

DAMAGE BY TENANTS: TENANCY TRIBUNAL GUIDELINES ON TENANTS' IMMUNITY

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Who pays when residential tenants carelessly damage their rental properties? The Court of Appeal confirmed earlier this year that, in most cases, it will be the landlords or their insurer.

One evening in 2009, Mrs Osaki was cooking dinner in her rental home. She left a pot of oil on a hot stove and went out to attend to her children. Her inattention caused a serious fire and left her landlord's insurers with a huge bill. Ultimately, it also caused a shift in the allocation of risk for damage to property from tenants to their landlords. The final chapter in litigation brought by the insurer was the Court of Appeal decision in April this year.

Until the Osaki case, it was thought that tenants of residential properties could be made to pay where they cause damage. The Court of Appeal ruled otherwise, bringing residential tenancies into line with commercial tenants, with the notable difference that commercial landlords can pass on the cost of insurance premiums to their tenants.

Under the Property Law Act 2007 (PLA), tenants will now be exempt from liability for unintentionally causing damage to their leased property in certain situations. In simplified terms these are:

- For certain types of damage, such as fire, flood, storm or explosion, etc. This is not limited to natural disasters but includes damage from incidents such as cooking fires or flooding when a tap is left running. Although the wording of section 169 PLA refers to the exemption arising "if the landlord is insured", case law under this section has established that the exemption applies whether or not the landlord has taken out insurance, or is fully covered.
- Where other types of peril are covered by the landlord's insurance.

Tenants do not have complete immunity. They will be liable where the damage was intentional or occurred while committing an imprisonable offence, or where the tenant has done something that means the landlord isn't covered. For example, secretly running a business from the property which causes a fire.

On 26 July 2016, the Tenancy Tribunal issued a practice note on the decision. It includes consideration of the practical effects of the Osaki judgment. There are many and various legal issues that arise from the practice note, and indeed the decision itself. We cannot cover them all in detail here, and some will require test cases before we can know how the law will develop. However, following are some of the key issues.



Terminating the lease

Under sections 55 and 56 of the Residential Tenancies Act 1986 (RTA), landlords can cancel a lease where a tenant breaches conditions of their tenancy. Serious misdemeanours (e.g. causing substantial damage), are dealt with under section 55. For less severe damage and breaches capable of being remedied, a landlord must give their tenants a minimum of 14 days to remedy before the Tribunal will sanction termination of the lease under section 56.

The Tribunal's practice note prohibits landlords from issuing these notices where their tenant's breach relates to property damage – even in cases where the tenants would be liable as it is not fire or flood etc. and not covered by insurance. It remains to be seen whether this blanket requirement will be challenged as being outside the jurisdiction of the Tribunal on the grounds that it is inconsistent with landlords' rights under the RTA.

Policy excess

The practice note states that landlords cannot recover the insurance excess from their tenants. This is not a point that was addressed in the Court of Appeal's decision, but it follows from the interpretation of the PLA whereby the source of the immunity arises from the type of 'peril' involved, rather than whether or not there is insurance for it. If the damage is caused by a peril, or event, of the specified kinds (fire, flood or a different peril for which there is insurance), that is damage for which the tenant has full immunity, including a portion that isn't covered by insurance because it falls under the excess or if it exceeds the sum insured.

Other sections in the PLA

The practice note states that the Tribunal will give priority to the terms of the RTA that prohibit contracting out rather than allowing a landlord to rely on section 271 PLA. The Tribunal's reasoning is that the immunity under the PLA is a right that has been imported to the RTA. The effect of this is that it is a broader right than that enjoyed by commercial tenants whose landlords can note in the lease that there is no insurance against fire and flood so that is at the tenant's risk. The practice note suggests that as this right is not available to residential landlords, they will then be liable for fire and flood damage even where there isn't insurance, without the option of agreeing otherwise with the tenant.

The Court of Appeal's decision does not allow for a piecemeal importation of rights but found that the principles in that part of the PLA can be relied upon under the RTA. Arguably that should include section 271 which overrides section 269. Perhaps it should even include 270 PLA to claim increased premium or excess costs in future claims from careless tenants, despite the RTA prohibition on charging a tenant for outgoings. It remains to be seen how these issues will be dealt with by the Tribunal. ▲

Tips for property managers in light of Osaki:

- Many landlords will be unaware of the changed landscape in relation to property damage. Communication is key to avoiding unrealistic expectations when damage is found.
- Diligence around the selection of tenants and monitoring of the property is essential. Any reluctance on the part of landlords to pay for regular inspections can be countered by the need to check on the condition of the property regularly so that prompt notice can be given to insurers.
- Landlords should be encouraged to take note of the terms of their insurance policy. If damage is not covered because landlords have not complied with the terms of their policy (for example by failing to let the insurer know that the property is tenanted), they will foot the bill if the insurer declines the claim, not the careless tenant.
- Although it is not a property manager's role to provide financial or insurance advice, if asked, landlords should be made aware of the limits of a tenant's liability for damage and the need for comprehensive insurance. Tenants have full immunity for damage from fire, flood etc even if their landlord only has partial insurance cover, leaving the landlord having to pick up the balance of the repair costs.

“UNDER THE PROPERTY LAW ACT 2007 (PLA), TENANTS WILL NOW BE EXEMPT FROM LIABILITY FOR UNINTENTIONALLY CAUSING DAMAGE TO THEIR LEASED PROPERTY IN CERTAIN SITUATIONS. FOR CERTAIN TYPES OF DAMAGE, SUCH AS FIRE, FLOOD, STORM OR EXPLOSION, ETC.”

This article is intended to provide general information on legal developments, it is not legal advice. To discuss this or a particular property or contractual dispute, please contact Sarah Wroe, on 021 598 543 or sarah@jonesandco.nz.