

BETWEEN

AEY

APPLICANT

AND

ZUX

RESPONDENT

AND

ZUW LTD

SECOND RESPONDENT

Date of Order:

19 August 2011

Referee:

Referee Benson

ORDER OF THE DISPUTES TRIBUNAL

The Tribunal hereby orders that ZUW Ltd is to pay \$1,500 to AEY within ten days of the date of this order. The claim by AEY against ZUX is dismissed.

Facts

[1] AEY (the landlord of a residential property) sought \$1,500 from the Respondents (the managing agents) to recover funds paid by the agent to tenants.

[2] AEY employed ZUW Ltd to act as his managing agent in respect of his residential property in Auckland.

[3] On 28 November 2010, the property was let to GH and LF (“the tenants”).

[4] On 23 January 2011, ZUX (on AEY’s instructions) advised the tenants that the property was for sale.

[5] The selling agent (PD) arranged photographs and marketing and, from 5 February, open homes were held at the property.

[6] The tenants objected to the circumstances of the open homes and brought a claim in the Tenancy Tribunal against ZUW Ltd and AEY for compensation for breach of quiet enjoyment (s 38 of the Residential Tenancies Act 1986).

[7] ZUX filed a counterclaim on behalf of AEY for rent arrears, compensation (or exemplary damages) for “loss of sale”, and refund of the bond.

[8] The Tenancy Tribunal, on 24 March 2011, heard the claim and, on 12 May 2011, dismissed the counterclaim, ordered a rent reduction of \$150 per week from 26 January to 4 March 2011, and ordered ZUW Ltd to pay \$1,500 to the tenants as exemplary damages for breach of quiet enjoyment and harassment.

[9] ZUW Ltd paid the exemplary damages to the tenants and deducted that sum from rent collected for AEY as landlord.

Issues

[10] The issue as to whether AEY was entitled to recover \$1,500 from the Respondents was decided on the evidence (on the balance of probabilities) and the law of agency.

[11] Under the law of agency, an agent had a right to be indemnified by the principal for all losses and liabilities incurred in execution of the agency. However, where expenses or liabilities only arose because of the agent's fault, it was obvious that there was no liability to indemnify (see Peter Watts (ed) *Bowstead and Reynolds on Agency* (19th edn, Sweet & Maxwell 2010) at paras 7-056 and 7-065; see also *Laws of New Zealand Agency* (online ed) at paras 99 and 100).

[12] In the present case, the agency contract was between AEY and ZUW Ltd. ZUX was not a party to the contract and not personally liable to AEY. The claim against ZUX was therefore dismissed.

[13] However, ZUW Ltd was liable to pay \$1,500 to AEY because this liability, although arising in the course of the agency for AEY, only arose because of the fault of ZUW Ltd. This was clear from the reasons given by the Tenancy Tribunal Adjudicator (Applications 11/00846/AK, 11/00874/AK, 12 May 2011):

[24] On the evidence, however, I have to consider whether it would be just to make any further award of compensation or damages to the tenants. The evidence relevant to that consideration is the conduct towards the tenants of PD [the selling agent] and ZUX, in their capacities as agents of the landlord. While tenants and PD were at times in strenuous disagreement, it is noteworthy that PD's emails to them were at all times courteous and professional. In giving her evidence, PD displayed the same courtesy and professionalism, without compromising her client's case.

[25] The tenants' emails to PD and ZUX were likewise courteous and professional.

[26] Several of ZUX's emails fall into a different category. They were sprinkled liberally with threats to the tenants – to enter with keys, to bring civil litigation for “several \$100,000s of dollars”, that the litigation would “certainly be massive”, that “the money and liability for lost sales is huge”, that if the

tenants did not allow two open homes per week, “this will compromise the sale process which could cause you a lot of liability”, that he would apply for termination of the tenancy, and that “the owner is legally able to do viewings.” These threats were baseless. They were a barrage, calculated to try to intimidate the tenants into allowing an extra open home per week, when the tenants were within their rights to decline it. In contrast with PD, ZUX’s demeanour in giving evidence was consistent with the domineering approach shown in his emails.

[27] ZUX’s conduct towards the tenants was a prime example of interference with their reasonable peace and comfort, in circumstances amounting to harassment: [Residential Tenancies Act 1986,] section 38(2) and (3). An award of exemplary damages should follow. Having regard to the criteria in section 109(3), ZUX’s conduct was intentional, its effect was distressing for the tenants and it lacked legitimacy. There is an important public interest in discouraging such behaviour.

[28] The Residential Tenancies Amendment Act 2010 increased the upper limit for exemplary damages for a breach of section 38 to \$2,000. Taking into account the considerations noted above, I award \$1,500, which ZUW Ltd is ordered to pay to the tenants.

[14] ZUX argued for ZUW Ltd that it should not be liable for the following reasons.

[15] Firstly, the property management authority contract provided that:

- (i) The agent had an indemnity from AEY for “all costs, claims, demands, suits, legal proceedings or loss howsoever arising in the proper management of the tenancy premises” (clause 14.1);
- (ii) The agent was entitled to act as if the landlord and do all things necessary to manage the property effectively (clause 1.4);
- (iii) The agent was authorised to ensure compliance with the tenancy agreement and Residential Tenancies Act 1986 by taking whatever steps the agent deemed appropriate (clause 2.1(i)); and
- (iv) The agent was to take due care in performance of contractual obligations but did not warrant and was not liable for any default by the tenant in payment of rent or other charges, causing damage to the property or the observance of other terms of the tenancy agreement (clause 9.3).

[16] Secondly, ZUW Ltd acted on AEY’s instructions in a difficult situation started by PD (the selling agent, who left a door open at the property after an early open home) and AEY (who decided to sell the property, despite clause 8.1 of the property management

authority, which provided that the landlord would not sell the property for six months from the commencement of any tenancy), in which ZUX acted properly and as best he could.

[17] Finally, the Tenancy Tribunal ordered ZUW Ltd to pay the tenants on the basis that the company was named as landlord in the tenancy agreement, not because of its acts as agent.

[18] However, these were not reasons to excuse the liability ZUW Ltd. The indemnity in clause 14.1 applied where there had been “proper management” of the tenancy premises. Harassment of tenants in breach of the Residential Tenancies Act 1986 was not “proper management”.

[19] ZUW Ltd’s authority to act for AEY as landlord (clauses 1.4 and 2.1(i)) did not determine whether it was entitled to an indemnity from AEY; and, as for clause 9.3, the agent did not take due care in performance of its contractual obligations.

[20] There was a factual basis to the problems with the tenants in this case, but the agent had an obligation, despite the difficulties, to act lawfully or in compliance with the Residential Tenancies Act. AEY did not instruct the agent to breach the Residential Tenancies Act and it was the role of a competent agent to advise a landlord of obligations under the Act. In this case, ZUW Ltd did not act properly, but unlawfully and in breach of the Act.

[21] The Tenancy Tribunal order named AEY and ZUW Ltd as parties but only ordered ZUW Ltd to pay exemplary damages to the tenants. Even if the fact that ZUW Ltd was ordered to pay the tenants was not decisive, on the facts and law of agency ZUW Ltd was not entitled to an indemnity from AEY.

[22] The above orders were therefore made.