

TENANCY TRIBUNAL AT Napier

APPLICANT: Suzanne Maree Gamble
Tenant

RESPONDENT: Regent Realty Ltd trading as Harcourts, Scott Nicholls and
Suzanne Vickery as Trustees for the GS Nicholls Family
Trust
Landlord

TENANCY ADDRESS: 40A Geddis Avenue, Maraenui, Napier 4110

ORDER

1. The 90 day notice given to end Suzanne Maree Gamble's tenancy at 40A Geddis Avenue, Maraenui, Napier 4110 on 27 August 2018 is declared retaliatory and it is of no further effect.
2. Regent Realty Ltd trading as Harcourts and Scott Nicholls and Suzanne Vickery as Trustees for the GS Nicholls Family Trust must pay Suzanne Maree Gamble \$1,651-93 immediately, calculated as shown in table below.

| Description | Landlord | Tenant |
|---|-----------------|-------------------|
| Exemplary damages: Breach of section 24 of the Residential Tenancies Act 1986 | | \$340.00 |
| Compensation: Breach of section 45 of the Residential Tenancies Act 1986 | | \$290.00 |
| Compensation: Breach of section 38 of the Residential Tenancies Act 1986 | | \$720.00 |
| Compensation: Reimbursement of ant removal cost from tenant's eye | | \$28.90 |
| Compensation: Reimbursement of vet bills arising from ant bites | | \$71.50 |
| Compensation: Reimbursement of ant poison | | \$27.99 |
| Compensation: Bandages and medication | | \$153.10 |
| Filing fee reimbursement | | \$20.44 |
| Total award | | \$1,651-93 |
| Total payable by Landlord to Tenant | | \$1,651-93 |

3. The landlord must carry out the following work to the premises, which must be completed by 5:00 pm on Friday the 17th day of August 2018:
 - A locksmith is to be engaged, and work done, to ensure the back door lock is fit for purpose and does not “randomly” pop open. Additional security may be required to address the problem.
4. If the landlord fails to comply with either Order 3 above, then the tenant may undertake the work and charge the landlord the costs of this work up to \$340-00. These costs may be set off against rent payable.
5. All other application claims were either withdrawn or are dismissed.

Reasons:

1. Both parties attended the hearing. Regent Realty Ltd trading as Harcourts [hereafter referred to as “Harcourts”] was represented by the tenancy manager, Ms Pedersen.
2. The tenant has applied for a declaration of retaliatory notice, compensation, and/or exemplary damages for alleged breaches of rent in advance, harassment, and failure to address an issue with Argentine fire ants in a timely fashion.
3. At the hearing held on 9 August Ms Gamble also raised an issue with the cleanliness of the premises at the start of the tenancy, problems with the back door lock, and issues with the owner’s son and guests who are her neighbours.

Background

4. Ms Gamble entered into a periodic tenancy agreement with Harcourts that began on 29 November 2017. Within the first week of her tenancy Ms Gamble and her son were being bitten by something which they soon discovered to be Argentine fire ants.
5. Ms Gamble immediately sought help from Harcourts to address the problem. However, a professional exterminator only came to the property on 7 February 2018 to address the issue. In the interim the owner did work to try and address the issue.
6. In the intervening period Ms Gamble and her son suffered serious bites from these aggressive ants, and also had the awful experience of having ants crawl up her nose at night, and one ant had to be removed from her eye.
7. In addition, Ms Gamble was asked to pay an extra day’s rent when this was not required, and she felt constantly harassed by Harcourts’ phone calls and text messages regarding rent.
8. Other issues also arose during this tenancy.
9. On 24 May 2018 Ms Gamble was given a 90-day notice that her tenancy would end on Monday 27 August 2018.

10. This led to Ms Gamble filing an application in the Tribunal on 21 June 2018. The application was originally set down for hearing on 31 July 2018 but this hearing was adjourned at Harcourts' request.

11. The application was finally heard on 9 August 2018.

Issue 1: Was the 90 Day Notice given to end Ms Gamble's tenancy a Retaliatory Notice?

