[2024] NZTT 5044228, 5061552

TENANCY TRIBUNAL - Whakatane | Whakatāne

APPLICANT: Jillian Dua, Josh Speck

Tenant

RESPONDENT: Alysha Macaulay

Landlord

TENANCY ADDRESS: 517 Pikowai Road, Pikowai, RD 4, Matata 3194

ORDER

1. The Tribunal declares that the termination notice issued by the landlord on 12 October 2024 is retaliatory and that notice is of no effect and is set aside.
2. By consent of the parties, the tenant's name under which the bond is recorded is to be amended to record that the correct spelling of the tenant's name is "Speck".
3. All other applications are dismissed.

REASONS

1. The Tribunal must consider applications filed by both the tenants and landlord. This is a continuing tenancy.
2. Both parties appeared at the hearing in Whakatane on 29 November 2024. Mr Harris appeared and gave evidence for the landlord.

BACKGROUND

3. The landlord in this case is Alysha Macaulay and the co-tenants are Joshua and Jillian Speck.
4. The tenancy commenced on 14 July 2024, and is a fixed term tenancy due to end on 14 January 2025.
5. The premises are rurally situated. The tenancy agreement records that the premises do not include any grazing land, but there is a further clause indicating that following January 2025 the parties could negotiate having animals, in particular:

> Grazing and adjustment for Farm Animals and all stock negotiable after six months, January 2025.

6. There is a neighbour for the tenants, Rhys, who lives in the woolshed on the wider premises. Rhys is also a tenant of the landlord, but of course under a different tenancy to the Specks'. As I will discuss further below, the tenants and Rhys have had considerable conflict throughout the tenancy.
7. On 12 October 2024 the landlord issued a termination notice to the tenants, stating:

> …Unfortunately, due to the circumstances, financial & demanding ongoing stress. I will not be renewing our tenancy contract on the 14 January 2025.
>
> I am officially giving you 90 days' notice to end the tenancy, as of the 17th of October 2024.
>
> 517 Pikowai road (my home) will be going on the market.

8. I take that notice to mean that the tenancy would end at the end of the fixed term period on 14 January 2025.
9. It is also relevant to note that the parties have been negotiating a sale of the premises to the tenants, who reported at the hearing that they are in the process of arranging finance for the purchase.

RELEVANT LEGAL CONSIDERATIONS

10. The relevant law that applies is found in the Residential Tenancies Act 1986 ("RTA").

11. With any claim before the Tenancy Tribunal, the Tribunal applies the usual civil law standards and expectations.

12. That includes a requirement that the party bringing the claim (the applicant), establish their claims "on the balance of probabilities". The balance of probabilities means more likely than unlikely, or in mathematical terms, has a fractionally more than 50% likelihood. The Tribunal does not need to be certain or very sure about any claim, only that what is claimed is likely.

13. This obligation carried by the applicant is referred to as the "burden of proof". Independent witnesses, corroborating documents and photographs are an important part of discharging this burden.

14. As noted by the District Court in Kaipo v Clarke & McCarthy (DC) TT233/02, in practical terms this means that:

> … [L]ike anyone who brings an application before a Tribunal or Court, it is incumbent upon the applicant to provide the evidence necessary to prove the case. If the applicant fails to do that, then their application will be dismissed whether it has merit or not because it is up to the applicant to provide the necessary evidence. It is not up to the other parties, and it is certainly not up to the Tribunal to extract evidence.

TENANTS CLAIMS

15. I will consider the tenants claims in turn.

Eviction notice to be set aside

16. The tenant's position is that the termination notice should be set aside, because it is inconsistent with the agreement they had entered into and was a retaliatory termination notice following complaints they raised about the tenancy.

17. The tenants particularly referred to clause 11 of the tenancy agreement which anticipated that the tenants could have an expanded use of the farm, and the landlord's indication that this would be our 'forever home'.

18. The landlord considers that the tenants have broken the tenancy contract 'numerous times', such as by having farm animal's on the premises (lambs). The landlord states that she has found the interactions with the tenants stressful, and she has decided to sell the premises. The landlord states she wants to sell and move to Napier.

