IN THE DISTRICT COURT
AT WELLINGTON

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

CIV-2020-085-000713
[2021] NZDC 16182

IN THE MATTER OF	AN APPEAL PURSUANT TO S 117 OF THE RESIDENTIAL TENANCIES ACT 1986
BETWEEN	T.M.T NEW ZEALAND LIMITED T/A STRATA PROPERTY MANAGEMENT Appellant
AND	KIRK LIAM SWEENEY ANNE-METTE HOLMGARD SUNDAHL Respondents

Hearing: 21 July 2021

Appearances: A Hu as a representative of the Appellant company
Respondents appear in person

Judgment: 13 August 2021

RESERVED JUDGMENT OF JUDGE S M HARROP

Introduction

[1] The appellant appeals against an undated decision of the Tenancy Tribunal (Mr Alan Henwood) at Wellington which appears to have been received by the parties on 18 November 2020.

[2] The respondent tenants rented a property at 2A Percy Dyett Drive in Karori from the appellant landlord. The tenants applied to the Tribunal for compensation for the landlord's failure to provide premises in a reasonable condition, to provide required documentation and complained about an inadequate lock on a sliding door.

[3] At the hearing on 16 November 2020, the adjudicator heard from both tenants and from Mr Hu on behalf of the landlord.

[4] The Tribunal's order with reasons was as follows:

> **ORDER**
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> 1. T.M.T New Zealand Limited T/A Strata Property Management must pay Kirk Liam Sweeney and Anne-Mette Holmgard Sundahl $1,520.44 immediately, calculated as shown in table below:
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> 2. The Landlord is directed have the TV checked by a registered service technician and, if necessary, repaired. In the alternative, the landlord is to pay the tenants the sum of $500.00.

Description	**Landlord**	**Tenant**
Compensation: Failure to provide premises in a reasonable state of cleanliness		$550.00
Exemplary damages: Failure to provide premises in a reasonable state of cleanliness		$500.00
Exemplary damages: Failure to provide documentation		$200.00
Exemplary damages: Failure to secure premises		$250.00
Filing fee reimbursement		$20.44
Total award		**$1,520.44**
Total payable by Landlord to Tenant		**$1,520.44**

> **Reasons:**
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> 1. Both parties attended the hearing.
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> 2. This is a tenant application for compensation for failure of a landlord to provide premises in a reasonable condition, and failure to provide required documentation.
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> 3. The tenants replied to an advertisement for the premises in August 2020 and viewed the premises. The previous tenants had departed leaving most of their possessions and rubbish, and it was agreed by the landlord that the property would be cleaned and some of the possessions removed. On that basis the tenants signed up to a tenancy commencing 5 September 2020.
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> 4. The property had been advertised as fully furnished. It emerges from correspondence that most of the furnishings were the possessions of the previous tenants, which the new tenants did not want, and it was agreed that most of them would be removed. The tenancy agreement lists the chattels that were provided.
>
> *Condition of the Property*
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> 5. The evidence is that the premises were cleaned but the previous tenants' possessions were still in place. When they were finally removed (with the assistance of the tenants), more dirt and rubbish became obvious. For example, in the laundry there was evidence of rodent droppings and bait. The tenants

carried out some cleaning but maintained that it was the landlord's responsibility to provide the premises in a reasonable state of cleanliness, pursuant to section 45(1)(a) of the Residential Tenancies Act (RTA) and it had not done so.

6. The landlord's response was that it had had cleaning carried out, the tenants were aware of the condition when they committed to the premises and it was their choice to rent them. This, of course, mistakes the law which is that a reasonable state of cleanliness is an objective standard, and acceptance by tenants of anything less is not binding: section 11(3).

7. Evidence presented indicates that the cost of cleaning was $80.00, which indicates cursory cleaning at best.

8. Desultory correspondence followed and eventually, on 4 October, the tenants issued a 14-day notice, listing the lack of cleanliness and other issues. The premises have now been cleaned to a standard acceptable to the tenants, but they seek compensation for the condition in the interim. They seek a 20% discount on their rent for 49 days and also recompense for their cleaning of the house – 20 hours at $20 per hour.

9. There is an element of duplication in their claim. The cleaning was not a cost incurred and the appropriate approach is to assess compensation on the basis of loss of amenity.

