TENANCY TRIBUNAL

Practice Note 2016/1

Tenant Liability for Damages

This Practice Note is produced in response to the decision of the New Zealand Court of Appeal in *Holler & Rouse v Osaki* [2016] NZCA 130. It reflects the findings of the Court on the matter of a tenant's right to be exonerated from liability for damages in certain situations, and in particular incorporates the relevant provisions of Part 4 of the Property Law Act 2007.

APPLICATION OF THIS PRACTICE NOTE

This Practice Note is issued pursuant to section 115 of the Residential Tenancies Act 1986 and takes effect from 1 August 2016.

It applies in all applications to the Tenancy Tribunal in which a landlord claims damages compensation from the tenant, for damage done to the tenancy premises ("the premises") during the course of the tenancy, where that damage is more than fair wear and tear.

In this Practice Note:

- "the landlord" means the owner, or his or her property manager or other authorised agent;
- "the tenant" means the person or persons named on the Tenancy Agreement as tenant parties to that agreement;
- "the Act" means the Residential Tenancies Act 1986;
- "PLA" means the Property Law Act 2007;

APPLICATIONS BY LANDLORDS FOR DAMAGES

1. In any claim by the landlord for damages the landlord must first establish, on the balance of probabilities, that the damage occurred during the course of the tenancy and that it exceeds fair wear and tear.

2. If that is established, the tenant must show on the balance of probabilities that the damage was not intentionally caused by either the tenant or any person in or on the premises with the tenant's permission. For the purposes of section 40(4) of the Act, "the lessee" in the PLA means the tenant, and "the lessee's agent" means "a person or persons on the premises with the permission, express or implied, of the tenant", reflecting section 41 of the Act.

3. Where it is established that the damage is careless, the landlord must disclose whether or not the premises are insured for the event from which the damage arose. Where the landlord holds insurance, the landlord must provide the Tribunal with the insurance policy and the Schedule to the policy, the latter being the source of the details of coverage. As with all documents submitted as evidence, two copies of the original must be provided.

4. If the landlord has insurance for the event that caused the damage in question, the tenant is exonerated from paying for the damage caused by his or her carelessness, or that of any person on the premises with the tenant's permission.

5. If the damage is intentional, the tenant does not have the benefit of the landlord's insurance. Compensation can be awarded by the adjudicator in accordance with the provisions of the Act.

6. If the damage was caused by one of the events in section 268(1)(a) of the 2007, (fire, flood, explosion, lightning, storm, earthquake or volcanic activity) the tenant is exonerated from liability for damages whether or not the landlord has insurance, unless the landlord is able to establish that the damage was:

    (a) caused intentionally; or

    (b) the result of an imprisonable offence that occurred on the premises (including the land); or

    (c) an act or omission by the tenant or his/her visitor caused the insurance moneys to be irrecoverable.

7. In the context of section 268(1)(a), "fire", "flood" and "explosion" are not required to be catastrophic natural events comparable to lightning and earthquakes. Following the Court of Appeal's direction, incidents such as cooking fires, a plug left in a sink with a tap running, and explosions generated by fireworks, are included.

RECOVERY OF THE EXCESS OR DEDUCTIBLE

8. The landlord cannot be awarded the excess. The excess is "the loss the insured has agreed to bear" in order to lower his/her costs, which is to the insurer's advantage because the insurer is spared the uneconomic cost of processing and paying out on small claims

9. The general presumption that the excess can be recovered from the party who caused the damage is over-ridden by the specific terms of Part 4 of the PLA. Although premiums and insurance cover are regarded as "costs incurred in arranging the insurance cover" and therefore recoverable outgoings, the excess represents the amount of risk which the insured agrees to accept. It therefore represents a cost of making good the destruction or damage and is covered by section 269 of the Property Law Act 2007, meaning the landlord cannot recover it.

CONTRACTING OUT

10. A residential landlord cannot rely on section 271(2), require a tenant, as a term of the tenancy agreement, to pay the excess of any claim the landlord makes against his or her insurance. Section 11 of the RTA prohibits any attempt to have the tenant contract out of rights under the Act. The right to exoneration from liability for damages where the landlord is insured is a right under the Act by virtue of section 142(2).

FOURTEEN-DAY NOTICES AND WORK ORDERS

11. Fourteen-day notices to remedy may not be issued by a landlord to require the tenant to effect repairs to damage to the property. Such matters should be brought to the Tribunal in the form of an application for a work order, to assess whether the tenant can be made to effect or pay for repairs.

12. Work orders can be made by the Tribunal where it is satisfied that the damage is intentional or where the landlord is not insured for that event.

Dated this 27th day of July 2016.

Melissa Poole
Principal Tenancy Adjudicator

This Practice Note was re-issued on 30 August 2016 to address a typographical error in para 11.