

TENANCY TRIBUNAL AT Pukekohe

APPLICANT: Stuart Brauning
Tenant

RESPONDENT: Barfoot & Thompson Limited Denise Smyth
Landlord

TENANCY ADDRESS: 194 State Highway 2, Mangatawhiri 2471 (the Property)

ORDERS

1. The Tenancy began on the 19 March 2020 and the tenant is liable for rent from that date. S 77(2)(b) and 78(1)(a).
2. The landlord's application for termination is dismissed.
3. The tenant is to advise if he requires further determination on the claims for failure to maintain the grounds and failure to provide a secure locking door by the 1 October. If no further determination is required, then these applications will be closed.

Reasons:

1. Both parties attended the hearing held at Pukekohe on the 31 August 2020.
2. The landlord made the first application to the court. It sought termination for non-payment of rent arrears.
3. The tenant made a cross application on the 16 July seeking:
 - a) An order from the Tribunal as to when the tenancy began.
 - b) That the landlord was in breach of its obligations to the tenant on the 8 February 2020 because:

- (i) The Landlord was unable to give vacant possession to the tenant on the 8 February 2020, because the landlord's belongings were still at the property
 - (ii) That the Landlord did not provide the property on the 8 February 2020 in a reasonably tidy condition.
 - (iii) That the landlord did not provide the property on the 8 February 2020 in a reasonably maintained condition.
 - (iv) That the landlord did not provide the property on the 8 February 2020 with secured doors, in that one of the external doors had a broken lock.
 - (v) That on the 8 February 2020 there were inadequate smoke alarms in the property.
4. The Tenant seeks a declaration from the Tribunal that the tenancy began on the 19 March, when the tenant moved into the property, and that rent is only due from that date.
 5. The landlord seeks rent from the 8 February 202, the start date in the agreement.
 6. Essentially these proceedings are about when did the tenancy begin?

Background

7. Mr Brauningger seeks properties for rent on behalf of a number of farming businesses. He rents properties that are close to the farm properties, where the farm employees work, this makes it easier to find suitable employees for farming work.
8. Mr Brauningger has a number of tenancies with Barfoot & Thompson. He is authorised to sublet the properties to his tenants.
9. The parties have signed a tenancy agreement which states that the tenancy is covered by the Residential Tenancies Act 1986 (RTA).
10. The landlord is the agent of the owner of the Property. The Property has been tenanted for a number of years. The property manager is Mr Tonumaip'e'a.
11. The Property is rural, it comprises of a two-storey house and curtilage , garage and shedding, and two paddocks.
12. On or about the end of January Mr Brauningger approached the landlord and asked if they had any suitable listings in the area. He was shown the Property on the 29 January together with his prospective subtenant Mrs Morgan. Mr Brauningger says that during that the inspection, he noted that the place was not clean, that there were still some possessions in both the house and the sheds, and that the grounds needed a good clean up. He said that these items were discussed with Mr Tonumaip'e'a and that Mr Tonumaip'e'a told him that the place

would be tidied up and maintenance completed before the tenancy began. Mr Brauningger told me that they were not specific about the items that would be done, rather they agreed that things would be 'cleaned up' and repairs done. The previous tenant was in the process of moving out, so both Mr Brauningger and Mr Tonumaip'e'a understood that the tenant's and owner's belongings would be moved out, and the place cleaned.

13. On the 30 January Mr Brauningger and Mr Tonumaip'e'a spoke about the Property. Mr Brauningger says that he was told that there was a lot of interest in the Property and that he could secure it for \$780.00 per week instead of the advertised price of \$750.00. Mr Tonumaip'e'a confirmed that he had other parties that were interested in the property at that time.
14. Mr Brauningger wanted to secure the Property, primarily because of its location to the farm employer of Mrs Morgan. He wanted the tenancy to run from that weekend the 1 February 2020, but Mr Tonumaip'e'a told him that the Property would not be available until the following week 8 February as the Property needed to be cleaned (by the previous tenant), and repairs and maintenance done.
15. On the 4 February the landlord prepared a tenancy agreement and sent it to Mr Brauningger to sign. Mr Brauningger signed the tenancy agreement and sent it back to the landlord with an accompanying email setting out changes he had made to the agreement and issues that still needed to be dealt with before the tenancy began:

"Given the general state of the place can you please confirm what repair and maintenance works are being completed this we (sic) prior to our taking possession on Saturday."

