TENANCY TRIBUNAL AT AUCKLAND

APPLICANT: Ella Svensen, Richard Gibbons

Landlord

RESPONDENT: Ella Kiliuyi

Tenant

TENANCY ADDRESS: 58A Bel Air Drive, Hillsborough, Auckland 1061

ORDER

1. Ella Svenson and Richard Gibbons must pay Ella Kiliuyi $7,206.15 immediately, calculated as shown in table below.

Description	**Landlord**	**Tenant**
Rent overpayment		$305.71
Bond held by landlord		$2,250.00
Payment made by tenant towards repairs		$2,020.00
Refund of fixed charges		$360.00
Exemplary damages: Breach of s 39 and 137		$750.00
Exemplary damages: Failure to maintain		$1,500.00
Filing fee reimbursement		$20.44
Total award		**$7,206.15**
Total payable by Landlord to Tenant		**$7,206.15**

Reasons:

1. Both parties attended the hearing.
2. The landlord has applied for rent and water arrears, compensation, and reimbursement of the filing fee following the end of the tenancy.
3. The tenant also claims compensation, and reimbursement of the filing fee following the end of the tenancy.
4. The parties agree the landlord holds the tenant's bond, $2,250.00 and that the tenant has paid $2,020.00 to the landlord as partial compensation for damage to a number of sewage pumps. As this matter has now been brought to the Tribunal the tenant is entitled to a credit for these amounts.

How much is owed for rent?

5. The landlord claims the tenancy ended on 17 January 2019 after agreeing to a minor reduction in the fixed term, down from 24 January 2019. The tenant claims she left the property on 22 December 2018 after struggling with the landlord's failure to repair the sewage pump system.

6. The tenant claims the property had become uninhabitable for herself and her children after the landlord refused to repair the sewage pump for the third time until she agreed to enter into a payment arrangement to pay for these repairs. The history and liability for these repairs is addressed below.

7. However I am persuaded that by 10 November 2018 the property had become uninhabitable due to sewage contamination for the third time in little over 18 months and therefore under s 59 of the Residential Tenancies Act 1986 (RTA) the tenant was entitled to vacate the property on notice of not less than 2 days, notwithstanding the fixed term tenancy agreement.

8. The tenant had attempted to negotiate an earlier departure from the property, but the landlord refused to terminate the tenancy earlier unless a new tenant could be found. That was clearly not a tenable position given the sewage contamination.

9. Further I am not persuaded this position is altered by the landlord's evidence that it was unaware of how serious the problem was. The written correspondence before me is clear. The landlord was aware the sewage pump was not operating correctly if at all and the landlord refused to immediately remedy the problem and address liability later, preferring instead to enforce an agreement that the tenant would pay the costs directly to the pump supplier and installer before it would authorise the repair. It appears the tenant had little option but to vacate if she could not afford the repair. It is also clear on the evidence the tenant had found alternate accommodation before or as the repair was being carried out and it was then too late to alter her plans.

10. As stated above I am persuaded the property was uninhabitable from 10 November, the landlord did refuse to remedy within a reasonable time and the tenant did give the landlord notice of her intention to leave within the required notice. Therefore, the tenant is not liable for rent from 22 December 2018. On the landlord's own records, the tenant has over paid the rent by $305.71 to that date.

How much is owed for water?

11. The landlord claims water arrears. At hearing the landlord admits it has been charging its tenant for fixed and other transaction water charges for the entire term of the tenancy.

12. The Watercare invoices supplied to support this claim disclose that normal supply water and wastewater are subject to separate charges. Normal supply and waste water is charged in accordance with a volumetric charge. Wastewater is calculated as a percentage of the water volume, as measured by the water meter.

13. Watercare's regular water charge, based purely on consumption, is the responsibility of tenants under s 39(4)(c) of the Residential Tenancies Act 1986 ("RTA"). Wastewater charges that are calculated according to a tenant's consumption (as determined by the water meter) and are "exclusively attributable" to the tenant are also the tenant's responsibility: s 39(3) of the RTA."

