[2020] NZTT Christchurch 4250952, 4253033

TENANCY TRIBUNAL AT Christchurch

APPLICANT: Hannah Helm, Hamish Helm

Tenant

RESPONDENT: Holmwood Real Estate Limited

Landlord

TENANCY ADDRESS: 85 Shepherd Avenue, West Melton, West Melton 7618

ORDER

1. The tenancy of Hannah Helm, Hamish Helm at 85 Shepherd Avenue, West Melton ended at 11.59pm on 5 June 2020.
2. Hannah Helm and Hamish Helm must pay Holmwood Real Estate Limited $4,631.25 immediately, calculated as shown in table below.

Description	**Landlord**	**Tenant**
Rent 20 March to 5 June 2020	$5,680.00	
Costs to find new tenant	$201.25	
Compensation: misrepresentation and vacant possession		$1,250.00
Total award	**$5,881.25**	**$1,250.00**
Net award	$4,631.25	
Total payable by Tenant to Landlord	**$4,631.25**	

3. The tenants' other claims are dismissed.
4. The landlord's other claims are dismissed.

Reasons:

1. Both parties attended the hearing. Ms Brown and Mr Colgan represented the landlord.

2. Mr and Mrs Helm signed a tenancy agreement for the premises on 9 March 2020, after seeing it advertised on Trade Me. The tenancy was agreed to be a one-year fixed term tenancy commencing on 20 March 2020 with a weekly rental of $560. Mr and Mrs Helm paid the first weeks rent for the tenancy on 2 March and they paid a bond of $2,240.00 on 18 March 2020. The bond was paid to the Bond Centre soon after.

3. Mr and Mrs Helm did not move into the premises and they claim a refund of the amounts paid to the landlord. They claim, in their application, that the property was misrepresented as a four bedroomed home all with built-in wardrobes when the home was only in fact three bedroomed. They also claim exemplary damages on the basis that they were not provided with vacant possession because it contained a large number of chattels that belonged to the landlord. They claim the Tribunal application fee.

4. The landlord cross applied for payment of rent and a declaration that the tenancy was a continuing one. It also applied for legal costs and the Tribunal application fee.

5. The applications first came before the Tribunal on 21 May 2020 and on 25 May 2020 the Tribunal issued a decision that the premises were misrepresented and Mr and Mrs Helm were entitled to cancel the contract. The Tribunal also found that Mr and Mrs Helm were not given vacant possession as required by section 37 of the Residential Tenancies Act 1986 (the Act). The Tribunal ordered that the landlord pay to Mr and Mrs Helm the rent paid and it order the Bond Centre to pay Mr and Mrs Helm the bond (which it did so in May). The landlord's application was dismissed.

6. The landlord appealed the Tribunal's decision and, in a decision dated 8 October 2020, His Honour Judge Callaghan held that there was no misrepresentation as to the number of bedrooms at the property but there was a misrepresentation in the advertisement with regards to the number of wardrobes. Judge Callaghan considered that the issue of when Mr and Mrs Helm became aware of the misrepresentation regarding the wardrobes was no fully explored at the Tribunal hearing, in particular, whether they became aware of the lack of wardrobe in the fourth bedroom when they viewed the property on 24 February. Judge Callaghan also considered that issues regarding the status of the "condition report" signed by Mrs Helm after the tenancy agreement was signed was not fully explored at the hearing and therefore whether the landlord is in breach of section 37 of the Act by not providing vacant possession.

7. His Honour therefore considered that a rehearing of the matter in the Tribunal was appropriate and that the following core issues need to be properly ventilated at the hearing (at [40]):

   "(a) Was the inclusion of the fourth built-in wardrobe an essential feature of the agreement?

(b) Are [Mr and Mrs Helm] faced with substantial consequences given the absence of the fourth built-in wardrobe?

(c) Were [Mr and Mrs Helm] induced into the agreement by the misrepresentation that the fourth bedroom included a built-in wardrobe? This may be but one reason why [Mr and Mrs Helm] were induced. It need not be the only reason they were induced to enter the contract:

(d) Did [Mr and Mrs Helm] become aware of the misrepresentation at the viewing of the property on 24 February 2020?

(e) What is the status of the “condition report”?

(f) Is the “condition report” part of the agreement contract?

(g) Should an award of exemplary damages be made?

8. At the hearing Mr Coglan and Ms Brown, for the landlord, accepted that there was a misrepresentation regarding the fourth bedroom and they did not dispute that Mr and Mrs Helm were induced, at least in part, to enter into the contract by the misrepresentation. However, they claim that damages is the appropriate remedy, not cancellation of the contract.

Does the misrepresentation regarding the fourth bedroom wardrobe entitle Mr and Mrs Helm to cancel the contract?

