TENANCY TRIBUNAL - Auckland | Tāmaki Makaurau

APPLICANT:	Ray White Remuera Property Management Limited As Agent For Chunyan Yang Landlord
RESPONDENT:	James Mckenzie, Kelly Hedley, Campbell Paton, Fintan Christopher Minehan, Andrew McCombie, Arthur Denis Alfred Caughley, Henry Thomson Tenants
TENANCY ADDRESS:	59C Onslow Avenue, Epsom, Auckland 1023

ORDER

1. By consent, the tenancy of James Mckenzie, Kelly Hedley, Campbell Paton, Fintan Christopher Minehan, Andrew McCombie, Arthur Denis Alfred Caughley and Henry Thomson at 59C Onslow Avenue, Epsom, Auckland 1023 is terminated, and possession is granted to Ray White Remuera Property Management Limited As Agent For Chunyan Yang, at 11.59 pm, Friday, 19 May 2023.
2. Ray White Remuera Property Management Limited As Agent For Chunyan Yang must pay James Mckenzie, Kelly Hedley, Campbell Paton, Fintan Christopher Minehan, Andrew McCombie, Arthur Denis Alfred Caughley and Henry Thomson $1,468.68 being compensation for electricity immediately.
3. Ray White Remuera Property Management Limited As Agent For Chunyan Yang and James Mckenzie, Kelly Hedley, Campbell Paton, Fintan Christopher Minehan, Andrew McCombie, Arthur Denis Alfred Caughley and Henry Thomson must comply with rent reduction and compensation for breach of quiet enjoyment in the table below.

Description	Tenant
Compensation: Electricity - 13 commercial dehumidifiers	$1,468.68
Compensation: Rent reduction by 70% (27/01/23 to 16/02/23)	$3,465.00
Compensation: Rent reduction by 50% (17/02/23 to 06/03/23)	$2,121.43
Compensation: Rent reduction by 30% (07/03/23 to 19/05/23)	$5,232.86
Compensation: Breach quiet enjoyment	$100.00
Total award	**$12,387.97**
Total payable by Landlord to Tenant	**$12,387.97**

Reasons:

1. Both parties attended the hearing.
2. Ms Gao and Mr Farmer appeared jointly as agents for the landlord. They both addressed me and made oral submissions on behalf of the landlord. In the judgment below, “landlord” reflects either Ms Gao or Mr Farmer or jointly.
3. All tenants appeared before me except Ms Hedley due to work commitments. There was no suggestion that Ms Hedley was unaware of the hearing date. Since the tenants are jointly and severally liable under the tenancy agreement, I consider it appropriate to continue the hearing in Ms Hedley’s absence. Mr Paton was the representative of the tenants who addressed me. Mr McKenzie addressed the issue that Ms Gao entered the premises without consent on 6 March 2023. The outcome of this judgment is binding on all tenants, irrespective of who addressed me in the hearing.
4. On 27 January 2023, extreme weather caused flooding in many suburbs of Auckland. The properties affected by the flood were likely to face the issue of whether the premises were destroyed or so seriously damaged as to be uninhabitable, wholly or partially.
5. It is difficult to decide on the appropriate rent reduction because there is no fixed formula I can follow. Each case has its unique facts and circumstances.

Background

6. The tenancy is a fixed-term tenancy. It commenced on 21 May 2022.
7. The property is in a suburb near Cornwall Park with good access to public transport. Mr Farmer submitted that the house has four bedrooms. There are:
    a. Three bedrooms upstairs. 2 have ensuite. The third bedroom uses the toilet and shower upstairs.
    b. One bedroom with ensuite downstairs.

c. Two open living spaces downstairs. One of the open spaces is used as a kitchen. The other can be closed as a “room”.

8. Mr Paton did not dispute that the house has four bedrooms but submitted that one of the open living spaces downstairs is a “bedroom” because they could use the space however they prefer.

9. Both parties presented their case well. They both worked together as much as they could. They both appreciate 27 January 2023 flooding was an act of God.

10. Before the flooding on 27 January 2023, the relationship between the parties was “manageable”. I use the word “manageable” because there were tenancy issues before 27 January 2023 between the parties, but they were able to keep their relationship workable.

11. For instance, Mr Farmer submitted that there were noise complaints from the neighbours. On the other hand, Mr Paton complained that the communication between the parties was unsatisfactory.

12. The flooding on 27 January 2023 was the turning point between the parties. Mr Paton said they longer have confidence in the landlord because they do not believe the landlord will respect their rights, and they felt the landlord acted dishonestly in their dealings with them.

13. The issue the tenants took exception to was that on 6 March 2023, Ms Gao entered the premises and took photos downstairs without consent. I will address this complaint below.