16. The landlord did not reply to this correspondence until the 7 February 2020, after Mr Brauningger phoned Mr Tonumaip'e'a. Mr Brauningger says that he spoke with Mr Tonumaip'e'a on the 7 February and once again asked for confirmation of what repairs and maintenance would be completed. He says that Mr Tonumaip'e'a *"did not commit to anything and stated that he didn't know as he had not been to the property since he first showed it to me. He did mention that a cracked window downstairs had apparently been repaired."*
17. Mr Brauningger says that he paid the rent and bond.
18. After making payment of the rent and bond, Mr Brauningger received an email from the landlord at 1.35pm which responds to his questions in the email of 4 February and says in respect of the condition of the property

"As mentioned in our call this morning, the property is as is. I can confirm that there is no hole in the toilet or bathroom ceiling. Please reference the inspection report when the keys are collected tomorrow from our office and feel free to add anything absent from the report in relation to damages or effects on the property and return within 7 days."

19. On the 8 February Mr Brauningger collected the keys from the landlord and went to the property to find *"none of the promised repairs and maintenance works had been done"*.

Mr Brauningger immediately rang Mr Tonumaipe'a and left a message saying he would not be taking possession as the property was not in a fit and reasonable state. Mr Brauningger asked for an urgent meeting between the two of them. Mr Brauningger went to the property and took photographs of the condition of the property. He has provided a copy of those photographs to the Tribunal.

20. Mr Brauningger says that he tried to call Mr Tonumaipe'a a number of times between Saturday the 8 February and Monday 10 February. As he had not had a reply from Mr Tonumaipe'a by Monday he went to the landlord's offices to speak to someone but was told that he needed to speak to Mr Tonumaipe'a and that as he was not there, no one else could assist him. Later that afternoon Mr Tonumaipe'a telephoned Mr Brauningger and they arranged a meeting at Mr Tonumaipe'a's offices later that afternoon.
21. Both Mr Brauningger and Mr Tonumaipe'a agree that Mr Brauningger told Mr Tonumaipe'a that he was not taking possession of the property because he believed that the landlord was in breach of its obligations to the tenant, at the beginning of the tenancy. The parties both told me that Mr Brauningger raised issues with the state of the property being unclean and untidy, the condition of the grounds, vegetation being overgrown and piles of rubbish, that the landlord's belongings were still in the sheds and garages, that the garage was not water tight, and that the external door could not be locked.
22. Mr Brauningger in his submissions notes that he *"ended the meeting by telling Donny that I wanted all of the issues fixed ASAP or wanted to be immediately released from the tenancy."*
23. Mr Tonumaipe'a confirms that Mr Brauningger did ask to be released or for the items to be rectified immediately.
24. Mr Brauningger and Mr Tonumaipe'a both agreed that Mr Brauningger should go to the property and take further photographs of his concerns, so that the landlord could show the owner of the property, which he did. A copy of those photographs were given to me.
25. Mr Brauningger says that he did not hear back from Mr Tonumaipe'a, and on the 13 February, he called Mr Tonumaipe'a and told him again, that if the landlord was not willing to fix everything immediately then he requested that the agreement be voided as he had not yet taken possession.
26. Later that day the landlord received an email from the landlord (4.23pm)- which stated,

Dear Stuart, your application (APPID 67002) on 194 State Highway 2 Mangatawhiri has been finalised. Congratulations on finding your new home.

Thanks again for choosing to apply through Barfoot and Thompson Pukekohe.

Best Regards,

Donny Tonumaipe'a

27. Mr Brauningger says that due to the telephone call earlier that day he thought that the emailed confirmed that his application to have the agreement avoided on the basis that the landlord had not given vacant possession and could not comply with its obligations under the RTA had been granted.
28. Mr Tonumaip'e'a told me that he was unaware that the email had been sent out in his name. That it is a computer-generated email sent when all the tenancy documents are signed, and the rent paid etc.
29. Mr Brauningger sent a reply back to Barfoot and Thompson a few hours later (8.10pm) to ensure that his understanding of the email was correct – I have set it out in full.

Hi Donny,

Thanks for this - I assume given the day and hour that this has been received, that this is Barfoots agreement to void the tenancy originally entered into for the reasons we discussed during our meeting on Monday just gone (and is a response to my many requests since for an update on the matter) ?

Please confirm that this is correct so I can then continue to engage both yourself and Barfoots moving forward to continue to be my/the businesses sole supplier of local rental properties. I have a board meeting tomorrow to discuss this matter as would very much like to confirm that it has now been finalised, and to put a resolution forward to continue to retain Barfoots as our sole supplier of rental properties moving forward.

