

Order of the Tenancy Tribunal

Residential Tenancies Act 1986

Office of the Tenancy Tribunal

Tenancy Tribunal at Pukekohe

Tenancy Address

39b Gibson Road, Tuakau 2121

Applicant

Full Name	
Yvette Sharnell Visagie	Tenant
Adriaan Visagie	Tenant

Respondents

Full Name	
Harper Property Management Ltd	Agent
Tom Sebastian	Landlord

Order of the Tribunal

The Tribunal hereby orders:

1. Tom Sebastian to pay Yvette Visagie and Adriaan Visagie the sum of **\$7,525.00** immediately calculated as follows:

Rent refund (partial refund only)	\$3,500.00
Disposal costs for contaminated belongings	\$4,025.00
Amount payable by Landlord to Tenant	\$7,525.00

2. The tenants' claims for storage costs and general damages are dismissed.

(Sections 2, 77, 78 and 85 Residential Tenancies Act 1986 ("RTA"))

Reasons:

1. Both parties attended the hearing.
2. This matter involved an application by the former tenants of the subject premises seeking compensation from their former landlord in respect of the premises being contaminated with methamphetamine residue.
3. The tenancy commenced on 8 August 2015 and ended in November 2015.
4. It was common ground between the parties during the hearing that testing of the premises in November 2015 revealed that the premises were contaminated with methamphetamine residue at levels exceeding the 0.5 micrograms per 100 cm² level specified in the Ministry of Health's *Guidelines for the Remediation of Clandestine Methamphetamine Laboratory Sites* (2010) ("the MoH guidelines")
5. A subsequent written report containing details of testing results for nine items of the tenant's furniture in the premises revealed that six of those items had been contaminated with methamphetamine residue at levels exceeding the 0.5 micrograms per 100 cm² level specified in the MoH guidelines. In respect of two of the items of furniture tested the results indicated the presence of 'pre-cursors' commonly used for the manufacture of methamphetamine.
6. The former tenants, Ms & Mr Visagie, gave evidence as to the awful consequences that living in a house contaminated with methamphetamine had for them and their family. This included evidence as to ongoing physical and mental health conditions, contamination of their belongings (which must be disposed of), significant financial costs and stress and upset.
7. Much of the evidence given both parties during the hearing was focused on whether the landlord knew, or ought to have known that the premises were contaminated with methamphetamine residue.
8. Ms Visagie gave evidence as to being advised by neighbours, after they had moved into the premises, of prior "drug activity" at the premises and she said that the Police subsequently told her that the address was 'known' to them. Ms Visagie also produced a copy of an email she sent to the landlord's property agents about a week after they moved in which noted a smell "like alcohol" was present inside the house.
9. The evidence from both the landlord and his agents was that they did not know that the premises were contaminated. Mr Sebastian purchased the subject premises just prior to the tenancy commencing and had had no dealings with the former tenants who were tenants of the person he purchased the property from. Mr Harper stated that the reference in Ms Visagie's email to a smell "like alcohol" in the premises had not been noticed by him and did not raise any 'red flag' for him about possible drug contamination - he said that this matter is the first time he has encountered methamphetamine contamination of premises in his 12 years working as a property manager.
10. Although, for the reasons set out below, I consider that the issue of the landlord's knowledge has no bearing on my decision I record here that I accept that the landlord and his agents had no actual knowledge of the contamination and the evidence fell short of establishing that they ought to have known about the contamination of the premises as at the commencement of the tenancy.

11. Ms Visage claimed that the landlord had a responsibility to provide her family with a clean and safe property to live in.
12. The rights and obligations of parties to a residential tenancy agreement in New Zealand are as set out in the RTA, in the tenancy agreement between the parties and in accordance with the general law, particularly as it relates to the law of contract.
13. Section 45 RTA is headed "Landlord's responsibilities". This section includes provisions that require the landlord to: (a) provide the premises in a reasonable state of cleanliness, (b) provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes and (c) comply with all requirements in respect of buildings, health and safety under any enactment so far as they apply to the premises.
14. As occurred in the present case, section 59 provides for the termination of a tenancy, on very short notice, where the premises are so seriously damaged as to be "uninhabitable". This Tribunal has previously determined that contamination of premises with methamphetamine residue at levels exceeding the 0.5ug level specified in the MoH guidelines amounts to damage to the premises - (cases).
15. The words "habitable" and "uninhabitable", as used in sections 45 and 59 respectively, are not defined in the RTA.
16. The RTA does not explicitly require residential premises to be habitable. However in my view a presumption in the RTA as what may be called a 'basic habitability of premises' is the foundation upon which the landlord's obligations as set out in section 45 RTA rest. Thus, for example, it is possible for premises to be unclean but still be habitable or to be in need of repairs but still habitable.
17. The tenancy agreement that was signed contains no express term that the premises are habitable.
18. I find that it was an implied term in the residential tenancy agreement between the parties that the subject premises were 'habitable', or in ordinary language 'fit to be lived in'.
19. Analysis by legal scholars and academics of the various 'tests' that have been applied by the courts in cases concerning the issue of implied terms in contract law fill many pages of the legal literature. These reasons are not the place to digress with such a review. I simply note here that in **McNeil v Gould** (2002) NZ ConvC 193,557 at paras [25] to [27] the Court of Appeal approved of the following formulation:
20. "[A] court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations; first, where it is necessary to give business efficacy to the contract, and secondly where the term implied represents the obvious, but unexpressed, intention of the parties".
21. That residential premises are 'fit to live in' must represent the obvious, but unexpressed, intention of all landlords and tenants in entering into a residential tenancy agreement in New Zealand.
22. **McFadyen & Binks v Epsom Management Ltd** (DC Wellington, CIV 2013-085-00021, 6