14. However in regard to the fixed charges fee, this fee is responsibility of the landlord. This fee clearly fits within s 39(1) of the RTA, which states that landlords are responsible for all outgoings that are "incurred whether or not the premises are occupied". Therefore, for customers with water meters, such as in this case, the landlords is responsible for the annual fee and other transactions charged no related to consumption. This is irrespective of the tenants use so cannot fit within s 39(3); instead it fits squarely within s 39(1).

15. Expressed more plainly, the tenant is liable for the cost of water she can control, metered water use and waste water charges based on consumption, but not for charges she cannot control, the fixed charge and other transactions, a cost that would be charged whether water was being used or not. This view ensures that landlords are not unfairly liable for an outgoing that is entirely out of their control, yet also ensures tenants are not unfairly responsible for charges that exist irrespective of whether or not they occupy the premises.

16. As the tenant has paid the fixed water charges over the course of the tenancy, she is entitled to a credit as calculated above. Given the invoices supplied, I assess this over payment to be $360.00 over the 18-month term of the tenancy.

17. Further I do not allow the amount claimed as water arrears today, as the landlord has admitted this amount includes charges it is not entitled to make under the RTA and has not provided the Tribunal with any basis on which to separate out these charges.

18. I must also consider the landlord's failure to demand water rate payments in line with the law. This is a matter the Tribunal cannot overlook.

19. Whereas the RTA does not hold a breach of section 39 as an unlawful act, the Tribunal is still able to consider compensation for such a breach. In doing so the Tribunal can consider both s137 of the RTA, a prohibition on prohibited transactions and any actual loss suffered and the effect of this breach on the tenant along with the actions and intent of the landlord. The Tribunal is also aware of the public interest, in particular tenants' interest in having landlords take this provision seriously. Given these circumstances, I am persuaded that the tenants are entitled to compensation equivalent of one week's rent, $750.00 to reflect both the costs she have incurred in attempting to remedy this situation and the time and stress

this has caused and a reminder to the landlord of the importance of considering the provisions of the RTA before commencing in the business of Residential property management.

Is the tenant responsible for the damage to the premises?

20. A landlord must prove that damage to the premises occurred during the tenancy and is more than fair wear and tear. If this is established, to avoid liability, the tenant must prove they did not carelessly or intentionally cause or permit the damage. Tenants are liable for the actions of people at the premises with their permission. See sections 40(2)(a), 40(4) and 41 RTA.

21. In *Holler and Rouse v Osaki* [2016] NZCA 130, the Court of Appeal ruled that provisions in the Property Law Act 2007 which relate to commercial tenancies also apply to residential tenancies. As a consequence, tenants are not required to pay for the cost of repairing damage in a number of circumstances, including where the damage is caused by fire or is of a kind covered by the landlord's insurance. There are exceptions to this general rule. For example, if the damage is intentional, the tenant is required to pay the cost of repairs.

22. The High Court has held that the principle in *Osaki* applies to any insurance excess, and where the amount claimed is less than the excess and the landlord does not make an insurance claim. See *Linklater v Dickison and Others* [2017] NZHC 2813. The tenant is also protected where the amount of insurance cover is limited to a fixed sum. It is the fact of insurance, not the extent of it, which provides the protection.

23. Damage is intentional where a person intends to cause damage and takes the necessary steps to achieve that purpose. Damage is also intentional where a person does something, or allows a situation to continue, knowing that damage is a virtual certainty. See Tekoa Trust v Stewart [2016] NZDC 25578.

24. The Tribunal is also required to take depreciation into account where appropriate and to consider the effect of section 49 of the Residential Tenancies Act 1986. Where any party to a tenancy agreement breaches any of the provisions of the agreement or of the RTA the other party must 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.