10. The tenants incurred some disruption until possessions were removed and loss of use of the garage in which most of the possessions were stored until sold. This raises the question as to how the landlord was able to sell the possessions as compliance with sections 62-62F is not evident, which is not an issue with which the current tenants need to be concerned, but it is relevant as indicative of the landlords approach to tenancy matters.

11. I also accept the evidence that the premises were not let in a reasonable state of cleanliness.

12. The landlord argues that the rental reflects a discount for the condition of the property and no compensation is justifiable. The emails submitted in evidence indicate negotiation over the rent but there is nothing which, in the Tribunal's view, reflects a discount for the condition of the property.

13. However, I consider a discount of 10% as representative of loss of amenity as too high: I adopt 15%.

Exemplary Damages for Condition

14. In addition, the tenants seek exemplary damages. Failure to supply premises in a reasonable state of cleanliness is an unlawful act which can attract such damages.

15. The principles on which such damages are awarded are set out in section 109. As precondition, the landlord must have acted intentionally, in the sense of deliberately and with full knowledge. The argument of the landlord is that the tenants accepted the condition of the premises -subject to cleaning- and that established the acceptability of the premises. I have rejected this argument and regard it as unreasonable for the landlord to have taken the view that it

did. It is a professional manager and should have bene aware of its responsibilities. I find intention established.

16. Section 109 then lists a number of factors to be considered, including the intent of the landlord, the impact on the tenants and the public interest. I accept that the landlord expected that the lack of cleanliness would be remedied by the cleaning to be carried out, and it was not the intent of the landlord to abrogate its responsibilities totally. I also detect an element of tolerance on the part of the tenants, at least up to a point. From the point of view of the public interest, it is disturbing that a professional manager would attempt to let premises in the condition that they were.

17. The RTA sets the standard high, at a maximum of $4000, reflecting the importance the Legislature places on these matters. However I do not regard this case as warranting substantial damages and I award the sum of $500.

Documentation

18. The second claim of the tenants relates to the documentation provided.

19. The tenancy agreement submitted by the tenants consists of 4 pages. They say that it is all they received from the landlord, acknowledging that the initial inspection report was yet to be completed. The standard Tenancy Services agreement which was used runs to some 12 pages. Conspicuously missing are insulation, insurance and Health Homes statements.

20. The landlord says that the additional information was sent in an email dated 4 September. It is not in the evidence provided. Email correspondence indicates that insurance details were provided on 6 October.

21. The immediate difficulty which the landlord faces is that section 13A of the RTA requires the information to be included in the tenancy agreement. Failure to do so, in the case of insulation and Healthy Homes, is an unlawful act.

22. Applying the analysis above to the question of exemplary damages, I find again that the landlord acted intentionally. The maximum amount of exemplary damages that can be awarded is $500. I award $200.00.

Security

23. The third issue raised by the tenants is security. There were issues with the ranch slider lock. It seems that, by jiggling the door the lock could be tripped, which was said to be a common fault with the typical locking mechanism used.

24. The tenants asked for a dead bolt. Instead the landlord provided a piece of wood which could be inserted in the runner and prevent the door being opened. It was described as a common solution.

25. Section 46 requires a landlord to provide and maintain such locks and other similar devices as are necessary to ensure that the premises are reasonably secure. Reasonably secure means secure against the use of normal force.

26.For these purposes I do not regard a piece of wood as either “a lock” or an “other similar device”.

27. Breach of section 46 is also an unlawful act. Having regard to the considerations noted above, I award the sum of $250.00 by way of exemplary damages.

TV

28. The final issue is the TV. The tenants say that it is not working properly.

29. The landlord says that it belonged to the previous tenants and it is not its responsibility to repair. But it is listed in the chattels provided by the landlord, and by operation of law, as chattels left by previous tenants, is not the property of the landlord.

30. There will be an order for the landlord to have the TV checked and repaired.

31. Where such an order is made, the RTA requires an order for payment of money to be made as an alternative. The sum imposed represents the Tribunal's assessment of the probate cost of replacement of the TV like for like.

