NEW ZEALAND PROPERTY INVESTORS FEDERATION

The Osaki Case and Unlawful Dwellings

By: Andrew King, 04 June 2018

These two issues have caused rental property owners a great deal of anxiety over the last two years and are finally being addressed through the Residential Tenancies Amendment Bill No 2. It has taken far too long.

Solutions to both issues are not perfect, but they are better than we currently have at present.

The Bill has been before the Select Committee and has now been referred back to Parliament for its final reading before becoming law. This is likely to be some time later this year.

Osaki and tenant responsibility for damage

The Osaki case saw a High Court Judge rule that tenants are no longer responsible for damage that they cause (unless it was intentional) to a rental property if the landlord is insured. The Tenancy Tribunal determined that landlords cannot recover the excess from an insurance claim from the tenant. Clearly this is a poor situation.

The Bill essentially continues to permit tenants to not be held responsible for any damage they cause if the landlord is insured. However it does allow the tenant to be responsible for the excess or excesses if there are multiple cases of damage.

The solution is complicated and could result in poor or unfair outcomes for either tenants and landlords when there is a multiple damage situation. However the Bill makes things better than the situation we currently face.

The NZPIF suggested we revert back to tenants being responsible for the damage they cause and that landlords should be required to make this clear when signing up a new tenancy. This would have been simpler but the suggestion was not taken up by the Government Select Committee which has reviewed the Bill.

The Government Select Committee made three recommended changes to the Bill.

1. Landlords are required to tell their tenants about their insurance with a $500 penalty for not doing so. This means it is likely that landlords will give tenants a full copy of their insurance policy rather than a summary.

2. The committee has clarified who has to prove if the damage was caused intentionally. It is up to landlords to prove that damage wasn't fair wear and tear. It is up to tenants to prove that any damage was not intentionally done or caused by a careless act or omission.

   This is good, however it still doesn't confirm if there is a difference between an accident and a careless act or omission. It still appears that if damage is accidental, then the tenant has no liability, including liability to pay the excess.

   We have expressed our concern to policy officials who said that accidental acts are intended to be covered by the Bill, but I still don't believe it is clear enough. As an example, a tenant could say that a cat ran out and tripped them causing them to spill wine on a carpet, so it was an accident and they weren't careless.

   We will be attempting to get this issue clarified before the Bill becomes Law.

3. Previously the Bill said that a tenant’s liability was limited for each incident, but this has been removed.

   This appears to suggest that tenants will only be responsible for one insurance excess even if the insurance company determines that there are multiple incidents. However policy advisors have said that this is not the case. MBIE legal advice is that including "per incident" is unnecessary as this is explicit in the intent of the Bill. If correct, this means that tenants can still be made to pay multiple excesses if appropriate.

   However there is a risk that this will give Adjudicators too much ability to limit a tenant’s responsibility for damage. By actively taking the "per incident" section out, it appears to be a signal that it is not the Government’s intention that tenants are responsible for each incident of damage. We need to have Government clarify the situation when the Bill is debated at the third reading.

It is unlikely that the Bill will change much before being adopted into law.

Unlawful dwellings

Following the High Court decision in the case of *Anderson v FM Custodians Ltd* (2013), a situation has developed where unconsented rental properties are deemed unlawful, with the Tenancy Tribunal having no jurisdiction over them. The only exception is that the Tribunal can declare the tenancy a prohibited action and award any rent paid by a tenant refunded back to them.

Shortly after the Residential Tenancies Act Amendment Bill was drafted, a Dunedin District Court appeal ruling actually provided a resolution to the matter.

The District Court judge defined "residential premises" to be "any premises used or intended for occupation by any person as a place of residence. In my view, the decision in Anderson is not the wide-ranging decision that the Adjudicator in this case (and Tribunals in other cases) have seen it to be".

The judge ruled that the Tenancy Tribunal was incorrect in the way they interpreted the High Court ruling, saying they did have jurisdiction to hear cases of unlawful dwellings and use all aspects of the Residential Tenancies Act in coming to their decision.

This was excellent, as it meant that Tenancy Adjudicators did not have to award all rent paid back to tenants for not having a consent.

The NZPIF is now monitoring Tribunal cases to see that Adjudicators are being fair in their decisions. If they are not, then we will request that the Principle Tenancy Adjudicator issue a practice note to Adjudicators giving them clear direction on how cases of unconsented properties should be handled.

So this section of the Bill should confirm how Government wants to handle unlawful dwellings. The Bill confirms that the Tenancy Tribunal can hear applications where the premises are unlawful and will be able to use all aspects of the RTA in making decisions. So that is good news.

However it still allows Adjudicators to make subjective conclusions on whether they believe a property is safe for tenants. A recent case saw an owner of an otherwise sound rental property have to refund rent back to the tenant just because an RCD safety switch, which didn't used to be required, was not installed in the fuse box. This does not seem fair to the owner.

In addition, while the NZPIF does not wish to condone unsafe and unsanitary rental properties, we are concerned that otherwise highly suitable rental properties, such as some "granny flats", which may have been successfully rented to tenants for decades, could suddenly be lost from the rental pool.

It is unknown how many properties like this will be effected, however it is likely to be in the tens of thousands. Faced with awards against them and having to give rent back to their tenants, it is unlikely anyone will continue offering these properties as rentals.

It is likely that a significant proportion of these dwellings may never be able to be consented. Even a local authority issued Certificate of Acceptance may be difficult to obtain for these properties for reasons such as lack of a fire wall between units.

Without a firewall they cannot obtain a Certificate of Acceptance, but there may be other ways to improve the safety of these properties, such as interconnected smoke alarms.

While the NZPIF does not condone slum rental properties, we do not want to see properties that are highly desired by tenants removed from the rental stock. This could lead to an even greater shortage of rental properties at a time when we really need more.

We are also concerned with situations where tenants themselves may have converted part of their rental property, such as the garage, to be used as accommodation. It would be unjust for a landlord to have to give the rent paid back to the tenant and potentially have to pay exemplary damages as well, when they didn't offer the unlawful part of the dwelling for rent.

Section 78A(2)(b) says that the Tenancy Tribunal can declare a rental property unlawful if the landlord fails to comply with ANY of the requirements in respect of buildings, health, and safety under ANY enactment so far as they apply to the premises.

It is unlikely that anyone knows the full extent of the wide ranging Acts of Parliament that could be applied to a rental property. There will be numerous small requirements hidden within various acts that could be used against rental property owners. Because of this we are concerned that rental property owners may have to refund rent to their tenants for fairly minor breaches.

Officials have advised us that this is unlikely. However we will continue to monitor the situation and have talks with the Tenancy Tribunal and MP's if it looks like rental property owners are suffering from unjust decisions.

Rental property owners would be wise to ensure that their rental properties are consented and well maintained.