19. The tenant disputes that the original tenancy was on a trial basis. While the tenants agree they had a lamb on the premises for a few days, that was only to train the lamb on a bottle. The tenants say they would not have taken the tenancy if they knew this was not a longer-term tenancy, particularly as the tenants "thought they were getting the paddocks" for their own stock after January 2025.

20. The tenants consider that it was only when they raised complaints about Rhys, that the landlord issued the termination notice.

Analysis

21. The parties entered into a fixed-term tenancy agreement. What that means, is that the tenancy cannot be terminated by notice during that fixed term period, which is due to end on 14 January 2025. However the landlord can give notice to end the tenancy at the end of that fixed term period, providing it is notice given on grounds a landlord could lawfully give to end a periodic tenancy.

22. Section 51 of the RTA sets out the limited grounds upon which a landlord can order termination of the tenancy, and that includes when:

> The premises are to be put on the market by the owner within 90 days after the termination date for the purposes of sale or other disposition.

23. The tenants seek an order setting aside the termination notice. There are two ways the tenants could succeed with that application, either proving that the notice was not valid, or if the notice was valid, but proving the notice was retaliatory.

24. In this case, the tenants have not established that the notice was not valid (they have not suggested otherwise), so the question then becomes whether the notice was retaliatory.

25. Section 54 of the Residential Tenancies Act 1986 holds that the Tribunal may declare a notice to terminate a tenancy of no effect, and retaliatory if:

> In giving the notice, the landlord was motivated wholly or partly by the exercise or proposed exercised by the tenant of any right, power , authority, or remedy conferred on the tenant by the tenancy agreement or by this or any other Act or any complaint by the tenant against the landlord relating to the tenancy.

26. The essential element of a retaliatory notice is the issuing of it in response to a tenant asserting a right, but it need not be the sole motivation, provided the landlord was partially motivated by the tenant asserting the right.

27. The Tribunal in *Easton v Marks* Auckland TT 229/87, 27 May 1987 considered the meaning of the verb "motivate". It considered the Webster's dictionary definition "to furnish with a motive or motives; to give impetus to; to insight; to impel" and held that the landlord was not incited or impelled by the tenant's actions. The Tribunal in that case noted that:

> It is one thing to say that an owner of a property has grown somewhat tired of his property being tenanted to persons, it is another thing to say that the tenants gave impetus to, or incited, or impelled the owner to give the notice to quit.

28. In this case, I have determined that the termination notice was a retaliatory termination notice, because I consider it likely that in giving the notice (to use the words of section 54) the landlord was at least partly motivated by the exercise of a right, power, authority or remedy that the tenant had in relation to the tenancy, or a complaint by the tenant in relation to the tenancy.

29. The right that the tenants have with these premises is a right of quiet enjoyment. That is a statutory right under section 38 of the RTA:

> **38. Quiet enjoyment**
>
> (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.

30. Plainly the tenants consider that their quiet enjoyment of the tenancy has been severely impacted by Rhys. Because Rhy is a tenant of the same landlord, then there is another right for the tenant, and that relates to a statutory obligation held by the landlord around neighbours. Section 45 of the RTA sets out the landlord's responsibilities, and that includes that the landlord must

> take all reasonable steps to ensure that none of the landlord's other tenants causes or permits any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises.

31. The right for the tenants is that they were entitled to rely on the landlord ensuring that that neighbours did not disturb the reasonable peace, comfort, or privacy of the tenants in the use of their premises.
32. It is clear that the tenants complained to the landlord about Rhys, again on the basis that he was disturbing their comfort or quiet enjoyment of the premises. I am very confident in concluding that the landlord's decision to sell the premises was in part because of those tenant complaints, in fact that is indicated in the termination notice, describing the landlord being motivated by "demanding ongoing stress".
33. The primary remedy for finding the termination notice to be retaliatory, is that the notice is set aside. That is the only order the tenants seek under this claim, so that sole order is made in response to this claim.