12. Ms Gamble alleges the 90-day notice given to end her tenancy was retaliatory because Ms Pedersen was sick of her ringing up about the ant problem, issues with the doors, rent, and the owners' son as her neighbour.

13. Ms Gamble accepted she would get upset when talking to Ms Pedersen but said it was because she was 'sick' of being told by Ms Pedersen she could give 21 days' notice to end her tenancy, and that she had a big portfolio of properties to manage.

14. Ms Pedersen told me the time had come to give Ms Gamble notice because she would get agitated and yell at her on the phone if she did not like what she had to say. Around the time she made the decision to give the notice Ms Gamble had been calling her about the ants and what was happening at the front house with the owners' son and guests.

15. Ms Pedersen discussed her intention to give notice with one of the Trustees who told her to "do as she saw fit". When she handed the 90-day notice to Ms Gamble she swore at her and left.

Decision

16. I must now consider the following questions:

i. Did the notice comply with the content requirements of section 51 of the Act?

Yes.

ii. Did the period given to end the tenancy appropriately take into consideration service days for delivery of the notice as required under sections 136 and 136A of the Act?

Yes. Personal delivery took place on the 24 May 2018 and the 90-day notice period would therefore end on 22 August 2018. However, Ms Gamble was given until 27 August to vacate the premises.

iii. If so, did Ms Gamble apply to the Tribunal for an order declaring the notice retaliatory within 28 working days after its receipt?

Yes. The notice was delivered on 24 May 2018 and Ms Gamble filed her application on 21 June 2018.

iv. If so, were the landlords motivated wholly or partly to give the notice because Ms Gamble was exercising, or proposing to exercise, any "right, power, authority, or remedy" afforded her under the tenancy

agreement, or this or any other Act, or because of any complaint made by Ms Gamble against the landlords relating to the tenancy?

Yes. I am persuaded it is more probable than not that the landlord was partly-motivated to give the notice because Ms Gamble was engaged in on-going complaints and issues with an ant problem and the owner's son as a neighbour. Ms Pedersen was honest and told me these issues were of concern to Ms Gamble at the time she got angry, which resulted in the 90-day notice being given.

- v. If so, was Ms Gamble's exercise of her rights or her complaint against the landlords vexatious or frivolous to such an extent that the landlords were justified in giving the notice?

No. I want to make it clear that I do not condone verbal abuse or anger by either a landlord or a tenant, but in the stressful situation being faced by Ms Gamble it is best seen as poor manners and lack of effective communication skills. I can only imagine the physical and mental anguish and hurt the Argentine fire ants have caused Ms Gamble and her family, and her heightened concern to have this matter quickly, and finally, addressed. Ms Gamble also had legitimate complaint about some of the actions of her neighbour, the owner's son and his guests.

The notice is therefore declared to be retaliatory and of no further effect.

- vi. Finally, has an unlawful act taken place?

Yes. The giving of a notice terminating a tenancy is an unlawful act if the notice is declared to be of no effect.

- vii. Is an award of exemplary damages appropriate for this breach?

No. I am not persuaded on the evidence received that the landlord intended the notice to be retaliatory, meaning they set their mind to flout the law. They merely wanted a tenant who would communicate in a better manner when interacting with the landlord, and this is not totally unreasonable. It was not what Ms Gamble was saying and asking, but it was the way she was saying and asking.

Therefore, an award of exemplary damages is not appropriate.

17. While I acknowledge the undoubted stress arising from the notice and trying to find new accommodation, Ms Gamble did not produce any evidence of quantifiable costs she has incurred as a result of the retaliatory notice.

18. Therefore, an award of compensation cannot be made for this breach.

19. We did discuss at the hearing the landlord's right to give a further 90-day notice if this notice was declared retaliatory. The reality is that, as the law currently stands, any landlord can end a periodic tenancy at any time (unless it is retaliatory) by giving a 90-day notice that complies with the requirements of the

Act. In such situations, moving/relocation costs are a normal part of ending a tenancy and the landlord would not be responsible for these costs.