March 2013), concerned an appeal from this Tribunal in which both parties accepted that the subject premises had had a problem with some form of unknown contamination that affected the tenant's health and ability to remain in the premises.

23. In **McFadyen**, Judge Thomas stated that "*The starting point in my decision is whether the premises...were **fit for the purpose of a residential tenancy***" and concluded that "*...the tenants were not provided with **habitable premises***" (emphasis added).
 24. The notion that terms may need to be implied in residential tenancy agreements is not novel or exceptional.
 25. In **Woollams v Simpson** (DC Auckland, CIV-2005-004-1583, 16 March 2006) Judge McElrea held that it was an implied term in the tenancy agreement that a landlord would provide water rates accounts to a tenant at regular intervals, rather than belatedly, so as to enable payment to be made. The Court's decision in **Woollams** has been consistently applied by this Tribunal subsequently, and perhaps even weekly given that the issue it concerned is frequently raised in this jurisdiction.
 26. In **Tomlinson v Mittal** (TT Auckland, 08/05574/AK, 4 February 2009, Adjudicator Maidment) the Tribunal held that it was an implied term of the tenancy agreement that the landlord of an inner city apartment would provide curtains or blinds of sufficient quality to provide privacy and shield the occupants from intrusion by exterior light at night.
 27. As I have determined that it was an implied term of the tenancy agreement that the premises would be habitable/fit to live in, the issue of whether or not the landlord knew, or ought to have known, that the premises were contaminated with methamphetamine residue is immaterial.
 28. Instead, the question that must be answered is whether or not the landlord breached this implied term in the tenancy agreement or, put another way, did the contamination of the premises with methamphetamine residue mean that it was uninhabitable or not fit to live in?
 29. Although the MoH guidelines make clear that they do have not statutory effect and are advisory only, I consider that they are of primary importance in determining whether or not the premises were fit for tenants to live in.
 30. Section 3A of the Health Act 1956 provides for the function of the Ministry of Health in relation to public health as follows:
 31. "**Function of Ministry in relation to Public Health** Without limiting any other enactment or rule of law, and without limiting any other functions of the Ministry or of any other person or body, the Ministry shall have the function of improving, promoting, and protecting public health".
 32. The issuing of the MoH guidelines is consistent with the Ministry's function of protecting public health.
 33. The MoH guidelines state (at page 71):
 34. "*Exposure to the chemicals and by-products of illicit drug manufacture of methamphetamine can cause serious adverse health effects, and in extreme cases, be fatal. Young children are particularly vulnerable, partly because of their lower tolerance to chemical exposure but also because they are more likely to come into contact with contaminated surfaces through crawling and putting objects in their mouths*".
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35. And page 72 of the MoH guidelines:
36. *"An abandoned laboratory in a domestic residence poses risk to any unwitting future occupants. Adverse health effects have been reported in subsequent occupants of suspected former laboratory sites that have not been adequately remediated (Burgess 1997). Throat irritation, nausea, respiratory difficulties and headaches account for the majority of reported symptoms. In addition, there have been reports of medical staff suffering adverse effects from exposure to patients who were contaminated by clan meth labs which demonstrates the ease of contamination transfer (Irving and Sutherland 2006)".*
37. In terms of the occupation of premises formerly used as a 'meth-lab', the MoH guidelines state:
38. *"In an effort to determine a level of methamphetamine at or below which the site remediation process could be considered adequate for the protection of people who would subsequently reoccupy a dwelling, the Ministry of Health has evaluated the current remediation guidelines used overseas, in particular in the United States. The Ministry of Health currently recommends that surface wipes for methamphetamine not exceed a concentration of 0.5 µg/100 cm² as the acceptable post-remediation re-occupancy level for a dwelling that has been used as a clan meth lab".*
39. Implicit in the advice contained in the extract cited above is that the health of people is not protected when occupying a dwelling where the level of methamphetamine contamination exceeds 0.5ug/100cm².
40. Both the relevant New Zealand and Australian (Federal) guidelines are squarely directed at the remediation of residential premises formerly used as clandestine drug laboratories.
41. Whilst the presence in two of the samples from the tenant's furniture of 'pre-cursor' chemicals could suggest that the subject premises were used to manufacture methamphetamine, the evidence adduced did not establish this as being more probable than not. In this regard however, the following statement at page 16 in the Australian guidelines is apposite:
42. *"Methylamphetamine synthesis (or "cooking") operations will contaminate inside surfaces of buildings with residual methylamphetamine. **Studies have also established that smoking methylamphetamine will likewise contaminate the inside surfaces of buildings with methylamphetamine. Regardless, the presence of methylamphetamine on inside surfaces at a level of greater than 0.5 micrograms (µg) per 100cm² is considered unacceptable**" (emphasis added).*
43. Accordingly, if the contamination is above the 0.5 micrograms level then the premises are not fit to be occupied whether the cause of the methamphetamine contamination was 'cooking' or smoking.
44. Because the inside surfaces of the subject premises were found to be contaminated with methamphetamine residue at levels exceeding 0.5ug per 100cm², I find that the subject premises were not fit to be lived in and the landlord breached the implied term of the tenancy agreement that the premises were habitable.
45. The tenants are therefore entitled to be compensated for any loss that they proved in accordance with the usual principles of the law of damages.
46. The tenants claimed: (a) \$7,275.00 being full refund of the rent they paid for the duration of the