Filing Fee

32. As the tenants have been successful, I award the filing fee.

[5] Following receipt of the order, the landlord applied for a rehearing. The Tribunal rejected the application. Its order with reasons is set out in full here:

ORDER

1. The application for rehearing is dismissed on the papers.

Reasons:

1. On 16 November 2020 the Tribunal made an order for payment of compensation and exemplary damages to the tenants.

2. On 19 November 2020, T.M.T New Zealand Limited applied for a rehearing on various grounds which are detailed below.

3. Section 105(1) Residential Tenancies Act 1986 provides that the Tribunal has the power to order a rehearing where "a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur".

4. Usually the party applying for the rehearing must show that something went wrong with the Tribunal's procedure, for example, that they did not receive notice of the hearing or they were not able to properly present their case. A rehearing may also be granted where there is new evidence that was not reasonably available at the first hearing. If it could have affected the outcome.

5. The District Court has held that if the Tribunal was simply wrong in its findings of fact, or its application of the law, this is not sufficient to establish

a miscarriage of justice: a rehearing is not an alternative to an appeal. Furthermore, a rehearing will not be granted just because a party is unhappy with the decision, or to give them a second opportunity to present their case.

Has a substantial wrong or miscarriage of justice occurred?

6. I deal with each of the issues raised by the landlord in turn.

TV

7. Contrary to the argument of the landlord, the order does not require the landlord to repair the TV but to investigate and, if necessary, repair. Compensation is only payable if the landlord fails to do so.

8. Contrary also to the landlord's argument, it is landlord's obligation to repair fixtures or chattels which it supplies. It may be able to recover the cost from the tenant if the item has been damaged by the tenant but that does not change the underlying obligation.

9. If the landlord believes the Tribunal is wrong, that is matter of law and the landlord's recourse is appeal.

Cleanliness

10. The landlord disagrees with the Tribunal's findings on cleanliness. It faces two issues.

11. First the Tribunal made findings on the basis of the evidence before it. If the landlord disagrees with those findings, its option is appeal.

12. Second, the evidence now offered in support is evidence which was available prior to the hearing or which was offered at the hearing. A rehearing is not an opportunity to introduce such evidence or re-argue the Tribunal's findings.

Documentation

13. The landlord also challenges the Tribunal's findings regarding documentation.

14. The landlord quotes from the Tenancy Services website but quotes from the 4th paragraph of the information provided, which only applies where information is requested after the tenancy is entered into. This tenancy was entered into in September 2020 and the 1st paragraph of the information on the website applies.

15. In relation to insurance and insulation, see also section 13A(1A) and (2). The landlord did not comply.

16.In relation to the healthy homes statement, the Tribunal accepts that, as a result of an amendment to the law, the requirement for such a statement was extended to 1 December 2020.

17. However this does not alter the outcome. The landlord had still failed to comply with the insulation and insurance statement requirements and

unlawful acts were committed. The amount of exemplary damages awarded would not have been materially different if the error had been realised.

Security

18. The landlord also objects to the award of exemplary damages for failure to secure the premises.

19. As I read the objection, it is that the amount awarded is far more than the cost of installing a bolt. This mistakes the purpose of exemplary damages, which is not compensate the tenant but to act as a deterrent to further default.

Compensation

20. Finally the landlord returns to the overall level of compensation. For the reasons I have noted this is irrelevant in the case of exemplary damages.

21. The landlord claims the tenant has been compensated for issues by a lower rent. The Tribunal rejected that argument.

22. If the landlord is suggesting that the tenants compromised their rights, then it needs to refer to section 11(3): a tenant cannot do so.

23. It also need to realise, as pointed out by the Tribunal, that cleanliness is an objective standard, not whatever the landlord and tenant may agree. That is only relevant to the question of compensation, where it was taken into account.

24. For those reasons the applicant has failed to establish the grounds for a rehearing.

Grounds of Appeal

[6] Mr Hu filed written grounds of appeal. He first explained that the issue relating to the television had been sorted out. He submitted that there were three issues on which the Tribunal's decision was wrong. He headed these three issues: Cleanliness, Document and Statement and Securing the property. I will discuss the submissions made by Mr Hu and by the two tenants in response on each issue below. Before I do so, it is appropriate to set out the law on appeals.