Issues with neighbour

34. The tenants seek an order in relation to a neighbour, Rhys, who again lives on the wider property owned by the landlord, in a woolshed, and is in effect a neighbour for the tenants.
35. The tenants say that shortly after moving in they had problems with Rhys, who stated to the tenants that he was going to shoot their Rooster as it woke him up one morning.
36. The tenants say that they have done their best to calm the waters with Rhys and live with him in a neighbourly way, but that was not successful. The tenants state that complaints have been made to the Police, who are backing the tenants on this matter, and depending on the outcome of this hearing, are intending to pursue notices around harassment.
37. The tenants say that one of the complaints from the landlord is that the tenants are leaving gates open, but the tenants consider it is Rhys who is leaving the gates open.
38. Further there are issues the landlord has raised about a rubbish pit being dug, but the tenants say it was Rhys that dug that pit. While the tenants agree they put one bag of rubbish in the pit, the majority of the rubbish was from Rhys.

39. The tenants also consider that Rhys is injuring their animals and moving the chicken coup that they are entitled to use without their agreement, which has unsettled the chickens so they are not laying.

40. The tenants described Rhy's as being "in their face all the time", and that includes making racial slurs toward one of the tenant, or calling them other offensive names.

41. The tenants provided email correspondence sent to the landlord raising the concerns in detail.

42. The landlord states that this is a case of warring neighbours. The landlord states that she has done her best to keep the relationship between the parties amicable, but ultimately, trespass notices have been issued between the Tenants and Rhys, and also given the involvement of Police.

43. The landlord states the situation is "intense", and it was clear to me that the landlord has found the situation very stressful.

Analysis

44. While I am minded that Rhys was not called to the hearing to give evidence, I consider the evidence does support that the tenant's quiet enjoyment of the premises has been impeded by Rhys, I have discussed that above so will not discuss that further here.

45. I have also set out the obligations held by the landlord in relation to ensuring the tenants have quiet enjoyment in relation to the actions of Rhys.

46. The Tribunal is limited in what orders it can make here, because Rhys is not a party to the tenancy, and in fact the Tribunal does not have any jurisdiction to make orders against a neighbour like Rhys (we can only make orders between tenants and landlords).

47. However the landlord has confirmed that she has given notice terminating the tenancy of Rhys. That being the case, there would not be any further practical benefit of making any further order in relation to Rhys. That said, I note that the landlord will continue to have her statutory obligations around her tenant's quiet enjoyment, as discussed above, and that continues will Rhys is working through his notice period.

48. I will therefore not make further orders on this claim.

Bond details

49. The tenants seek an order from the Tribunal correcting the spelling of the tenant's names, which was wrongly recorded on the bond lodgement form.

50. The landlord does not oppose this request.

51. Of course the bond should be recorded on the correct tenants name, and in order to progress this matter I will contact the Bond Centre and request that the bond records be amended to record the correct tenants name, which is spelt at “Speck”, not “Spec” as in the bond form.

LANDLORDS CLAIMS

52. The only claim from the landlord were around ending the tenancy. The landlord seeks either for the Tribunal to order termination for breach of contract.

Termination of tenancy

53. The landlord seeks a termination of the tenancy on the following grounds:

    a. Tenants having a lamb on site (which the landlord removed).
    b. Running water tanks dry, which would endanger stock.
    c. Rubbish on site and being burned.
    d. Overcrowding (more than maximum tenants)
    e. Affixing shelving in bedroom.

54. In response, the tenants say:

    a. They did have three lambs, in August 2024 but it was their understanding that they could have them on their premises, but not the wider farm. The tenants advised they were intending only to have the lambs for about three weeks to get the lambs used to bottle feeding, after which it would be handed over to a friend’s child for calf club.
    b. They are not responsible for the state of the water tank, it was caused by damage for cows on the wider farm and other users. The tenants also consider that it was further the result of an electric pump being turned on by Rhys. In addition, Mr Speck said he would regularly check the water tank to make sure it did not run dry.

c. The tenants agree they had put one bag of rubbish in the pit that Rhys had dug in August 2024, but that was removed when the landlord raised concerns.

d. The tenants dispute that their teenage son's girlfriend lives in the premises. That confirmed she does stay occasionally overnight, but not live there.

e. The tenants agree that they did build shelves in the bedroom but did not realise this would cause problems with the landlord, and if she had asked, they would have removed the shelves. The tenants said they did not realise this would be a breach of their obligations.