9. Mr and Mrs Helm would only be entitled to cancel the contract if they have established that having an in-built wardrobe in the fourth bedroom was an essential term of the agreement or the absence of the wardrobe caused them substantial consequence: section 37 of the Contract and Commercial Law Act 2017 (CCLA).

10. I am not satisfied, on the evidence before me, that the existence of a wardrobe in the fourth bedroom was either an essential term of the tenancy agreement or caused Mr and Mrs Helm substantial consequence. My reasons follow.

11. The fourth bedroom was not intended for everyday use. It was intended to be used by Mrs Helm’s mother when she stayed overnight when Mr Helm was away. Moreover, the absence of the wardrobe in this room was not mentioned by Mr and Mrs Helm as a reason for wanting to cancel the contract in their email dated 1 April 2020 to the landlord. I also consider it relevant that Mr and Mrs Helm did not look inside the fourth bedroom when viewing the property on 24 February, as would be expected if a wardrobe in that room was an essential requirement.

12. I therefore find that Mr and Mrs Helm were not entitled to cancel the contract due to the misrepresentation regarding the in-built wardrobe in the fourth bedroom.

13. However, the misrepresentation does entitle them to damages: section 35 CCLA. Taking into account all the circumstances I consider the sum of $150.00 reasonable compensation for the misrepresentation regarding the fourth bedroom

wardrobe. In assessing the amount of compensation I have taken into account that Mr and Mrs helm did not move into the premises and therefore did not suffer any direct loss as a result of the lack of wardrobe in that room.

Was the landlord in breach of section 37 of the Act by not providing Mr and Mrs Helm with vacant possession and if so what is the appropriate remedy?

14. Mr and Mrs Helm claim that the landlord is in breach of section 37 the storage of a considerable amount of the landlord's belongings in the garden shed and in part of the garage.

15. I agree. Section 37 of the Act provides that the landlord must provide the tenant with vacant possession. This means that all of the landlord's belongings must be removed from the premises unless they are a chattel provided as part of the tenancy and for the tenant's use.

16. I do not consider that the signing by Mrs Helm on 18 March of a detailed inventory list of the landlord's belongings changes the outcome. Ms Helm said that she was given the form to sign while at the Harcourts office to collect the keys and she signed it without reading it. She said that she asked the Harcourts staff member what it was she was told that it is a property condition report and lists "some stuff" that is in the house and she could query it within seven days.

17. While generally a person who signs an agreement is bound by that agreement whether they read it or not, I accept that it is not clear from the inventory list the extent of the interference with the use and enjoyment of the property. In particular the garden shed is not mentioned on the list and, because of the extent of belongings in it, it essentially meant that the shed could not be used by Mr and Mrs Helm.

18. Moreover, I do not consider that the inventory list is part of the tenancy agreement which was concluded on 9 March 2020. It is, in my view, simply an agreed record of the condition of the premises at the start of the tenancy and, in this case, a record of chattels provided and of landlords' belongings stored there.

19. Mr Coglan and Ms Brown claim that clause 2.24 of the tenancy agreement means that the report is part of the tenancy agreement. However, the clause, in my view, is merely notice that a property condition report and chattel list will be prepared and given to the tenant and it provides the consequences if it is not returned to the landlord within seven days noting any differences.

20. Section 11 of the Act is also relevant here. That section provides that any agreement that is inconsistent with the provisions of the Act will have no effect unless permitted by the Tribunal. Thus, even if the inventory list was part of the tenancy agreement, it could not override the effect of section 37 and the requirement on the landlord to provide vacant possession.

21. I am therefore satisfied that the landlord is in breach of section 37 by not removing the landlords' possessions from the premises.

22. At the hearing Mr and Mrs Helm also claimed that the property was misrepresented because it was advertised as unfurnished when in fact it was furnished because of the appliances (microwave, washing machine, dryer, fridge freezer) left at the premises provided for their use. I do not agree. In my view a furnished property is one that includes furniture and the like, not just appliances provided for tenant use.

23. A breach of section 37 means that the landlord has breached a term of the tenancy agreement (the rights and obligations in the Act are terms that are implied into every residential tenancy). A breach of the Act or the agreement by the landlord entitles the tenant to damages.

24. I accept that Mr and Mrs Helm had particular need for additional storage to store their belongings. They had come from a four bedroomed house with four car garaging and so the reduced storage space was inconvenient and interfered with their right to fully use and enjoy the property.

25. However, I do not consider that the breach of section 37 significantly reduced the benefit of the tenancy or significantly increased the burden or made it something different altogether. They could still use the premises as a home for themselves and their two children, which was the fundamental purpose of the agreement. The interference was essentially on the right to use the shed and part of the garage for storage. I therefore do not consider that failure by the landlord to remove their possessions from the premises entitled Mr and Mrs Helm to cancel the contract.

