

TENANCY TRIBUNAL AT Christchurch

APPLICANT: Diana Jocelyn Castillo-Millan, Miguel Peregrino, Tara Kirkwood and Tim McDonald

Tenants

RESPONDENT: Property4rent Limited

TENANCY ADDRESS: 190 Highsted Road, Casebrook, Christchurch 8051

ORDER

1. Diana Jocelyn Castillo-Millan and Miguel Peregrino are liable to Property4Rent in the sum of \$490 for rent arrears to 7 December 2018.
2. Property4Rent is liable to Diana Jocelyn Castillo-Millan and Miguel Peregrino in the sum of \$490 exemplary damages for breach of the landlord's obligations in relation to bond.
3. The Bond Centre is to pay the sum of \$550 from the bond (6029763-008) to Diana Jocelyn Castillo-Millan and Miguel Peregrino immediately. The remainder of the bond is to be retained by the Bond Centre and it is declared that Diana Jocelyn Castillo-Millan and Miguel Peregrino have no further interest in it.
4. The term of the fixed-term tenancy of Diana Jocelyn Castillo Millan and Miguel Peregrino at 190 Highsted Road, Casebrook, Christchurch 8051 is reduced and ended at 11.59pm on 7 December 2019.
5. The remainder of the parties' applications are dismissed.

Reasons:

1. Ms Castillo-Millan and Mr Peregrino attended the hearing. The landlord was represented by Ms Williamson. Ms Kirkwood and Mr McDonald did not attend.

One or Three Tenancies?

2. In the reasons given in my order made on 21 December 2018, I found that there were three separate tenancies in this case, not one tenancy as contended for by the landlord.
3. For reasons which will follow, I stand by that finding.
4. Because I am dealing with the tenancy of Ms Castillo-Millan and Mr Peregrino, I will call them “the tenants” and I will call Mr McDonald and Ms Kirkwood “the other tenants” unless I refer to them by name.
5. The premises were advertised for rent and the tenants came to look at it. So too did Mr McDonald. The tenants did not know Mr McDonald and the landlord was aware of that. Mr McDonald worked with Ms Kirkwood and that is how she came to be a tenant a month or so later.
6. Ms Williamson said that she told the tenants that it was up to them if they wanted to put together a group of people to take the tenancy but that she was not willing to let the premises room by room.
7. Joint and several liability for rent under a tenancy agreement is based on the principle that there is one rent for the premises and all tenants have agreed to the same tenancy. Section 276 in the Property Law Act 2007, which applies to residential tenancies, states that joint covenantors are jointly and severally liable under their covenants unless a contrary intention appears from the instrument (the tenancy agreement in this case).
8. I find that a contrary intention does appear from the agreement in this case because it specifies the rent payable by each of the tenants. It also gives the total rent payable (although the sum of the individual rents is greater than the total rent figure). A landlord who expects each tenant to be liable for the rent for the premises in full, has no business apportioning the rent between the tenants. How the individual tenants contribute to the rent should be of no concern to such a landlord.
9. I also note that the agreement states, “Based on special individual rates, 3 rooms have beds provided”.
10. I accept that the tenants understood that they were responsible only for paying the rent that was allocated to them. That is how they paid their rent throughout the tenancy.
11. It might be arguable that each tenant was responsible for paying the share of the rent allocated to them but that they were jointly and severally liable for their other obligations under the tenancy. However, Ms Kirkwood did not become a tenant

until after the tenants and Mr McDonald. So, there was not one tenancy to which all tenants agreed at the outset. That is more consistent with there being three separate tenancies. There are other terms of the tenancy that are consistent with a boarding house type arrangement.