Analysis

55. The Tribunal can order termination of a tenancy, but the circumstances were a termination can be ordered are limited in the RTA. Given the allegations from the landlord here, the Tribunal could order a termination of the tenancy under section 56, which is a general termination provision. Section 56 is as follows:

> **56 Termination for non-payment of rent and other breaches**
>
> (1) On an application made to it under this section by the landlord or the tenant, the Tribunal may make an order terminating the tenancy if the Tribunal is satisfied that—
>
> (a) the other party has committed a breach of any of the provisions of the tenancy agreement (including provisions relating to the payment of rent) or of this Act; and
>
> (b) in the case of a breach capable of remedy,—
>
> (i) the applicant gave to the other party a notice specifying the nature of the breach complained of and requiring the other party to remedy the breach within a reasonable period, being not less than 14 days commencing with the day on which the notice was given; and the other party failed to remedy the default within the required period; and
>
> (c) that the breach is of such a nature or of such an extent that it would be inequitable to refuse to make an order terminating the tenancy.

56. Accordingly, section 56 sets out three particular requirements in order for me to order termination, in summary:

    a. The tenant must have breached some legal obligation to the landlord (section 56(1)(a)); and

    b. If the breach is capable of remedy, the landlord issued a 14 day notice to remedy which the tenant has not complied with (section 56(1)(b)); and

    c. That the breach was of such significance, that it would be inequitable not to terminate the tenancy (section 56(1)(a)).

57. In *Vincent Dean Huff v City Central Property Management* [2020] NZDC 19229 (Judge Rowe), the Court needed to consider the extent of section 56(1)(c), which requires consideration of whether the breach:

> …is of such a nature or of such an extent that it would be inequitable to refuse to make an order terminating the tenancy.

58. The Court set out a range of factors that would be relevant to the question of equitability, being:

    1. The history of the tenancy.
    2. Whether there had been a persistent failure after repeated warnings.
    3. Whether the history of breaches was such it was unlikely the tenant would comply with their obligations in the future.
    4. Whether the breach was inadvertent or deliberately committed.
    5. The conduct of the landlord.
    6. The gravity of the breach.
    7. Whether termination is a proportionate response to the breach.

Has the tenant breached any obligations to the landlord?

59. In the circumstances of this claim, I conclude as follows in relation to these claimed breaches:

    a. **Lambs on site** – I am not persuaded that the tenancy agreement would prohibit the tenants from having a lamb. The agreement does

not prohibit the tenants having specific animals. The agreement does advise that certain animals are 'welcome' including chickens, cats and dogs and domestic animals, but strictly it does not prohibit lambs. It is arguable that keeping a pet lamb would in fact become a domestic animal. That being the case I am not persuaded that the landlord has proven there to be a breach in relation to the lamb.

b. **Running water tanks dry** – I am not persuaded that the landlord has established any legal obligation the tenant has in relation to the water tanks, and ensuring they do not run dry. The tenancy agreement does include a clause that the tenants "fill the tanks from bore when needed", but that is not an obligation the tenant had under the RTA. It must be noted that section 11 of the RTA confirms that any clause in a tenancy agreement which is inconsistent with the RTA is of no effect. There is no provision in the RTA which requires tenants to monitor or fill water tanks, especially when those tanks are used by other users on a wider property. I can see no compelling reason to find that the tenants should be responsible for a multi-user water tank. But even if that were not the case, the water tank was used by other users, so it could not be said that these tenants would be solely responsible for the water usage. The landlord has not established a breach in my assessment.

c. **Dumping of rubbish** – The evidence is that Rhy's dug a large hole on the premises. It is likely that Rhys has dumped rubbish in that hole, and the tenants accept that they had also put a bag of rubbish in the hole. There is a tenancy agreement clause of "No dumping of rubbish all rubbish to be placed into drum beside container…". There is an obligation on the tenants under section 40 of the RTA that the tenant keeps the premises reasonably clean and tidy, so this clause in the tenancy agreement is consistent with that obligation on the tenants. I find there has been a breach of the RTA in relation to the rubbish.

d. **Overcrowding** – the landlord considers that the tenants have more than the maximum number of occupants in the premises required in the tenancy agreement being 4, in particular that the tenant's son has his girlfriend living in the premises, however the landlord fairly noted that she did not have evidence to prove this claim. The tenants have accepted that their son's girlfriend does stay every now and then, but they are clear that she is not residing there. Section 40 sets out the tenant's responsibilities and confirms at subsection 3 that:

> (3) Where the tenancy agreement specifies a maximum number of persons that may ordinarily reside in the premises during the tenancy, the tenant shall ensure that no more than that number ordinarily reside in the premises at any time during the tenancy.

