[2023] NZTT 4504952

TENANCY TRIBUNAL - Auckland | Tāmaki Makaurau

APPLICANT:	Prosperous Property Management Limited T/A Prosperous Rentals As Agent For M Cube Property Ltd Landlord
RESPONDENT:	Mohammad Sarwar Faraso, Jamila Faraso Tenant
TENANCY ADDRESS:	34 Parrish Road, Sandringham, Auckland 1025

ORDER

1. Prosperous Property Management Limited and M Cube Property Limited are granted possession of the premises at 34 Parrish Road, Sandringham, Auckland 1025 at 11.59pm on Thursday 25 May 2023.

Reasons:

1. The landlord has applied for possession of the premises following termination of the tenancy.
2. Ms Han attended the hearing for the landlord. The tenants (Mr and Mrs Faraso) did not attend. However, Mr Dean Larsen attended purporting to represent Mr and Mrs Faraso. Mr Larsen is a consultant with the law firm Doug Cowan Barristers & Solicitors. Mr Larsen said that he does not have a practising certificate and is therefore attending in his personal capacity, not as counsel.

3. The grounds for representation by a representative (other than counsel) in the Tribunal are set out in ss 93(2) and 93(5) of the Residential Tenancies Act 1986 (the Act). Section 93(2) of the Act provides that a party is entitled to be represented where the other party consents or the amount in dispute exceeds $6,000.00.

4. The amount in dispute does not exceed $6,000.00 (the application is for a possession order) and Ms Han confirmed that the landlord did not consent to Mr Larsen representing the tenants.

5. Section 93(5) provides that the Tribunal may (on the application of the party) consent to representation if the Tribunal is satisfied that for sufficient cause the party is unable to appear in person or unable to present his or her case adequately.

6. There is no application from Mr and Mrs Faraso requesting consent for Mr Larsen representing them and giving reasons why they are unable to appear or present their case themselves. As mentioned, Mr and Mrs Faraso did not attend the hearing. Mr Larsen said that Mr Faraso did not attend because he had a dental appointment and Mrs Faraso did not attend because she did not speak English. He said that he was assisting Mr and Mrs Faraso with the case because of their difficulties with English.

7. As explained to Mr Larsen at the hearing, I am not satisfied that the grounds for representation in s 93 of the Act have been satisfied. Even if Mr and Mrs Faraso had applied to be represented it would not have been granted on the reasons provided by Mr Larsen because there was not sufficient cause for either Mr or Mrs Faraso to not appear in person, and difficulties with English is not sufficient reason for being unable to adequately present their case themselves. The Tribunal can and would have appointed an interpreter to assist parties with any language difficulties.

8. I therefore made an order at the hearing that Mr Larson did not have speaking rights. Before leaving the hearing Mr Larsen presented (or rather left on the desk) a bundle of documents that I have considered. The bundle includes a brief submission.

Should a possession order be granted?

9. On 3 February 2023 the landlord served a notice on Mr and Mrs Faraso terminating the tenancy on 10 February 2023 because the premises are uninhabitable.

10. Section 59(1) and (2) of the Act provides that where, otherwise that as a result of a breach of the tenancy agreement, the premises are destroyed or so seriously damaged as to be uninhabitable, either party may give notice to the other

terminating the tenancy. The minimum period of notice that a landlord must give is seven days.

11. There is no definition of uninhabitability in the Act but there is some guidance from District Court decisions made following the Christchurch earthquakes. The principles that emerge from these cases that are relevant here can be summarised as follows:

    - Whether the premises are uninhabitable is to be decided on the particular facts of each case.
    - The Tribunal should take a liberal approach to a finding on uninhabitability and uninhabitability should be assessed in the light of prevailing conditions and expectations of the particular community at the particular time.
    - The Tribunal should consider what damage has been caused to the premises by the flood event(s) and what effect this has or might have on the tenants. When considering the effect on the tenants, the tenants personal or family circumstances should be taken into account.
    - The Tribunal should consider whether it would be unreasonable to require the landlord to reinstate the property or to require the tenancy to continue with the tenancy.

12. The landlord claims that the premises are uninhabitable because of damage caused by two flood events on 27 January 2023 and on 8 February 2023. They provided three documents in support.

13. The first is an email dated 2 February 2023 from Mr Mike Allen of Morgan Project Services, insurance assessor. Mr Allen states that he assessed the property on 27 January 2023 and found that:

    > "It was evident from the level of contaminated black water ingress throughout the entire home that there was substantial water that has caused significant unhealthy levels of moisture in the property.
    >
    > …
    >
    > This property is not habitable and will require substantial strip out, decontamination and drying. This will also cause substantial and long term disturbance to any tenant."

14. Then on 8 February 2023 Mr Allen issued a full report /scope of works in which he states:

    > "There is water damage from flood inundation less than 300mm high, this has resulted in damage to the internal linings, insulation, trims, kitchen joinery, appliances.

***** Due to the flood damaged, moisture content, contamination from black water and potential electrical concerns of the property, it is not safe or healthy environment to live in. This property is not habitable and needs to be vacated for urgent strip out, drying and decontamination *****"

15. Then on 10 May 2023, the landlord engaged Direct Construction Consulting Limited to carry out an investigation of the property to identify its current condition, and whether there are any structural and weathertight issues.

16. The investigation was carried out by Mr David Wang, a licensed building practitioner. In a report dated 10 May Mr Wang recorded that "the sub floor foundation is filled with water at a height of 160mm; large amount of water present in subfloor space could result in moisture rise up to living area, causing damp environments to its occupants". He records a finding of "highly elevated" moisture readings in the wall linings of all rooms in the house. He also states that mould growth was found on all internal ceilings and condensation build up on the living room and all bedroom windows which "could pose health hazard to its occupants". He concludes that "[t]he property is not suitable for occupancy until all remedial work is complete".

17. Mr and Mrs Faraso dispute that the premises are uninhabitable. They rely on photographs of the inside of the premises and the fact that, on 5 March 2023, the property was certified by Auckland City Council as having no restrictions on access ("White Stickered"). However, the notice states that the assessment of the safety of the building is from a "quick visual inspection of the building" where no obvious structural problems were observed but this does not mean that the building is completely safe or is not damaged. The notice recommends that the owner of the building arrange for someone to look at the building more thoroughly. I therefore put little weight on the assessment by the Auckland City Council when considering whether the property is safe and habitable because the landlords have had the premises more thoroughly inspected and the investigations have found the property to be unsafe and uninhabitable.

18. Mr and Mrs Faraso also rely on photographs provided of the inside of the premises to support their claim that the premises are habitable. However, much of the damage identified by the insurance assessor and the builder is damage that is not easily captured in photographs, in particular, the high moisture levels, and the contamination due to black water ingress.

19. After carefully considering all of the evidence and the principles set out above (in paragraph 12) I am satisfied that it is more likely than not that the premises have been so seriously damaged as to make them are uninhabitable. Of particular concern is the very high moisture levels inside the house which is the likely cause of the mould growth, and the contamination of the premises by the ingress of black water, which can cause serious health issues for the family (Mr and Mrs Faraso live in the premises with their four children). It is also clear that the

premises require substantial remedial work which is likely to take considerable time and it would be unreasonable and possibly unsafe for a family of six to remain in the tenancy while this occurs.

20. I therefore make a possession order in favour of the landlords to take effect on 25 May 2023.



R Merrett
18 May 2023

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.