Reduction of Fixed Term

12. The tenants have applied for reduction of the fixed-term tenancy that was due to end on 22 February 2019.
13. The Tribunal may reduce a fixed term tenancy where:
 - a. there has been an unforeseen change in the applicant's circumstances; and
 - b. there would be severe hardship to the applicant if the term is not reduced; and
 - c. the applicant's hardship would be greater than the hardship to the other party if the term is reduced. See section 66(1) Residential Tenancies Act 1986.
14. I find that there was an unforeseen change in the tenants' circumstances.
15. I accept the evidence that the tenants gave in relation to this part of the case. Mr McDonald declined to give any evidence in relation to it because he had been advised not to.
16. Where, as in this case, a tenancy is put together with tenants who did not previously have a common intention of becoming joint tenants, there is a much greater risk that there will be discord amongst them. It proved so in this case.
17. The tenants experienced difficulties with Mr McDonald. They found that he drank too much and would become loud and argumentative. They found some of his comments racist and offensive. He did not pull his weight with the cleaning of the premises.
18. Things came to a head on 1 December. The tenants were watching TV. Mr McDonald had been drinking and he made racist comments such as "Hitler was right" and "migrants shouldn't be here". He was carrying a kitchen knife and he confronted the tenants and was thrusting the knife in their direction while making racist comments.
19. The tenants called the Police who came and arrested Mr McDonald. He has been charged with offences arising from the incident. As part of his bail conditions, he was not permitted to live in the premises and he went to live with his parents very nearby.
20. The tenants no longer wanted to live in the premises. Although Mr McDonald was no longer living in there, he was living very nearby and the tenants did not feel

safe in the premises with him living so close. That is understandable. They moved out of the premises on 7 December.

21. This application was filed by the tenants but they were advised by Tenancy Services that they should add the other parties to the agreement to the application, which they did.
22. Both Mr McDonald and Ms Kirkwood attended the hearing on 21 December 2018 and they both supported the application. Mr McDonald could not live in the premises and so naturally he no longer wanted to have the obligations of a tenant. It was Ms Kirkwood's intention to vacate the premises shortly after the hearing, which she did.
23. The hardship that the tenants would suffer if the term of the tenancy is not reduced is obvious. They would have liability for two rents and other obligations for two premises.
24. Ms Williamson declined to discuss in any detail the hardship that the landlord would suffer if the term of the tenancy was reduced.
25. I therefore find that the tenants' hardship would be greater than the landlord's hardship.
26. In all the circumstances, I find that the tenancy should end on 7 December 2018.
27. Where the Tribunal reduces a fixed-term tenancy, it may order the tenant to pay the landlord reasonable compensation for any resulting loss. See section 66(2) Residential Tenancies Act 1986.
28. It is not appropriate to order compensation in this case. The main reason for that is that the landlord is, to some extent at least, responsible for this situation arising. In the first place, it has facilitated a flat sharing arrangement that carried quite a substantial risk of being problematic.
29. As well, the landlord's agent did not recognise that the situation was deteriorating and did not take any effective steps to address the problem. The tenants' felt that she took Mr McDonald's side and I can well understand why they feel that. She made a mistake in doing so.
30. My decision to reduce the term of the tenancy does not affect the other tenants because I have found that they had their own separate tenancies. In any case, they have agreed terms with the landlord which are in full and final settlement of all issues between them concerning their tenancies.

Failure to Take All Reasonable Steps

31. The tenants claim compensation for the landlord's failure to take all reasonable steps to ensure that Mr McDonald did not interfere with their peace and comfort in their use of the premises (contrary to section 45(1)(e) of the Act).
32. There is some evidence to indicate that the landlord may have been in breach of its obligation in this respect. The tenants raised their concerns about Mr

McDonald on several occasions and the landlord either failed to take them seriously or failed to take effective action.

33. However, after considering the evidence, and in particular the text messages that the tenants sent to Ms Williamson regarding Mr McDonald, I am not satisfied that there was a breach of the obligation. With hindsight, it would have been better if the landlord had done more. But, this is not a clear case of the landlord failing to take certain steps that, at the time, plainly should have been taken.
34. I have therefore dismissed the claim.