26. The consequences of my finding that Mr and Mrs helm were not entitled to cancel the contract is that the tenancy remained a continuing one until the landlord found a new tenant on 6 June 2020 and Mr and Mrs Helm remained liable for rent until that date. Thus there application for a refund of the amounts paid to the landlord for the tenancy is dismissed.

27. However, as mentioned the breach of section 37 of the Act does entitle Mr and Mrs Helm to an award of damages. After carefully considering all the circumstances, including the agreement essentially required them to pay rent for a property without full use of the garage or use of the shed, I consider the sum of $1,100.00 reasonable compensation.

28. Mr and Mrs Helm's claim for exemplary damages for breach of section 37 is dismissed because exemplary are only available for some breaches of the Act (those that are declared to be 'unlawful acts') and section 37 is not one.

Is the landlord entitled to rent and costs to find a new tenant?

29. Under a fixed term tenancy a tenant remains liable for rent until a new tenant is found for the premises or until the expiry of the term, whichever is the earlier. A landlord is also entitled to reasonable costs incurred to find a new tenant.

30. Mr and Mrs Helm said that the landlord did not act promptly to find another tenant, in particular, they did not advertise the tenancy until the end of May. However, there is no obligation on a landlord to take steps to mitigate a tenant's loss in such circumstances: section 64(4) of the Act. Thus, the landlord can simply sit back and do nothing to find a new tenant and claim rent from the tenant until the fixed term ends (although most landlords, sensibly, do take steps to find a new tenant as quickly as possible to assist a departing tenant or to minimise their loss).

31. As mentioned the landlord found a new tenant for the premises on 6 June and the landlord provided a rent record which establishes the amount of rent owing to 5 June 2020.

32. Ms Brown explained the costs incurred to find a new tenant, including advertising costs, credit checks and her time to conduct viewings and the like. I am satisfied that the amount claimed is reasonable.

Is the landlord entitled to legal costs and the cost to file in the District Court?

33. These claims are dismissed because the legal costs and filing fee claimed are for the appeal proceedings in the District Court and should have been claimed in that proceeding.

34. In any event section 102 of the Act does not allow the Tribunal to award any party costs (other than the Tribunal application fee) except in the limited circumstances set out in section 102. None of those circumstances apply here.

The Tribunal application fee

35. Both parties have been partially successful in their claims and I consider it appropriate that each party bear the loss of the application fee they paid.

THE SEAL OF THE TENANCY TRIBUNAL

R Merrett
18 December 2020

Please read carefully:

Visit justice.govt.nz/tribunals/tenancy/rehearings-appeals for more information on rehearings and appeals.

Rehearings

You can apply for a rehearing if you believe that a substantial wrong or miscarriage of justice has happened. For example:

- you did not get the letter telling you the date of the hearing, **or**
- the adjudicator improperly admitted or rejected evidence, **or**
- new evidence, relating to the original application, has become available.

You must give reasons and evidence to support your application for a rehearing.
A rehearing will not be granted just because you disagree with the decision.
You must apply within five working days of the decision using the Application for Rehearing form: justice.govt.nz/assets/Documents/Forms/TT-Application-for-rehearing.pdf

Right of Appeal

Both the landlord and the tenant can file an appeal. You should file your appeal at the District Court where the original hearing took place. The cost for an appeal is $200. You must apply within 10 working days after the decision is issued using this Appeal to the District Court form: justice.govt.nz/tribunals/tenancy/rehearings-appeals

Grounds for an appeal

You can appeal if you think the decision was wrong, but not because you don't like the decision. For some cases, there'll be no right to appeal. For example, you can't appeal:

- against an interim order
- a final order for the payment of less than $1000
- a final order to undertake work worth less than $1000.

Enforcement

Where the Tribunal made an order about money or property this is called a **civil debt**. The Ministry of Justice Collections Team can assist with enforcing civil debt. You can contact the collections team on **0800 233 222** or go to 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.

If you require further help or information regarding this matter, visit tenancy.govt.nz/disputes/enforcing-decisions or phone Tenancy Services on 0800 836 262.

Mēna ka hiahia koe ki ētahi atu awhina, kōrero ranei mo tēnei take, haere ki tenei ipurangi tenancy.govt.nz/disputes/enforcing-decisions, waea atu ki Ratonga Takirua ma runga 0800 836 262 ranei.

A manaomia nisi faamatalaga poo se fesoasoani, e uiga i lau mataupu, asiasi ifo le matou aupega tafailagi: tenancy.govt.nz/disputes/enforcing-decisions, pe fesootai mai le Tenancy Services i le numera 0800 836 262.