30. Mr Brauningger, said that he thought that the tenancy agreement was at an end for this Property, as he had no response to his email.
31. On the 14 February Mr Brauningger received a 14 day notice from the landlord to remedy rent arrears. Again, Mr Brauningger immediately rang Mr Tonumaip'e'a and was told that the letter had been sent in error. Mr Tonumaip'e'a then told Mr Brauningger that the agreement was *not* voided as Mr Brauningger had requested and that the email dated the 13 February was computer generated and not related to Mr Brauningger's proposal that the tenancy was to be voided. Mr Tonumaip'e'a stated that he was waiting to hear back from the owner to ascertain if the owner was 'willing' to undertake any repair, maintenance or cleaning at the property.
32. On the 21 February, Mr Tonumaip'e'a rang and asked for a meeting at the Property on Sunday 23 February. Mr Brauningger could not go, but his business manager Mr Cooper and the proposed subtenant Mrs Morgan could, so it was arranged that they would go in Mr Brauningger's absence.at 11am on Sunday.
33. On Sunday Mr Cooper and Ms Morgan went to the Property as arranged. The landlord had not turned up by 11.30, when called the owner said that they could not be there now until after midday, and as that was not convenient for Mr Cooper or Ms Morgan, the meeting never went ahead.
34. On the 24 February the landlord issued a further 14-day notice. The tenant once again queried the 14-day notice as the tenancy agreement was in dispute. He

contacted the collections team at Barfoot and Thompson and was told that the collections team had not been told that there was any issue with the property.

35. On the 27 February 2020 the landlord contacted Mr Brauningger to advise him that the landlord's goods had now been removed from the Property.
36. On the 29 February Mr Brauningger went to the Property again to check what had been done, he noted that the garage and shed had been cleared and cleaned but the other items he had disputed, cleanliness in the house, oven and hob not fixed, lights not fixed, back external door lock broken, rubbish in the yard and two large skips bins of rubbish left in the garden and driveway. Mr Brauningger once again took photographs of the state of the property.
37. Mr Brauningger says that by this stage he had lost the confidence of Ms Morgan, who no longer wanted to move into the Property because of all of the issues.
38. On the 5 March the landlord applied to the tribunal for rent arrears, Mr Brauningger telephoned Mr Tonumaip'e'a and they arranged for a further meeting to be held at the property with Mr Cooper and themselves on 6 March, but that meeting too was unable to go ahead due to Mr Cooper taking ill.
39. On 10 March 2020 the landlord told the tenant that it had fixed the lock on the door, so it could be secured.
40. On the 12 March 2020 there was a meeting between Mr Cooper and Mr Tonumaip'e'a at the Property. Some of the issues that Mr Brauningger had identified as wrong with the Property on the 8 February had now been remedied.
41. It was agreed at that meeting the new subtenants would move into the Property on the **19 March 2020**.
42. Before the new tenants moved in Mr Cooper went to the landlord offices to collect the new key for the downstairs door lock which had been fixed. He was told by Mr Tonumaip'e'a that the door not been fixed and that the owner had not intention of fixing it.
43. Mr Brauningger's subtenants moved into the Property on the 19 March 2020. Mr Brauningger alleges that even on that date, the Property was still dirty, the main garage and the other outbuildings still contained some of the landlord's personal belongings, that there was large amounts of rubbish and debris still around the outside of the drive, garage and yard. Many internal lights were not working. The downstairs external door was still not able to be secured. The hob and oven were still not working.

The landlord's obligations.

44. At the beginning of the tenancy landlords have an obligation to:
 - a) Ensure that there is no legal impediment to the occupation of the premises for residential purposes-s 36
 - b) Provide the tenant with vacant possession of the property- s 37

- c) Provide the property in a reasonably clean state- s45(1)(a).
 - d) Provide the property in a reasonable condition, taking into account the age and character of the building- s45(1)(b)
 - e) Ensure that the property meets all health and safety and building codes s45 (1)(c).
45. The tenancy agreement that was signed by the parties had a commencement date of 8 February 2020. The tenant picked up the keys on that date, but immediately notified the landlord that as the landlord was in breach of its obligations, the tenant would not take possession.
 46. There is no doubt that on the 8 February 2020, the landlord had left a considerable amount of belongings in the garages and shed. The photographs show the landlords belongings in the garage and shed and strewn outside the property. The garage and shed was not cleaned up and the bulk of the landlord's belongings removed until the 29 February 2020. There are still some items left in the shed/ garage and around the property but there is considerably less than what
 47. Section 37(1) RTA further provides that at the beginning of the tenancy tenants are entitled to vacant possession of the premises and s 36 RTA that there is no legal impediment to the occupation of the premises for residential purposes.
 48. The Tribunal has previously found that the landlord breaches s 37(1) obligation where a shed on the property is filled with the landlord's goods. *Lo v Grenadier Accommodation Centre Limited trading as Harcourts [2015] NZTT Christchurch.*
 49. A failure to give vacant possession by a landlord can give rise to cancellation of the tenancy agreement