Bond

35. There is no dispute that the landlord did not lodge the bond within the 23 working days that the Act requires. Ms Williamson said that she sent a cheque for the bond to the Bond Centre but for some unknown reason it was not banked. Obviously, she did not receive an acknowledgement from the Bond Centre. She did not follow it up. She said that she did not see that the cheque had not been presented.
36. Ms Williamson produced a copy of the cheque stub for the cheque she wrote. Whether it was sent to the Bond Centre or not, I can't be sure. What I can be sure of is that it is the landlord's responsibility to ensure that the bond is received and acknowledged by the Bond Centre. A professional letting agent such as Ms Williamson should have the procedures in place to ensure that and she should follow them. It is a poor excuse, in my view, to say that she sent a cheque and that it must have got lost in the post or otherwise mislaid.
37. In my view, the breach was intentional because it was reckless to assume that the cheque had been presented when there was no acknowledgment, no follow up and a simple reconciliation of the bank statement would have revealed that it had not been presented. Indeed, I find it difficult to accept that Ms Williamson was unaware that the cheque had not been presented.
38. I also note that it was Ms Williamson's position that the tenants had not paid their bond in full. When that was examined at the hearing, it was seen to be untrue. They had paid their bond in full. An alternative explanation for the late payment of the bond is that Ms Williamson believed it had not been paid in full and she was waiting for the full payment before lodging the bond. Even if she had been right that the bond had been under paid, that is not a reason not to lodge the bond.
39. It is important for tenants that bonds are paid to the Bond Centre promptly and landlords need to be held to account when they fail to do so. Taking all relevant factors into account I was minded to award the sum of \$500 exemplary damages for breach of the landlord's obligations in relation to the bond. For practical reasons, I have awarded the sum of \$490.

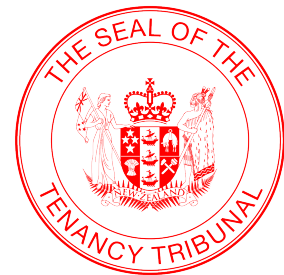
Unlawful Entry

40. The tenants also claim exemplary damages for unlawful entry by the landlord. There was an incident at the premises on 7 December, when the tenants were cleaning the premises, and Ms Williamson arrived. It ended with the tenants calling the Police.
41. Whilst technically there may have been an unlawful entry by Ms Williamson, in all the circumstances, I find that it would not be appropriate to award exemplary damages or compensation to the tenants in relation to the incident.
42. The tenants also claim that Ms Williamson entered their room and afterwards commented to the other tenants about the condition of the room and what she had seen in the room.
43. Ms Williamson explained that she had gone into the room with a contractor to fit a wall heater. The tenants had consented to the entry.
44. I am not satisfied that was any unlawful entry on that occasion and there is no justification for compensation or exemplary damages arising from it.

The Landlord's Claims

45. The landlord makes several claims that are on behalf of the other tenants. They are claims between tenants and the Tribunal has no jurisdiction over such claims. Therefore, no order can be made on them.
46. I am satisfied from the landlord's rent statement and from bank statements that were produced that there were rent arrears in the sum of \$490 at 7 December 2018.
47. The tenants said that they had not been notified of any arrears during the tenancy. They denied receiving the breach notice for rent arrears that the landlord said was delivered to them.
48. A landlord is not obliged to inform a tenant of rent arrears. It is the tenant's obligation to pay the rent as falls due and tenants should be aware of the rent position.
49. There are claims for carpet cleaning and general cleaning. The tenants deny liability for them. They said that they did not stain the carpet in their bedroom and they cleaned the premises as best they could, given that Ms Kirkwood was still in occupation, when they vacated.
50. I accept the tenants' evidence in relation to the carpet and cleaning.
51. I also take into consideration that the other tenants had an obligation to leave the premises reasonably clean and tidy and that they came to a settlement with the landlord. I don't know the exact terms of the settlement, but I gather that it involved the landlord keeping their shares of the bond.
52. In the circumstances, I can't be satisfied that the landlord has suffered any loss or incurred any expense that has not already been compensated. I therefore dismiss the claims.

53. I also dismiss the claim for the tenants exceeding the permitted number of occupiers of the premises. Ms Castillo-Millan had her two children staying at the premises two weekends per month. The landlord was aware at the start of the tenancy that would happen. That does not amount to allowing occupation of the premises by more than the permitted number of people.
54. I also dismiss the claim that the tenants refused the landlord lawful entry. That related to the incident on 7 December and I have already found that that was a non-event. No compensation or exemplary damages arise from it.
55. I make no order in respect of the filing fees.



R Armstrong
15 February 2019

Please read carefully:

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

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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.