14. Mr Paton submitted that he should receive a reduction in rent because he was unable to enjoy what he had bargained for. Mr Farmer did not dispute that rent should be reduced.

15. The issue for adjudication is the appropriate rent reduction reflecting the tenants’ loss of amenity, quiet enjoyment and free from any inconvenience such that 13 dehumidifiers were running simultaneously to keep the house dry, and dirt carried up from downstairs to upstairs. Mould started growing; the garage became a storage area after flooding because the tenants had to put their furniture somewhere. Undoubtedly, the tenants experienced a significant amount of stress and had to seek alternative accommodations until the damage caused by the flood was under control.

16. The tenants offered the landlord a rent reduction of 40% between 27 January 2023 and 16 February 2023 (“the first period”). 16 February 2023 was the date major works started on the property.

17. The tenants further offered the landlord a rent reduction of 80% from 17 February 2023 to the end of the tenancy.

18. Mr Farmer, on behalf of the landlord, offered the tenants a $300 or 18% rent reduction.

19. Unsurprisingly, the parties were too far apart to settle before the hearing.

20. After the hearing commenced and me having the opportunity to hear the submissions from both parties, the parties agreed the issue was the appropriate rent reduction from 27 January 2023 to the end of the tenancy.

21. I encouraged the parties to discuss the appropriate rent reduction if they would like the opportunity. They did. I adjourned the hearing for 15 minutes for them to discuss the appropriate rent reduction they could agree to.

22. When the hearing resumed, both parties informed me of their respective offer:

    a. The landlord offered a 50% rent reduction covering the period from 27 January 2023 to the end of the tenancy as a full and final settlement of all the disputes before me.

    b. The tenants asked for a 60% rent reduction covering the same period, excluding the complaint relating to unlawful entry and taking photos.

23. As the parties were unable to settle their differences, I told the parties I would consider the case and decide on the appropriate rent reduction.

24. Concerning Ms Gao's unlawful entry on 6 March 2023, the complaint was that she entered the premises without consent and took photos downstairs for insurance purposes. Mr Paton did not dispute that Ms Gao notified him via text messages on 3 March 2023 that "a tradesperson" would come to the property to arrange a quote for the flooring reinstatement on 3 March 2023 and the floor and kitchen cabinet contractor on 6 March 2023. Each text message ended with "Thanks – Ray White Remuera Property Management" and "… thanks Ray ~~White Remuera PM team".~~

25. Despite disagreements in rent reduction and an allegation of unlawful entry, both parties agreed to terminate the tenancy on 19 May 2023. Mr. Farmer agreed to reimburse the tenants $1,468.68 for the electricity used by 13 commercial dehumidifiers. The tenants accepted this offer.

26. I will first address the allegation that Ms Gao allegedly entered the premises without consent and took photos on 6 March 2023.

27. I then address the issue of rent reduction.

Did Ms Gao enter the premises without consent on 6 March 2023?

28. A landlord or authorised agents may not enter the premises during the tenancy except with the tenant's consent, in an emergency, or after giving the required notice for inspections, repairs, and maintenance. See section 48(1) and (2) Residential Tenancies Act 1986.

29. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $1,500.00. See section 48 (4)(a) and Schedule 1A Residential Tenancies Act 1986.

30. Mr McKenzie submitted that he did not dispute that “a tradesperson” had consent to enter the premises on 3 March 2023 and the floor and kitchen cabinet contractor to enter the premises on 6 March 2023. Mr McKenzie disputes that the consent was extended to Ms Gao to enter the premises on 6 March 2023.

31. Mr McKenzie submitted that even if I were to find Ms Gao did have consent to enter the premises, she nevertheless exceeded the ambit of the consent. Mr McKenzie submitted that the consent was for Ms Gao’s contractor to do the floor and kitchen cabinet downstairs. It was not for taking photos for insurance purposes.

32. Ms Gao submitted that she went to the premises because she did not receive a reply indicating she did not have consent to enter. She accepted that she took photos downstairs for insurance purposes.

33. Section 48(1)(a) RTA states that Ms Gao shall not enter the premises during the currency of the tenancy agreement except with the consent of the tenant(s) freely given immediately before the time of entry.

34. In my view, Ms Gao had consent to enter the premises for the following reasons:

    a. There is no dispute that on 3 March 2023, the tenants received a text message at 8.57 am from the landlord’s agent notifying them that a tradesperson would come to the property at 12.15 pm.

    b. There is no dispute that on 3 March 2023, the tenants received another text message at 4.31 pm from the landlord’s agent notifying them that the contractor for the floor and kitchen cabinet would come on 6 March 2023 between 10 and 10.30 am.

    c. The two text messages of 3 March 2023 to the tenants ended with “Thanks – Ray White Remuera Property Management” and “… thanks Ray White Remuera PM team.”

    d. Ms Gao is an employee of Ray White Remuera Property Management Ltd and an authorised agent on behalf of the landlord.

    e. Mr McKenzie submitted that he saw Ms Gao just before she entered the premises.

    f. Ms Gao’s entry was part of her responsibility as the property manager.