Law on Appeals

[7] Section 118 of the Residential Tenancies Act allows a District Court Judge on appeal to quash the order of the Tribunal and order a rehearing by the Tribunal or substitute any orders that the Tribunal could have made or dismiss the appeal. The

section envisages a rehearing with the procedure to be followed at an appeal to be such as the Judge may determine.

[8] Rule 18.20 of the District Court Rules 2014 provides that when conducting a re-hearing, the Court may rehear all or part of the evidence taken before the Tribunal. As is typical, the Notes of Evidence given before the Tribunal were typed up and have been considered by me, along with the Tribunal's decision and the submissions of Mr Hu for the appellant and Mr Sweeney (primarily) for the respondents.

[9] The Court is also granted full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit. In this case no such further evidence has been received but I did receive and consider copies of the documents that had been provided to the Tribunal including various emails. Other powers on appeal are set out in Rules 18.21 to 18.25.

[10] The correct approach of an appellate Court to this kind of appeal was succinctly set out in the judgment of the Supreme Court in *Austin, Nicholls & Co Inc v Stichting Lodestar*:[1]

> [4] Perhaps the most familiar general appeals are those between courts. So, in the present case, the Court of Appeal on general appeal from the High Court under s 66 of the Judicature Act 1908 was entitled to take a different view from the High Court. Similar rights of general appeal are provided by statute in respect of the decisions of a number of Tribunals. The appeal is usually conducted on the basis of the record of the court or Tribunal appealed from unless, exceptionally, the terms in which the statute providing the right of appeal is expressed indicate that a de novo hearing of the evidence is envisaged. (An example of a right of appeal with that effect was that under the legislation considered by the Court of Appeal in Shotover Gorge Jet Boats Ltd v Jamieson.) In either case, the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.
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> [5] The appeal court may or may not find the reasoning of the Tribunal persuasive in its own terms. The Tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the Tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives

[1] *Austin, Nicholls & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141.

> to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or Tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

[11] In *Housing New Zealand Corporation v Salt*[2], Judge Joyce QC discussed the nature of appeals by way of rehearing. His Honour said:

> [10] The next form of appeal is that which is by far and away the most common — an appeal by way of "rehearing". On such an appeal the appellate body is entitled to reach its own independent findings on the evidence it receives.
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> [11] The appeal is heard on the record of the oral evidence given below, subject to discretionary powers to rehear the whole or any part of the evidence or even to receive further evidence.
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> [12] In this context, the expression "rehearing" connotes that the appellate body is not limited to the correction of errors in the judgment below but may take into account developments since the trial. But it does not mean that the Court will hear all the evidence again as though it were a new trial.
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> [13] On an appeal by way of rehearing, the appellate body is not restricted by any findings which the lower court or Tribunal has made, but the appellate body nevertheless acknowledges the advantage enjoyed by the decision maker at first instance, which may have seen and heard the witnesses.
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> [14] There is something akin to a presumption that the decision appealed from is correct and it is also customary for the appellate body to exercise restraint in interfering with discretionary decisions.
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> [15] Thus, ordinarily, the appellate body will only differ from the factual findings of the decision maker at first instance if:
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> • The conclusion reached was not open on the evidence, that is, where there was no evidence to support it; or
>
> • The lower body was plainly wrong in the conclusion it reached

[12] In considering appeals from the Tribunal regard needs to be had to s 85 of the Residential Tenancies Act. That section provides that the Tribunal is to 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. Further, the Tribunal is to determine each dispute according to the general principles of law relating to the matter and the substantial merits and justice of the case but is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

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[2] *Housing New Zealand Corporation v Salt* [2008] DCR 697.

Cleanliness

[13] The Tribunal awarded $550 to the tenants for the landlord's failure to provide premises in a reasonable state of cleanliness and for that failure determined that exemplary damages of $500 were appropriate. The question of whether those two decisions were correct is central to this appeal; the $1,050 involved forms about 70 per cent of the amount awarded to the tenants.

[14] In support of the landlord's appeal Mr Hu reiterated the points he had made to the adjudicator. He was adamant the house had been handed over in reasonably clean condition and he showed me photographs taken prior to the tenancy and on a routine inspection on 22 November. He reiterated that the cleaning which had been done at a cost of $80 was not cursory as the adjudicator had held because the house in general terms was clean but the tenant had pointed out some particular areas on which focus was required so that the $80 spent was to focus on those rather than purporting to be a full clean.