Issue 2: Was the Landlord in Breach of their Responsibilities regarding Rent in Advance?

20. Yes. The landlord insisted Ms Gamble pay an extra day's rent when this was not required for her payments to be one week in advance.
21. Ms Pedersen's explanation for this breach, which she accepted at the hearing, was that:
 - Ms Gamble started her tenancy on a Wednesday and they run a Wednesday-Tuesday rental week.
 - However, Ms Gamble was paying the rent on a Thursday and this is why they asked for an extra day's rent so that she was paying weekly in advance.
 - Their computer system was showing Ms Gamble to be in rent arrears, and they act on this notification.
22. However, even a cursory glance at the rent record, as I did on the hearing day, would show that Ms Gamble was paying on a Wednesday, not a Thursday. She was therefore paying on the first day of the rental week, and was paying weekly in advance.
23. Requiring payment of rent "before the expiry of the period for which rent has been paid already" is declared to be an unlawful act. [See Section 23(1)(b) and (4) Residential Tenancies Act 1986].
24. Exemplary damages may be awarded for unlawful acts if the Tribunal is satisfied the breach was intentional.
25. Based on the evidence received I am persuaded the breach was intentional because the rent record they presented into evidence clearly showed, even to a casual observer let alone an experienced rental manager, she was paying on a Wednesday for a Wednesday – Tuesday rental week.
26. Having regard to those matters set out in section 109 of the Act, particularly the public interest and the effect of constant phone calls and text messages regarding rent, I am satisfied it is just to award exemplary damages of \$340-00.
27. This is at the lower end of what might be awarded and reflects the fact there is no evidence this is the habitable behaviour of this landlord.

Issue 3: Did the Landlord Fail to Address an issue with Argentine Fire Ants in a timely Fashion?

28. Quite simply, yes. Ms Gamble notified the landlord of a problem almost immediately and a professional exterminator was not called to address the problem until 7 February 2018. While I accept initially there may have been some lack of clarity as to the source of the bites, they were quickly identified to be Argentine fire ants.

29. Despite this reasonably prompt notification and identification to Harcourts it would appear that the owner was not notified until 9 January 2018. The owner then did not take the reasonable action of immediately employing an expert to address the problem.
30. In the meantime, Ms Gamble, her son and pet were being repeatedly bitten leaving large welts and infections on their skin, and had the awful experience of the ants crawling into facial parts. This needed to be addressed immediately, not with over-the-counter materials by the owner who “wanted to try bait” stations first before engaging an exterminator.
31. Nor is there any evidence that Ms Gamble caused this problem. Ms Pedersen told me she believed the infestation was likely to have occurred from the previous tenant who was a gardener.
32. Under section 45 of the Act a landlord must provide the premises in a reasonable state of cleanliness and repair, maintain the premises, and comply with all requirements in respect of buildings, health, and safety that apply to the premises.
33. Maintenance and compliance requires a landlord to respond in an appropriate and timely manner to any notification of issues at the premises. Waiting over two months while you are being “eaten alive” by aggressive Argentine fire ants for a professional exterminator to address the issue is unacceptable.
34. Ms Gamble is entitled to compensation for the breach, and to reimbursement of the medical and veterinary costs she incurred as a result of this breach.
35. Ms Gamble is awarded compensation equivalent to a rent rebate of \$20-00 per week for the period from 4 December 2017 to 8 February 2018 [i.e. 9½ weeks] to recognize the lack of timely effective action to properly address the aggressive ant problem at the premises until the first extermination took place.
36. However, I note a second extermination round was due in mid-to-late May 2018.
37. Ms Pedersen told me the exterminator did not tell her about this requirement. However, the evidence is that Ms Gamble was in communication with Ms Pedersen about this requirement around the time the 90-day notice was given on 24 May 2018.
38. On 10 July 2018 Ms Gamble had to have an Argentine fire ant removed from her eye, so it appears the matter is on-going. The evidence was not clear as to whether the second extermination round had taken place by the time of the hearing on 9 August 2018.
39. In these circumstances, I award a further nominal \$100-00 in compensation for the period from 24 May to 10 July 2018 as this maintenance and health and safety problem had still not been effectively rectified months later.

