malicious, there was clearly an adverse effect on Ms Birch.

[90] The assessment of damages which do not relate to the recompense of actual financial loss, is a difficult exercise. It is also clear that the awards of damages in this context are not particularly generous. I note from the schedule attached to one of the supplementary submissions, that the awards for much worse breaches have been fairly conservative. Nonetheless, in my view, the Tribunal's assessment in this case is close to being derisory.

[91] On any view of it, the intrusions caused significant distress and the awards in my view do not sufficiently recognise that fact.

¹⁹ TT20/09/2017 at pages 19-20.

[92] I therefore quash the original awards of general damages. In respect of the unauthorised entry into Ms Birch's home, I award the sum of \$2,000.00. On any view of it, it was a significant intrusion on the appellant's rights.

[93] In respect of the delivery of the packaging boxes, while undoubtedly distressing to Ms Birch, this was a much less significant one-off event. I consider in respect of this breach, the sum of \$500.00 is appropriate.

[94] Ms Birch is therefore awarded the sum of \$2,500 in damages.

Tenancy order for consolidation of appeals

[95] The Tribunal made an order on 14 November 2019 that another appeal application (TT4207456) regarding this tenancy be considered alongside the current appeal application.

[96] A further order was made on 13 January 2020 that that application will be scheduled for a rehearing in the Tribunal once my decision is released.

[97] Now, for the sake of clarity, the reason that matter must go before the Tribunal is because it is a fresh application. That means that the evidence regarding the claims therein must be heard before the Tribunal.

[98] I appreciate that some of these systems may be quite confusing for applicants, but any fresh applications must be considered first by the Tribunal. That is Tribunal's jurisdiction. If the Tribunal's decision is appealed, the Tribunal matter may come to the District Court, as has happened in this instance.

R E Neave
District Court Judge

Signed this day of 2020 at am/pm