[15] Mr Hu also referred to various emails about the issue of whether unwanted furniture would be removed before the tenancy started. He said that because the tenants had offered to move some unwanted items owned by the previous tenants into the garage ready for removal it was unfair to provide compensation for loss of use of the garage as a part of the loss of amenity. In general terms Mr Hu submitted that once the tenants had agreed to move in with unwanted items still in the premises there was an obvious risk that a lack of cleanliness would be discovered when they were removed so that should not be the landlord's problem.

[16] Having considered all of the evidence provided at the Tribunal I do not consider there can be any criticism of the adjudicator's factual findings that the landlord was in breach of its responsibility to provide the premises in a reasonable state of cleanliness as required by s 45(1)(a) of the Residential Tenancies Act. As the adjudicator effectively pointed out, regardless of the tenants having decided to rent the premises on the basis that some items from the previous tenancy were to remain, the landlord's obligation to provide the premises in a reasonable state of cleanliness is fundamental and unaffected. It imports an objective test. As the adjudicator also

pointed out, under s 11(3) of the Act tenants cannot be held to have waived the benefit of that obligation.

[17] I consider that the landlord's obligation, where there were items from the previous tenancy still in the premises, whether or not that was with the consent of the tenants, was to ensure the entire premises were clean, including behind and under any such items.

[18] The evidence was that when these items were removed an absence of cleanliness became obvious, most notably in the laundry where there was evidence of rodent droppings and bait. The tenants had to do cleaning (personally) which the landlord should have ensured was done before they moved in. They did not incur out of pocket expenses but did claim 20 hours' work at $20 per hour. However the Tribunal decided the appropriate way to approach the issue, and I consider this uncontroversial and appropriate, was to assess compensation on the basis of loss of amenity.

[19] The compensation claimed by the tenants was $728 being the 20 per cent discount on their rent for 49 days, but the Tribunal decided that 15 per cent or $550 was sufficient. Although the adjudicator referred in paragraph 10 of the decision to a loss of use of the garage, as I read the decision the award of $550 made was purely in relation to the breach of the fundamental obligation to provide the premises in a reasonable state of cleanliness.

[20] I note that the Tribunal expressly considered but rejected Mr Hu's argument that the rental finally agreed reflected a discount for the condition of the property. I agree with the Tribunal that the email correspondence did not include any clear discount reflecting the condition i.e. lack of cleanliness of the property. After all, the landlord said there was no such lack of cleanliness.

[21] The assessment of the appropriate proportion of the amount claimed, which I note was less than the tenants sought by $578.00 overall as the Tribunal declined the additional claim for cleaning, is very much a matter in the discretion of the Tribunal applying its expertise and experience and taking into account the s 85(2) direction as

to the exercise of its jurisdiction. I see no basis to interfere with the Tribunal's assessment.

[22] In relation to the question of the extent of the cleaning achieved for the $80, the Tribunal's decision essentially rested on the reality that whatever cleaning had been done by the landlord it was not sufficient to meet the appropriate standard. The Tribunal accepted the evidence of the tenants about the remaining lack of cleanliness. I consider the Tribunal's finding on this issue was entirely open to it and based on the evidence it heard. Nothing said by Mr Hu at the appeal persuades me that the Tribunal's decision was wrong.

[23] I therefore uphold the Tribunal's finding that $550 was an appropriate level of compensation for the landlord's failure to provide the premises in a reasonable state of cleanliness, in breach of s 45(1)(a) of the Act. The appellant's appeal on this issue is dismissed.

Exemplary Damages for Lack of Cleanliness?

[24] The Tribunal awarded $500 for exemplary damages for breach of s 45(1)(a) and its reasoning is set out in paragraphs 14 to 17 of the order.

[25] Under s 45(1A) the failure by a landlord to provide the premises in a reasonable state of cleanliness is an unlawful act. The consequence of that is potential liability for exemplary damages of up to $4,000 under s 109 and Schedule 1A of the Act.[3]

[26] Section 109 provides, in full:

> **109 Unlawful acts**
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> (1) Any of the following persons (A) may apply to the Tribunal for an order requiring any other person (B) to pay to A an amount in the nature of exemplary damages on the ground that B has committed an unlawful act:
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> (a) a landlord:
>
> (b) a tenant:

[3] From 11 February 2021 this has been increased to $7,200.