25. The damages claim is regarding three sewage pump breakdowns and replacement. The parties agree the background facts. The tenancy commenced on 23 June 2017. By 24 September 2017, the sewage pump had failed. The written evidence shows that the landlord was immediately notified of this, that the property suffered extensive sewage contamination and that rather than effect a repair immediately, the landlord entered into extensive correspondence with both the tenant and its insurer to assess liability. The problem was eventually rectified some

54 days later. The landlord paid for a new pump to be installed. There is no evidence if this pump was adequate or like for like with the existing pump.

26. On 7 January 2018 the sewage pump again failed and again the property suffered extensive sewage contamination and again the landlord entered into extensive correspondence with the tenant as to liability. The problem was eventually rectified some 34 days later, by replacing the damaged pump with an identical pump to the one above.

27. On 10 November 2018, the sewage pump again failed and again the property suffered extensive sewage contamination and again the landlord entered into extensive correspondence with the tenant as to liability. The problem was eventually rectified some 24 days later. This time the landlord upgraded the damaged pump with a higher specification. By this time the tenant was in the process of leaving the property after expressing concerns for her family's health.

28. In the landlord's evidence, it focuses on the tenant's obligation to pay and explains the admitted delay as partially due to the difficulties the landlord had in contacting the tenant and the tenant's failure to comply with her agreement to pay for the repairs.

29. As to liability, the landlord has provided the Tribunal with its correspondence from both its insurance broker, Mr. John Blackmore, and Citywide Plumbing & Pumps. Neither witness has appeared in person. Mr. Blackmore's evidence and Citywide Plumbing & Pumps is somewhat contradictory. Mr. Blackmore claims the damage to the pump will not be seen by the landlord's insurer as a sudden and accidental event and therefore is not covered under the policy. However Citywide Plumbing & Pumps seems to claim that at least the second failure was the result of very little sanitary material entering the system, a one off sudden event. The plumber appears to have shown the tenant one "wipe" and the photographs provided show one or at most two tampons aside the seized pump. I accept the written evidence refers to more material in the 1st and 3rd repair.

30. The plumber also notes that the large dumping fee charges are due to the large amount of solids build-up from waste water being used when the pump was not operating. These delays referred to above was caused by the landlord's failure to address the issue until payment had been received or at least guaranteed by the tenant, a total of 112 days the tenant was living at the property without a working sanitation system. It is difficult to see how the tenant can be liability for these costs.

31. The tenant admits she agreed to meet the cost of repair, but claims she was bullied into doing so and that she was desperate to return the property to a safe sanitary condition for her and her children.

32. The Tribunal is required to apply an evidential standard. The burden is on each applicant to prove their claim on the balance of probabilities.

33. I have carefully considered these claims and all the evidence put before me today. The parties wish to rely on their oral submissions and have referred me to the extensive written correspondence. This is the second call in the Tribunal and despite making the parties aware of the weight the Tribunal can place on written material evidence, neither party has requested an adjournment to provide evidence of the efficacy of the sewage system installed at this property.

34. There are really two possibilities for the pumps failures; either the tenant has used the sewage system in an unusual or reckless manner or the system itself was not fit for purpose. It appears this has been now remedied by upgrading the system.

35. The tenant admits some liability for the first failure in that she used flushable 'wet wipes for her children. The landlord is not seeking any compensation for this first repair have received an insurance pay-out to cover its loss. However the tenant claims she was very careful after this first failure and removed all wet wipes from her home. The tenant does accepts a guest staying with her over Christmas admits she let one tampon go down the sewer after it dropped in the toilet and she didn't wish to manually remove it.

36. The tenant also admits her Auntie stayed with her later in 2018 and her Auntie also admits she may have let the odd sanitary item be flushed into the system. The written evidence provided supports the tenant's claim that whereas some sanitary items were viewed by Citywide Plumbing & Pumps on their second and third visit it was nowhere near the volume of the first blockage.

37. The written correspondence from the plumber also supports the landlord's claim that they considered the blockage was due to user error rather than a substantial fault with the system itself. However, the Tribunal has not had the benefit of Citywide Plumbing & Pumps' direct evidence in this matter and this evidence remains untested by either the Tribunal or the tenant.

