Tenant's intentional damage

Has commonsense prevailed?

By Grant Harris*

You may have seen the article in the summer 2016 issue of this magazine about the Holler v Osaki Court of Appeal decision, which held that a residential tenant was immune from a claim by a landlord where the rental property suffered loss or damage caused carelessly by the tenant.

That decision had very far-reaching consequences for landlords. If tenants were able to side-step claims for damage in the Tenancy Tribunal, it left landlords open for potentially huge bills or insurance excesses relating to the damage.

In Tekoa Trust v Stewart, a Manawatu landlord has had a win for landlords, with a successful appeal of a Tenancy Tribunal decision that had held that the tenant was not liable for damage to carpet by the tenant's dog urinating as it was unintentional damage (on the basis of the Osaki decision).

The (undisputed) facts in Tekoa Trust are that the dog caused extensive damage to all carpeted areas (lounge, hallway and bedrooms), indicating the animal was allowed continuing access and that the Tenancy Agreement had a specific clause stating that pets were not permitted in the property.

The focus of the District Court appeal was whether the damage to the carpet was intentionally caused by the tenant. The judge relied on the following legal text definition of intentional: "Conduct will be intentional when it is deliberate, and not accidental, and the [resulting damage] … will be intentional if the defendant meant to cause it or (probably) knew that it was virtually certain to result".

The judge was of the view that the damage caused by the dog was not unintentional damage and that the tenant would have known that damage was virtually certain to result by allowing the dog to continually enter the premises.

That was supported by not only the extensive nature of the damage, but, by way of analogy, section 41(1) of the Residential Tenancies Act 1986, which places the tenant responsible for the conduct of any person who comes onto the premises with the tenant's permission unless the tenant took all reasonable steps to prevent that person from entering the premises (or ejecting them where required).

The tenant was ordered to pay the landlord costs for replacement carpet, lost rent and court costs.

The Tekoa Trust decision sets a binding precedent for the Tenancy Tribunal. Hopefully, the Tenancy Tribunal will promptly be providing its adjudicators with updated guidance regarding intentional versus unintentional damage and the application of the Tekoa Trust and the Osaki precedents.

The Tekoa Trust decision will no doubt result in a collective sigh of relief for landlords nationwide, however, the intentional versus careless damage liability issue will still remain and the Osaki precedent will prevail where damage has been determined to be accidental.

Nevertheless, landlords now have the comfort to know that tenants will not be let off scot-free for intentional damage and will be required to look after rental properties.

Housing Minister Nick Smith has introduced a proposed law change (following Osaki) that is going through the consultation process whereby a tenant would be liable for careless damage up to 4-weeks' rent or the landlord's insurance excess (if it is higher). This will provide some comfort for landlords regarding a tenant's careless or negligent actions, but as yet that proposed law change has not been implemented.

Review of the Unit Titles Act 2010

With townhouses and apartments becoming more prevalent for New Zealand home owners, the Ministry of Business, Innovation and Employment (MBIE) is reviewing the Unit Titles Act (UTA) following prompting from a group of property industry professionals. The intention is to make the property law around high-density →

housing operate more effectively and provide more protection for people buying or living in unit title developments.

The review of the UTA is also needed in the context of significant growth in the unit title sector, which will no doubt continue to grow particularly in high-population growth areas. MBIE reports that in Auckland alone there has been an increase of multi-unit housing developments from just over 15% of new houses in 2010 to more than 40% in the latest year.

The objective of the review of the UTA is to ensure that the law that regulates unit title developments is functioning well and is fit for purpose for a growing market. The targeted areas for review include:

- Improving the disclosure regime
- Strengthening body corporate governance provisions
- Ensuring professionalism in body corporate management
- Long-term maintenance regime, including investigating making long-term maintenance funds compulsory for developments of 30 or more units
- Accessibility of the disputes resolution processes.

Whilst the scope of this article cannot traverse all the proposed changes in any great detail, it is worth highlighting from an investor's perspective the following (limited) aspects of the review.

Disclosure requirements

The review is intending to ensure that purchasers have available to them the best information about the unit, the development and the activities of the body corporate. Proposals of note include amending the requirements and timing of the information required in disclosure statements to amalgamate all current disclosure into one step, with a view to ensuring that comprehensive information is provided to a prospective purchaser upfront, with any additional disclosure statements being required only should any changes of material significance take place since the original disclosure was given.

Proposals also include a requirement for body corporates to verify all disclosed information as complete and correct and to ensure that no serious defects or other high-risk information is left undisclosed. That would require the body corporate signing all documentation included in the disclosure statements and being accountable for the accuracy of the information.

Long-term maintenance planning and funding

Bodies corporate have responsibility to maintain common property, building elements and infrastructure for the development. The objective of the review is to ensure that the UTA promotes the best accounting practices to prepare current and future owners for the costs associated with owning a unit title. It would require long-term maintenance plans to be more credible and to accurately detail expected repair and maintenance expense for the near to medium future.

Currently under the UTA there is no penalty for a body corporate not having the required long-term maintenance plan and it is possible for a body corporate to opt out of the long-term maintenance funding requirements for the funding of that long-term maintenance plan.

Proposals also include extending the timeframe of a long-term maintenance plan from 10 years to 30 years. For medium-to-large complexes (with 10 or more units), long-term maintenance plans would be required to be signed by a suitably qualified professional.

Funding of a long-term maintenance plan through a long-term maintenance fund would be compulsory for developments with 10 or more units (unless opted out by a body corporate with between 10-29 units). That proposal would aim to ensure levies remain consistent and fair through forward planning and budgeting across the life of the building.

With some developments, if a fund is not in place unit owners can be stung with large repair and maintenance costs if that has not been adequately planned for with the appropriate "sinking fund".

The current consultation process with MBIE closed on Friday 3 March 2017. MBIE will consider submissions and develop final proposals, which will then go to government for approval. If approved, they will form the basis for a new legislation for unit title developments.

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