35. Accordingly, Ms Gao did not commit an unlawful act.

Did Ms Gao breach the tenants' quiet enjoyment?

36. Section 38(2) of the Residential Tenancies Act 1986 (the Act) states that the landlord must not cause or permit any interference with … privacy of the tenants in the use of the premises by the tenants.

37. Ms Gao did have consent to enter the premises on 6 March 2023. But, the consent was not for "routine inspection". It was for a contractor or contractors working on the floor and kitchen cabinet to enter the property and work on the floor and kitchen cabinet.

38. In my view, it is the taking of photos without notifying the tenants that Ms Gao breached the tenants' privacy in the use of the premises by the tenants.

39. There was no unauthorised entry to the premises. The tenants' privacy was unintentionally interfered with due to an oversight by Ms Gao.

40. Reaching this conclusion does not mean I agree with the tenants' submissions that Mr Farmer or Ms Gao did not respect their rights and acted dishonestly. On the contrary, I find Mr Farmer and Ms Gao's evidence reliable and credible. No issue whatsoever with Mr Farmer and Ms Gao's honesty.

41. My view is that Mr Farmer and Ms Gao acted professionally in the circumstances. The demand for their services must be high after 27 January 2023. As I have indicated above, it was an oversight on Ms Gao's part.

42. I accept that the tenants felt their privacy was interfered with on this occasion.

43. Accordingly, an award of $100 is appropriate.

Rent reduction

Section 59 – Destruction of premises consideration

44. Section 59 of the Act provides that rent shall abate accordingly where part of the premises has been so damaged as to be uninhabitable.

45. Both parties provided photos showing the damage caused by the flood. I have no difficulty in concluding that the downstairs was seriously damaged, and it was uninhabitable.

46. In my view, the initial three weeks between 27 January 2023 and 16 February 2023 ("the first period") would be the most challenging period the tenants had to endure. Stress, sleeping on the landing area upstairs at times, conditions of the living environment (smell, humidity and dirt … etc.), and uncertainty about their future at the property … etc.

47. The contractors would come and go between 17 February 2023 and 06 March 2023 ("the second period"). Downstairs could be used but not to the extent of pre-flooding on 27 January 2023. I accept that the tenants would not have been

able to use the entire downstairs as they used to. There was noise, loss of quiet enjoyment and loss of amenity. There were health and safety concerns because the wooden floor had been ripped up, and there were exposed nails, screws, electrical wires and tack boards.

48. The parties agreed to terminate the tenancy on 19th May 2023. Mr Farmer gave evidence that from 7 March 2023, he did not instruct any contractors to the premises for any work related to the damage caused by the flood. The landlord wants to do major work after the tenants vacate the premises. The period between 7 March 2023 and 19 May 2023 is “the third period”.

49. From the photos submitted into evidence, it would appear the conditions of the downstairs were “improved”. But the loss of amenity and use of the downstairs the way before flooding continued. There is no evidence from the tenants that downstairs conditions were the same as in the first or second periods. The tenants accepted they could use the shower upstairs, and the power supply was not interrupted.

50. The tenants' approach in calculating rent reduction was based on loss of use downstairs, inconvenience, loss of quiet enjoyment and conditions of the house in general.

51. The landlord did not dispute that a rent reduction was warranted.

52. The better approach is to consider the overall loss of amenity caused by the loss of the downstairs in different periods.

53. After considering all the circumstances, I have concluded that the rent should be reduced:

    a. by 70% from $1,650 to $495 weekly for three weeks in the first period (27/01/23 to 16/02/23 or three weeks).

    b. by 50% from $1,650 per week to $825 per week in the second period (17/02/23 to 06/03/23 or two weeks and four days).

    c. by 30% from $1,650 weekly to $1,155 weekly in the third period (07/03/23 to 19/05/23 or ten weeks and four days).

54. I have been informed that the tenants have not paid their full rent. During the hearing, both parties agreed to work out the exact amount of outstanding rent, who should pay whom, and how much after my decision is released to them.

Name suppression

55. The tenants were not wholly or substantially succeed in proceedings. I decline to order suppression.

Filing fee

56. Both parties were partly successful in their respective applications.

57. Costs lie where they fall.



M Kan
08 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 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.