38. Perhaps the best evidence is the landlord decision to replace the pump with an upgraded model. The landlord has confirmed it has not suffered any further blockage since this time. The landlord also admits it was given this option earlier, but for cost reasons determined not to upgrade the system even after the problems became evident.

39. Sewage systems are essential for residential use of a property. Section 45(1)(c) provides that landlords must comply with all requirements under any enactment regarding buildings, health and safety in so far as they apply to the premises. Some of the relevant enactments are the Building Act 2004 and the Health Act 1956 and the Housing Improvement Regulations 1947.

40. Under these provisions, every property must be supplied with a "water-closet", or, if for any good reason that cannot be provided, some other form of privy, for the exclusive use of the occupants of the house and in cases where there is a sewerage system available, every water-closet, urinal, bath, lavatory-basin, sink, and other sanitary appliance shall be connected to the sewerage system by

impervious pipes in accordance with the bylaws or regulations in force in the district. It is implicit in these regulations that the connection in is good working order and fit for purpose.

41. The landlord claims this system was in good working order and it is only the actions of the tenant that caused it to fail on three separate occasions within 18 months. This is of course possible, but is it probable? Is it not more likely, the required test, that the system itself was inadequate and any small error on the part of any user could cause it to fail?

42. By a fine margin I am persuaded that after the first repair, which the tenant accepts was due to her use of wet wipes notwithstanding they were sold as “flushable”, that the more likely clause of the two subsequent failures was a fully extended and underpowered system. This view is supported by the small amount of product found after the second failure and lack of any further problems once the upgraded pump was installed.

43. I have considered the landlord’s evidence, allegedly obtained from Citywide Plumbing & Pumps that it was the tenants use of the system that caused it to fail but in the absence of direct evidence, there is no basis on which to assess the suitability of the first two pumps installed by Citywide Plumbing & Pumps. There is no evidence before me the original pump was comparable to the first pump Citywide Plumbing & Pumps installed. If it was of a lower grade, this could explain why there were not problems until the first failure and why the second identical pump failed so quickly afterwards.

44. It is the landlord’s obligation to prove the tenant has casued the damage and to exclude wear and tear. On the evidence presented to the Tribunal the landlord has not met that burden today and therefore the tenant cannot be held liable for the cost.

Wardrobe door

45. The landlord claims the cost of repair to a wardrobe drawer. The tenant denies liability claiming this homemade furniture was always prone to failure.

46. At hearing the landlord has admitted it has no evidence of any loss actually suffered as a result of any damage and it appears more likely the landlord has simply re-glued the front panel. No evidence has been supplied of this cost

47. Without evidence of loss, and any that was actually incurred would be very minor indeed, the landlord cannot succeed. This part of the application is dismissed.

Failure to maintain

48. This is a matter of great concern to the Tribunal. It is clear the tenant informed the landlord the sewerage system was not working, that sewage and smell was

affecting both this property and the neighbours, yet on three occasions the landlord chose to attempt to determine liability before committing to any repair. This is simply unsafe and unacceptable.

49. I accept the landlord may not have fully have apricated the extent of the problem, but any reading of the correspondence gives a clear impression that this was not a matter that could be delayed.

50. Further I accept the tenant may have been difficult to get hold of at times, but that does not explain the extent of the delay, approximately 112 days over three failures. Again a carefully reading of the written correspondence clearly shows the major cause of the delay was the landlord's attempt to get the tenant to pay for it before authorising the repair.

51. The landlord's culpability in this regard is compounded by the landlord's refusal to release the tenant from her fixed term contract if she was unable to find a replacement tenant, essentially condemning her to live in unsanitary conditions. Regardless of the cause of the failure this position is clearly untenable. Neither am I persuaded by the landlord's claim that there was only a little sewage and it could be cleaned up with a bucket and soapy water. That is not the sanitation system anticipated the legalisation referred to above.