(c) the chief executive acting as the person responsible for the general administration of this Act or in the place of a landlord or a tenant under section 124A.

(2) A landlord or a tenant may not apply 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.

(2A) The chief executive may not apply under subsection (1) (whether acting as the person responsible for the general administration of this Act or in the place of a landlord or a tenant) later than 12 months after the date on which the chief executive first became aware of the unlawful act.

(3) If, on an application under subsection (1) (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 column 1 of Schedule 1A is the amount shown opposite that section in column 3 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 in place 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) [Repealed]

[27] For the purposes of s 109(4) the maximum amount payable under s 45(1A) where a landlord has failed to meet obligations in respect of cleanliness, maintenance, smoke alarms, the healthy homes standards, or buildings, health, and safety requirements was at the relevant time $4,000.

[28] Although the Tribunal discussed the guiding principles set out in s 109, with respect I consider these were not correctly applied in this case.

[29] Section 109(3), as a threshold, requires the Tribunal to be satisfied that the landlord (in this case) intentionally failed to provide the premises in a reasonable state of cleanliness. Self-evidently that requires the landlord to be aware of aspects of lack of cleanliness and to deliberately provide the premises for rent knowing they were not reasonably clean. The Tribunal purported to proceed on this basis saying "the landlord must have acted intentionally, in the sense of deliberately and with full knowledge". The Tribunal recorded the landlord's argument as being that the tenants had accepted the condition of the premises including the presence of the unwanted goods. However, the landlord was also arguing that the premises were to all appearances sufficiently cleaned after the $80 cleaning was carried out. It appears from the evidence that much of the cleaning work needing to be done was not obvious on inspection, notably the finding of the rodent droppings and bait only became apparent when the washing machine was moved. In relation to that issue, there is no evidence that the landlord knew that that was under the washing machine. The Tribunal also recorded as a factual finding that it accepted the landlord "expected that the lack of cleanliness would be remedied by the cleaning to be carried out and it was not the intent of the landlord to abrogate its responsibilities totally". The Tribunal added that it detected an element of tolerance on the part of the tenants, at least up to a point.

[30] Applying the statutory test I consider on the basis of those findings (from which I am not prepared to differ) that there was insufficient evidence of the landlord having intentionally (in the sense of deliberately and with full knowledge) let premises that were not in a reasonable state of cleanliness.

[31] Even if that conclusion is wrong, s 109(3) also requires it to be *just* that exemplary damages are paid having regard to the four criteria mentioned. In this case the level of intent even if meeting the threshold was clearly at a low level given that at least the $80 cleaning was carried out, as the Tribunal acknowledged. The effect of the unlawful act was not especially serious and in my view is adequately compensated by the $550 awarded by the Tribunal without exemplary damages on top. The same goes for the consideration of the respective interests of the parties. As to the public interest, the Tribunal said it was disturbing that a professional manager would attempt to let premises in the condition that they were but there is no suggestion this represents a pattern of behaviour by this landlord and the Act does not appear to me to suggest a different standard depending on the nature of the landlord.

[32] In my view this is not a case where even if the threshold intention were established, it would be just to supplement the award of reasonable compensation with exemplary damages, the purpose of which is to punish and make an example of the landlord. The Tribunal itself did not regard the case as warranting substantial damages but in my view, this is not a case where exemplary damages were warranted at all, on the cleanliness issue.

[33] I uphold the appellant's appeal on this issue.

Documentation

[34] The Tribunal's decision about the inadequacy of documentation provided in the tenancy agreement is set out in paragraphs 18 to 22 of the original order. I also note paragraphs 13 to 17 of the rehearing order of 30 November in which the Tribunal accepted that in relation to the healthy homes statement the requirement for such a statement had been extended to 1 December 2020, so it was not an obligation the landlord had to comply with at the time this tenancy agreement was entered into. However, there is no basis for disagreeing with the Tribunal's findings about the failure

to provide the insulation and insurance statements in the tenancy agreement and on that basis an unlawful act was committed in terms of s 13A(1F) rendering the landlord liable to exemplary damages of up to $500[4] under s 109 and Schedule 1A of the Act.

