

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV-2019-004-000595
[2020] NZDC 628**

BETWEEN

NEST RESIDENTIAL RENTALS AND
LANDLORD SERVICES LTD
Appellant

AND

LISA FOLLAND
Respondent

Hearing: 15 January 2020

Appearances: J Clark on behalf of Appellant
L Folland in Person

Judgment: 20 January 2020

DECISION OF JUDGE G M HARRISON

[1] Nest Residential Rentals and Landlord Services Ltd (NRRLS) appeals a decision of the Tenancy Tribunal of 26 February 2019 whereby the Tribunal ordered Ms Folland as the tenant of 74 Esplanade Road, Mt Eden, Auckland to pay arrears of rent following her cancellation of a fixed term tenancy.

[2] Ms Folland had a fixed term tenancy which expired on 2 March 2018. It was agreed by Ms Folland and Goode Rentals and Property Management Ltd, the then agent for the landlord, that an extension of 12 months to the fixed term tenancy had been granted with a new expiry date of 28 February 2019. The weekly rent was \$1,250.

[3] On 12 November 2018, Mr Nino Cassin, Ms Folland's partner, emailed Mr Jeff Reid of Goode Rentals, stating that they would like to terminate the lease as of

30 November 2018. Mr Reid replied and forwarded an “application for lease break” for signature, the form including a clause:

I/we understand that Goode Rentals and Property Management Ltd will have to obtain permission from the owners of the property to release us from the fixed term...

[4] On or about 23 November 2018 the property management changed hands and Ms Clark of NRRLS took over. She essentially carried on with steps initiated by Goode Rentals to obtain a new tenant.

[5] Ms Folland vacated the property on 7 December 2018. At that time rent had been paid to 23 November 2018, so at the time Ms Folland vacated the property two weeks rental was unpaid.

[6] The hearing before the Tribunal then proceeded on the basis as to whether the landlord had complied with his obligation to mitigate his loss as required by s 49 of the Residential Tenancies Act 1986 (the Act). Section 49 provides:

Where any party to a tenancy agreement breaches any of the provisions of the agreement or of this Act, the other party shall take all reasonable steps to limit the damage or loss arising from that breach, in accordance with the rules of law relating to mitigation of loss or damage upon breach of contract.

[7] In my view however s 49 has no application to this case. That is because of the provisions of s 61 of the Act. Subsection (1) provides:

(1) On the application of the landlord, the Tribunal may make an order terminating a tenancy where it is satisfied that the tenant has abandoned the premises and the rent is in arrear.

Subsection (2) relates to periodic tenancy.

Subsection (3) as relevant provides:

(3) A tenant who abandons the premises shall, notwithstanding any rule of law to the contrary, be liable to pay the rent for any period up to and including, but not after, the following date:

(a) ...

(b) in the case of a fixed-term tenancy,—

(i) the date of the expiry of the term; or

- (ii) the date of commencement of a new tenancy of the premises,—

whichever is the earlier.

[8] It is clear from that subsection that a tenant who abandons premises shall, in the case of a fixed term tenancy be liable for rent up to the date of expiry of the term or the date of commencement of a new tenancy if that occurs earlier.

[9] Subsection (4) then provides:

- (4) Nothing in section 49 of this Act shall impose upon the landlord any obligation, on finding that the tenant has abandoned the premises, to make an application under this section or to grant a new tenancy of the premises.

[10] Consequently, if Ms Folland has abandoned the premises, the landlord is not obliged to mitigate its loss as required by s 49 meaning, that the landlord would be entitled to claim rental to the date of the expiry of the term of the fixed tenancy, or if earlier re-let to the date thereof.

[11] On 17 December 2018 the landlord through NRRLS applied to the Tribunal seeking payment of rent to the end of the fixed term on 28 February 2019. The hearing before the Tribunal took place on 5 February 2019 and from subsequent submissions confirmation was given that the property was let to new tenants from 10 February 2019.

[12] At paragraph 19 the Adjudicator stated:

I find that there was no agreement to surrender the tenancy to the landlord on any particular date, and the release of the tenants from the fixed term was subject to the consent of the owner which was not obtained. Ms Folland was therefore in breach of contract when she left the property and stopped paying rent before the expiry of the fixed term.

[13] Despite this finding the Adjudicator went on to determine that the landlord had failed to mitigate any loss by refusing to agree to a new tenancy tentatively offered, to commence from 8 December 2018.

[14] However, that overlooks the provisions of s 61, and subsection (4) in particular relieving the landlord of any obligation to mitigate its loss cast upon her by s 49.

[15] It is clear that Ms Folland abandoned the premises on 7 December 2018 at which time rent had been paid to 23 November 2018. That means that the provisions of s 61 apply with the consequence that the landlord is entitled to rental until the expiry of the fixed term tenancy or any earlier date of commencement of a new tenancy.

[16] The premises were relet on 10 February. Rent was therefore payable from 23 November to 10 February in respect of which NRRLS seeks \$11,586.70, which is calculated to 9 February 2019 and is a considerable reduction from the rental owing to the termination of the fixed term of \$17,321.43.

[17] Section 118(1)(b) provides that on the hearing of an appeal a District Court Judge may:

- (b) quash the order and substitute for it any other order or orders that the Tribunal could have made in respect of the original proceedings.

[18] I therefore quash the order of the Tribunal of 26 February 2019 and substitute an order that Ms Folland is liable to pay rent in the sum of \$11,586.70.

[19] It is not clear whether that sum takes account of payments already made by Ms Folland. According to the Tribunal's decision the Bond Centre paid \$2,520.44 to NRRLS with Ms Folland paying the further sum of \$443.49. I anticipate that the total of those amounts should be deducted from the sum of \$11,586.70, but if that is not the case, I reserve leave for memoranda to be filed recording the correct amount to be paid.

G M Harrison
District Court Judge