“I am satisfied that the clear words of this section means that a tenant is entitled to have vacant possession of the premises as stated in the tenancy agreement. If the tenancy cannot commence on that date, then the contract has been breached fundamentally. Because of this fundamental breach I find that the tenant had the right to cancel the contract.” *Caldwell v TLC Property Management Limited TT Christchurch TT 1084/1, 7 June 2001.*
 50. I am satisfied that the amount of landlord's possessions left in the Garage and shedding, was a breach of the landlord's obligation (s37(1)) to give the tenants vacant possession of the property.
 51. The landlord submitted at the hearing, that the tenant could have still taken possession of the house. I do not accept that argument, the property is rented as a whole, this includes garages and sheds. Tenants are entitled to have full and unimpeded vacant possession of the Property that they are renting, not some of the property. If certain areas are excluded, then that should have been noted in the tenancy agreement.

52. I am satisfied that the because the landlord was in breach of its obligations to give vacant possession the tenant was entitled to elect not to take possession of the property.
53. It is clear from the interactions between the parties that the tenant tried to cancel the agreement, but the landlord would not agree.
54. I am also satisfied that the landlord did not provide the property in a reasonably clean and tidy state. The garage and sheds were not in a state that was reasonably clean for a rural shed on a rural property. The photographs of inside the house show that the house was clear and generally clean, but the shower had a weed growing up through the drain on the 8 February and was still there on the 29 February.
55. There was a considerable amount of rubbish and materials at the back of the shed. Although, this was not necessarily within sight of the tenants from the house, it was unsightly, and would have affected the tenant's use and enjoyment of the Property. This was not removed or tidied up to the tenant's satisfaction until after the 19 March.
56. I also am satisfied that the landlord had not maintained aspects of the property. The tiles on the bathroom should have been affixed so that the bathroom was waterproof. The issue with the potential hole in the toilet should have been dealt with before the 14 February. The lock was not fixed, and still does not work, so the tenant could not secure the Property.
57. The nature and effect of the breaches meant that the tenant could not and was fully within his rights to refuse to take possession of the property until these items were remedied.
58. I am also satisfied that the breaches of the RTA by the landlord, and the landlord's conduct (or lack of communication) means that it would be inequitable for the landlord to demand rent from the tenant from the 8 February.
59. I consider that the landlord's breaches to provide vacant possession, the Property in a reasonable state of cleanliness to be repudiatory- that is that the landlord showed the tenant that it did not intend to perform its obligations under the contract, by doing that the tenant was entitled to mitigate its loss, by treating the agreement as being at an end.
60. The tenant did not 'sit on his hands', he took immediate action to cancel the agreement, when he realised that the landlord did not intend to perform its obligations. The landlord's conduct did not give the tenant any confidence that the landlord intended to perform its obligations.
61. I therefore am satisfied that the original fixed term agreement was cancelled by the tenant. I am satisfied that the tenant and landlord later made a further tenancy agreement on or about the 12 March 2020 when they agreed to a

commencement date of the 19 March and to be bound by the previous terms of the agreement.

62. The tenant is only liable for rent from 19 March 2020 when the tenancy began.
63. As the tenancy had not began at the time that landlord applied to the Tribunal for termination, termination for rent arrears cannot be granted. The landlord's application for termination is dismissed.
64. I am satisfied that by the time that the tenancy began most of the issues raised by the tenant had been remedied. The grounds still required some maintenance and the door was still not able to be secured.
65. I have therefore left this application 'closed unless' to the 1 October 2020, for the tenant to confirm whether he requires me to make any further determinations on those claims. He had indicated at the hearing, that he wanted a determination on when the agreement began, and that if there was a final determination on that matter in his favour then he would not require further determination on each of his other claims. If the tenant indicates that he does not want a determination on those matters, then these applications will be closed.



T Prowse
23 September 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 fesoatai mai le Tenancy Services i le numera 0800 836 262.