[35] Mr Hu raised the same points on appeal as he did in relation to the application for rehearing. There appears to me to be no dispute on the evidence, or in Mr Hu's submissions, that insurance and insulation statements were not included with the tenancy agreement when it was signed. The fact that this information may have been provided within a month as Mr Hu claims did not meet the landlord's statutory obligation. This is fundamental information which a tenant must be given at the outset, in the tenancy agreement.

[36] As to whether exemplary damages are properly awarded on this issue, I note there are two failures, one in relation to insurance and the other in relation to insulation so strictly speaking there was liability, potentially, to exemplary damages of $500 in respect of each failure.

[37] The obligation to provide these documents are fundamental obligations on landlords of which it appears Mr Hu was not fully aware despite their being included in the Act since 2016 and 2019 respectively. Like all citizens, corporate or otherwise, he and his company are deemed to know the law and on that basis a failure to provide these fundamental documents is properly seen as intentional. Parliament's intention would be subverted if landlords were able to escape consequences for the unlawful acts involved by claiming ignorance of the law. Applying the other criteria in s 109(3) most notably the public interest in landlords being marked out for failing to comply with these important obligations, I consider it is appropriate to award exemplary damages at a modest level. I cannot say that $200 for two separate document failures was in any way inappropriate; arguably it was lenient. I therefore uphold the Tribunal's decision to award $200 exemplary damages against the landlord in relation to the failure to provide documentation.

[4] From 11 February 2021 this has been increased to $750.

Security

[38] This issue relates to the ranch slider lock and was addressed by the Tribunal in paragraphs 23 to 27 of its order.

[39] On this issue Mr Hu submits that the practical solution of using the piece of wood to secure the ranch slider was adequate compliance with s 46 of the Act. That section provides:

> **46 Locks**
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> (1) The landlord shall provide and maintain such locks and other similar devices as are necessary to ensure that the premises are reasonably secure.
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> (2) Neither the landlord nor the tenant shall alter any existing lock or similar device or add to or remove from the premises any lock or similar device, without the consent of the other given at the time that, or a reasonable time before, the alteration, removal, or addition is carried out.
>
> (3) Failure to comply with subsection (1), and contravention of subsection (2), without reasonable excuse, is each hereby declared to be an unlawful act.

[40] Mr Hu submitted that wood was commonly used in this situation and should properly be seen as an example of an "other similar device".

[41] While I accept that "other similar device" is a relatively broad phrase, I do not accept that a piece of wood used in this way is properly seen as similar to a lock. For a start, it is clearly not something designed to provide security and it does not allow a door to be opened and locked using a key or code. Using a piece of wood would not allow access from the outside by those who are entitled to enter.

[42] As well, holding that such a piece of wood adequately met the landlord's obligation to provide the statutory level of reasonable security would obviously create an undesirable precedent.

[43] I uphold the Tribunal's decision that there was a failure to provide the appropriate level of security in relation to the kitchen sliding door.

[44] Breach of s 46 without reasonable excuse is also an unlawful act. The Tribunal decided to award $250 for exemplary damages of a maximum possible of $1,000.[5]

[45] Although the Tribunal did not expressly address the threshold question of whether the landlord did not have a reasonable excuse, the obvious inference is that it found it did not. I agree. I have rejected Mr Hu's contention that the piece of wood is equivalent to a lock. That means the landlord also did not have a reasonable excuse for using the piece of wood in lieu of a suitable lock or locking device.

[46] There is no doubt that the provision of the piece of wood in lieu of an appropriate lock was intentional, and I am satisfied especially having regard to the public interest, that the award of $250 for exemplary damages was justified and appropriate, being 25 per cent of the maximum available. I therefore dismiss the appellant's appeal against that aspect of the Tribunal's decision.

Summary

[47] I uphold all of the Tribunal's findings (and associated reasoning) apart from the award of $500 exemplary damages for the breach of the obligation to provide the premises in a reasonable state of cleanliness. The appeal is allowed to that extent but is otherwise dismissed.

[48] I understood at the hearing that the appellant has paid the respondents the $1,520.44 awarded by the Tribunal so they will need to reimburse the appellant for the $500 I have found ought not to have been awarded.

S M Harrop
District Court Judge

[5] From 11 February 2021 this has been increased to $1,500.