52. Given the long delay in effecting repairs and the effect this has had on the tenant, I have considered explemary damages and the provisions of s109 (3);

> (3) *If, on such an application, 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,—*

53. The object of exemplary damages is to "punish and deter". In Auckland CC v Blundell [1986] 1 NZLR 732 (CA), Cooke P said at p 740:

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

54. The Tribunal must take into account the intent of the person against whom the order is sought. In Chief Executive, ex p Edmondson v Walls North Shore TT 548/92, the Tribunal said:

> *"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."*

55. I have carefully considered this matter. In particular I consider that the public have a great interest in ensuring that the health and safety provisions and general planning and building laws are upheld particularly in regard to residential premises. In mitigation I accept that the landlord may have been unaware of the extent of the effect on the tenant. I am not however persuaded by the landlord's submission that it was not as bad as the tenant has alleged. The written correspondence supports the tenants view on this.

56. I have also considered the landlord thought it had the tenant's agreement to pay for these repairs and therefore did not clearly understand its obligation. I encourage the landlord to understand the power imbalance in their relationship. It is clear the tenant thought she had no option but to agree given the pressure exerted by the landlord and the landlord's refusal to allow the tenant to leave the property before the expiry of the fixed term without arranging a replacement tenant.

57. It has become clear at hearing that the inexperience of the property owners and their chosen representative may have resulted in many of the misunderstandings that has arisen, however inexperience cannot excuse a landlord from liability. The landlord is in business and is expected to understand its obligations under the RTA.

58. Taking all these factors into account I consider it appropriate to order the landlord to pay the equivalent of two weeks rent, $1,500.00 in exemplary damages for its failure to carry out the repairs in a timely manner over the three pump failures.

Breach of quiet enjoyment, unlawful entry, harassment.

59. The tenant also alleges breaches of her right to quiet enjoyment, unlawful entry, and harassment. I am less persuaded of these claims. I accept absolutely that the tenant has felt pressured by the landlord to agree to make payments to remedy the pump issues. However the tenant did agree and did not take the option of applying to the Tribunal to have the matter undependably assessed. This purported agreement has contributed to the situation the tenant has found herself in.

60. I have carefully considered the applicant's claim for breach of peace and quiet enjoyment quiet enjoyment, unlawful entry, and harassment. Section 38 is clear that tenants are entitled to quiet enjoyment of their home:

    (1) The tenant shall be entitled to have quiet enjoyment of the premises without interruption by the landlord or any person claiming by, through, or under the landlord or having superior title to that of the landlord.

    (2) The landlord shall not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises by the tenant.

    (3) Contravention of subsection (2) of this section in circumstances that amount to harassment of the tenant is hereby declared to be an unlawful act.

    (4) In this section premises includes facilities.

61. Interference with privacy of a tenant has a maximum penalty of $2,000.00. Again I must consider the evidence before me. I accept that the parties' relationship became more difficult as liability issues were discussed but I am not persuaded that this amounts to a breach of the tenant's rights. A breach of quiet enjoyment requires more than a personality clash. In *Smith & Olmstead v Floris* Auckland TT 1404/93, the Tribunal said:

> *"Quiet enjoyment means effectively the right not to have the quality of the tenancy significantly impaired by actions of the landlord and/or the landlord's agents. Balanced against that, however, one must bear in mind that landlord/tenant relationships tend to be between individuals and that will inevitably involve some interaction between them on a personal level. It is important not to allow a simple clash of personality to become the sole basis for a claim for breach of this type."*

62. I am certainly not persuaded it reaches the level of harassment, a more serious breach. Further the tenant admits it had abandoned the tenancy by 23 December 2018 and the tenant is not ordered to pay rent pass this period so the landlord's access after this date can have had negligible effect on the tenant.

63. Whereas the Tribunal expects landlords to act with professionalism at all times and given the compensation ordered above, I am not persuaded the landlord should be subject to any further penalty.

Is the respondent liable for the filing fee?

64. If an applicant is wholly or partly successful in their application the Tribunal may order the other party pay the filing fee paid to have the matter determined by the Tribunal. Given the substantial success of the tenant, I consider it reasonable that she be reimbursed.

B Hannan
29 July 2019

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.