On the basis of the evidence available, I find the landlord has not proven that the tenant's son's girlfriend 'ordinarily resides' in the tenancy premises, so I find no breach has been proven.

e. **Shelving** – The landlord says that the tenant put shelves in the wardrobe without consent. This is a breach, because section 42 of the RTA requires that the tenant not affix any fixture to the premises without consent of the landlord.

Are the breaches capable of remedy?

60. If any breach is established, the landlord must give the tenant a notice to remedy, which the tenant does not remedy within 14 days.

61. One of the issues that does arise in these sorts of cases, is the question of what constitutes a breach capable of remedy. I note the legal text of *Residential Tenancy Law in New Zealand* (online – Westlaw), in which the editors state:

> A landlord is only required to serve a notice if the breach is capable of remedy. A promise to do something (such as paying rent) may be remedied. However, a promise not to do something (such as not use premises for an unlawful purpose), once done, usually cannot be remedied. Use of tenancy premises for an unlawful purpose, such as drug offences, cannot be remedied, so the landlord does not have to give notice to remedy and a social housing tenant who has moved to a retirement village is not capable of remedying a breach of a tenancy agreement requiring the tenant to live at the tenancy premises.

62. In relation to that consideration, I find as follows:

a. **Lambs in site –** If I were wrong in my above finding that there was no breach with the lamb, this application must fail because the landlord has not issued the tenants a 14 day notice to remedy. Certainly, this would be a breach capable of remedy. Failure to issue a notice is fatal to any application to terminate under section 56.

b. **Water tanks –** even if I were wrong in finding there was no breach, it would be a breach capable of remedy, and the landlord's failure to issue a 14-day notice means termination would not be available for this breach (if there was one). The landlord submitted that it could not be remedied because it is a breach of contract. That is not the case, breaches of contract certainly can be remedied. As an example noted above, missing a rent payment is also a breach of contract, and that can be remedied by paying the arrears.

c. **Rubbish dumping –** In my view, dumping of rubbish would be a breach not capable of remedy, because the breach occurred once the bag of rubbish was dumped.

d. **Overcrowding -** even if I were wrong in finding there was no breach, it would be a breach capable of remedy, and the landlord's failure to issue a 14-day notice means termination would not be available for this breach (if there was one).

e. **Shelving –** The evidence is that the tenant installed shelving. This would not be a breach capable of remedy, because once the shelves were affixed the breach occurred.

Would it be inequitable to refuse termination of the tenancy?

63. The final consideration under section 56 looks to whether it would be inequitable to terminate the tenancy, and I have set out above the approach supported by the District Court to that question within the appeal of *Vincent Dean Huff v City Central Property Management.* However, this consideration can only be applied for breaches that have been established, and which are either not capable of remedy, or not remedied within 14 days of any notice being given. That being the case, I can only consider a termination on the following grounds, that is dumping of rubbish and installing the shelves.

64. In terms of the dumping of rubbish, having considered the seven Huff criteria, in my view the breach is minor. I accept that the tenants had dumped one bag of rubbish only in the pit, and when concerns were raised by the landlord, the tenants removed this from the pit. The gravity of the breach is very limited, and ordering the termination of the tenancy would be entirely disproportionate to the breach.

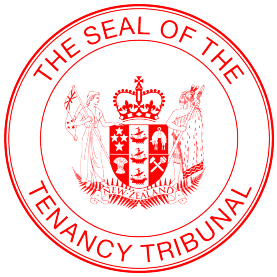
65. In terms of the shelving, again on the scheme of things this is a very minor breach. When the tenancy ends, the tenants will need to remove the shelving and make good any damage, so in reality the effect for the landlord will be limited, and her loss negligible, if any. Terminating a tenancy on for this breach would be significantly disproportionate to the breach.

FILING FEE

66. Because neither party has been wholly or substantially successful in this case, I decline to order either filing fee be paid by the other party.

NAME SUPPRESSION

67. There is no application for name suppression from either party.



N Bradley
02 December 2024

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 $260. 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.