Issue 4: Work Order for the Back-Door Lock

40. Ms Gamble told me that she had not received a key to the front door of the house until the first week of August this year. However, I make no orders on this issue as it is now resolved.
41. Ms Gamble's major concern at the hearing was that the back door lock at the premises randomly "pops open", even while locked. She told me the owner came and looked at the problem but could find no fault with the lock. However, the issue still remains.
42. Ms Gamble told me she sleeps on the couch every night because she fears of somebody being able to get inside the premises where just she and her son reside.
43. Ms Gamble wants the problem fixed.
44. Under section 45(1)(a) - (ca) Residential Tenancies Act 1986 and section 46 of the Act, the landlord has an obligation to provide and maintain certain standards and to comply with applicable requirements. In particular, section 46 provides that a landlord shall provide and maintain locks and other similar devices as are necessary to ensure the premises are reasonably secure.
45. By agreement, the landlord undertakes to engage of locksmith with expertise in such matters to ensure the back door has a lock that is fit for purpose and ensures that the premises and its occupants are secure. This may require additional security installation if the problem with the lock cannot be identified. At the hearing the landlord was given one week to do this work due the safety issues it raises.
46. Where the Tribunal finds that a Work Order is appropriate a Work Order may also authorise a tenant to undertake the work and charge the landlord the costs of doing the work, if the landlord should fail to comply with the Work Order.
47. A monetary limit must be imposed by the Tribunal on the amount of costs that can be charged. These costs can be set off by the tenant against rent payable. [See sections 78(2AAB) and 78(2AAC)(b) Residential Tenancies Act 1986].
48. Therefore, if the landlord fails to comply with either Order 3 above, then the tenant may undertake the work and charge the landlord the costs of this work up to \$340-00. These costs may be set off against rent payable.

Issue 5: Other Claims and Issues

The Owner's son as Neighbour

49. Ms Gamble also raised issues about the owner's son and his guests who live in the property in front of her own. Ms Gamble spoke about the many issues she is experiencing with these occupants including accumulation of rubbish leading to rats coming into her home, parking on her lawn area and ruining the lawn, blocking the driveway so she cannot drive out of her house, and intimidation and harassment.

50. Harcourts do not manage this occupancy as a rental tenancy agreement. However, they have informed the owners of the problems being experienced by Ms Gamble. They understood that the owners have raised these with their son.
51. The actions of the neighbour and his guest[s] is unacceptable. No one should have to live with rubbish around that attracts rats, have a car parked on their lawn right in front of their house, or have their driveway blocked so that they cannot get out and about as they wish. Nor should they be expected to have to regularly go over to the premises to ask the owner of the vehicle to move it.
52. However, there is little the Tribunal can do to address these issues unless there is also a residential tenancy agreement in place between the Trust and the Trustees' son that falls within the jurisdiction of the Tenancy Tribunal.
53. If this were the case then the owner (as landlord) has an obligation under section 45(1)(e) of the Act to ensure it takes all reasonable steps to ensure their other tenant[s] do not cause or permit any interference with Ms Gamble's reasonable peace, comfort, or privacy in her use of the premises. Compensation can be awarded for this breach.
54. However, if there is no tenancy agreement that falls within the jurisdiction of the Tenancy Tribunal then Ms Gamble's only recourse is through the local District or Regional Council to enforce health and safety enactments regarding rubbish removal or instruments like Trespass Orders to stop her neighbour and his guests parking on her property or blocking her right of way.