tenancy, (b) \$4,025.00 being the costs of disposing of their contaminated possessions, (c) storage costs up to the date of hearing in the sum of \$890.00 and (d) general damages for stress, inconvenience and upset.

47. The essence of the tenants' claim for a full rent refund is that, in a legal sense, there was a total failure of consideration in that they did not receive what they bargained for - premises that were habitable. I do not accept that there was no benefit at all received by the tenants from the tenancy agreement, at the very least they obtained accommodation for more than three months even if that accommodation was fraught with problems for them.
48. This is not a matter where the tenancy itself was the result of an illegal contract.
49. Accordingly I do not consider that an order requiring the landlord to refund all of the rent paid is appropriate or would be just. As a useful 'cross-check' for my finding in this regard, I also note that I consider that an order that required the landlord to refund all of the rent to the tenants would not be in accordance with what I consider to be the substantial merits and justice of this case - see section 85(2) RTA.
50. I determine that the tenants are entitled to be refunded by the landlord for the rent they paid in the sum of \$3,500.00 as compensation for the landlord's breach.
51. I am satisfied that the landlord should pay for the costs incurred by the tenants in disposing of their contaminated possessions and that such costs were a foreseeable consequence of the landlord's breach of the implied term.
52. I am not satisfied that, on the evidence put before the Tribunal, the ongoing storage costs claimed by the tenants meet the legal tests applicable to foreseeability of loss and the claim for these costs must be dismissed for this reason.
53. The tenants' claim for general damages for distress is problematic. The purpose of contractual damages is to put a plaintiff/applicant in the same position, as far as money can, that he or she would have been in had the contract not been broken: see **Bloxham v Robinson** (1996) 7 TCLR 122 (CA) at 133.
54. Quite understandably given that the parties were not legally represented, neither party provided any legal submissions on this issue.
55. In **Bloxham** the majority of the Court of Appeal held that those who breach contracts are only likely to be liable to pay general damages for distress suffered by a plaintiff when one of the objects of the contract is to safeguard the innocent party from losses of that kind.
56. The majority in **Bloxham** relied on the statement of principle by Bingham LJ in **Watts v Morrow** [1991] 4 All ER 937 who said at 959-60: "*A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy. But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exception category of case it would be defective*".
57. In the present case, the object or purpose of the tenancy agreement was to give the tenants

the right to occupy the premises in consideration for rent - see the definition of "tenancy" in section 2 RTA. In my view it cannot be said that the object of the tenancy agreement was to provide "pleasure, relaxation, peace of mind or freedom from molestation" - see, for example, **Pier v Imation Holdings Ltd** (HC Auckland, CIV 2005-404-503, 5 December 2006, R Hansen J.).

58. Recently, the Court of Appeal stated "*The law may properly be described as uncertain in this area; for example, we refer to the majority and minority judgments in Bloxham v Robinson, in which competing views are expressed by McKay and Temm JJ, and Thomas J.*": **Ma v Tay** [2014] NZCA 608.
59. Section 78(1)(h) RTA provides that this Tribunal has jurisdiction to make any order "that the High Court or a District Court may make under any enactment or rule of law relating to contracts".
60. I consider that I am required to take a cautious approach when the state of the law as to general damages for distress for breach of contract has been described by the Court of Appeal as uncertain. I also consider that I am bound by the decision in **Bloxham**. Accordingly, I make no award of general damages in this case.
61. Although the agent was named as a party, the above orders are made against the landlord only because the tenancy agreement makes clear that the agent was executing the tenancy agreement as agent only and on behalf of a named principal, Mr Sebastian. There was no suggestion from any party that the agent acted outside the scope of its' authority at any time and such as to give rise to any liability for the agent.
62. Finally I recognise that, in a pragmatic sense, the effect of this decision is that the landlord is liable for the consequences of the methamphetamine contamination of the premises he rented to the tenants even though he himself had no knowledge of the contamination.
63. The scourge of methamphetamine manufacture and use that is affecting many lives and communities throughout New Zealand has been well publicised by the media throughout 2015 and 2016. Any landlord who, in 2015 or 2016, rents out his or her premises without having it tested for methamphetamine contamination at the commencement of the tenancy is taking on a large risk in a number of respects.