Other Costs set out in Ms Gamble's Statement of Claim

55. At the hearing Ms Gamble withdrew claims for costs relating to her Visa card, her 2Degrees and Slingshot and Sky accounts, and petrol.
56. Ms Gamble's claim for printing costs is not a claim recoverable against the landlord and is a cost any party may incur as a result of bringing a claim in the Tribunal. This claim is dismissed.
57. Ms Gamble also seeks compensation for the unclean condition of the premises at the start of the tenancy.
58. However, Ms Gamble got early access to the premises at her request which meant the landlord did not have the opportunity to complete the cleaning work they wished to undertake. Ms Gamble cannot have it both ways.
59. Moreover, if Ms Gamble had been upset with the condition of the premises at the start of the tenancy the time to raise the matter was at the time, not now months later when the landlord has had no opportunity to address her concerns and mitigate any potential loss arising from a breach. This application claim is dismissed.
60. Ms Gamble also seeks orders relating to an oven plug that came away from the wall while she was cleaning. The problem was fixed within 2 days and the cause of the problem was found to have been incorrect installation in the first place.

61. As there is no evidence the landlord was the cause of the incorrect installation and the issue was promptly addressed, there is no breach by the landlord of their responsibilities under the Act. This claim is dismissed.

Issue 6: Did the Landlord Breach Ms Gamble's rights to Quiet Enjoyment of the Premises? If so, did this amount to Harassment?

62. Yes. The lack of timely and appropriate action to address the serious ant problem which was causing physical harm to the tenant and her son resulted in them being unable to fully utilize and enjoy living in the premises.

63. This is a breach of a tenant's rights to reasonable peace and comfort in her use of the premises under section 30 of the Act. If this breach amounts to *harassment* of the tenant it is declared to be an unlawful act.

64. Ms Gamble told me she felt harassed during the tenancy, but this is not the same as 'harassment' as envisaged under section 38 of the Act.

65. Ms Gamble did not adduce evidence to persuade me the landlord's breached her rights in circumstances amounting to harassment. Just like her, they were not the cause of the ant problem. However, it was their responsibility once notified to effectively address the issue.

66. Nevertheless, the matter does not end there. Ms Gamble is entitled to an award of compensation for a breach of her rights under section 38 of the Act. I find it fair and reasonable to award equivalent to a further rent rebate of \$40-00 per week for the period from 4 December 2017 to 8 February 2018 [i.e. 9½ weeks] to recognize the lack of enjoyment her family has had in the premises until the first extermination took place.

67. Ms Gamble is also awarded further compensation of \$340-00 for the on-going breach equivalent to one week's rent in recognition of the fact that this issue was still on-going as at the date of 10 July when the ant was found in her eye.

68. Because Suzanne Maree Gamble has substantially succeeded with the claim I have reimbursed the filing fee.



K Milne
21 August 2018

Please read carefully:

SHOULD YOU REQUIRE ANY HELP OR INFORMATION REGARDING THIS MATTER PLEASE CONTACT **TENANCY SERVICES 0800 836 262**.

MEHEMA HE PĀTAI TĀU E PĀ ANA KI TENEI TAKE, PĀTAI ATU KI TE TARI **TENANCY SERVICES 0800 836 262**.

AFAI E TE MANA'OMIA SE FESOASOANI E UIGA I LENEI MATAUPU FA'AMOLEMOLE IA FA'AFESO'OTAI'I LOA LE OFISA O LE **TENANCY SERVICES 0800 836 262**.

Rehearings:

You may make an application to the Tenancy Tribunal for a rehearing. Such an application must be made within five working days of the order and must be lodged at the Court where the dispute was heard.

The **only** ground for a rehearing of an application is that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur. Being unhappy or dissatisfied with the decision is not a ground for a rehearing. (See 'Right of Appeal' below).

Right of Appeal:

If you are dissatisfied with the decision of the Tenancy Tribunal, you may appeal to the District Court. You only have 10 working days after the date of the decision to lodge a notice of appeal.

However, you may **not** appeal to the District Court:

1. Against an interim order made by the Tribunal.
2. Against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than \$1,000.
3. Against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than \$1,000.

There is a \$200.00 filing fee payable at the time of filing the appeal.

Enforcement:

Where the Tribunal made an order that needs to be enforced then the party seeking enforcement should contact the Collections Office of the District Court on **0800 233 222** or go to www.justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc:

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.