

Order of the Tenancy Tribunal

Residential Tenancies Act 1986

Office of the Tenancy Tribunal

Tenancy Tribunal at Christchurch

Tenancy Address

74 Roydvale Avenue, Burnside, Christchurch 8053

Applicant

Full Name	
Bethani Edwards	Tenant
Brett Thomas Townsend	Tenant

Respondents

Full Name	
Wongeeon Vast Limited	Landlord

Order of the Tribunal

The Tribunal hereby orders:

1. The premises at 74 Roydvale Avenue, Burnside Christchurch 8053 are not residential premises to which the Residential Tenancies Act 1986 applies.
(Section 77(2)(a) Residential Tenancies Act 1986)
2. The Bond Centre to pay the bond of \$1,180.00 (5733277-001) to the applicants immediately.
(Sections 22 and 127(4)(a) Residential Tenancies Act 1986)

Reasons:

1. Mr Townsend attended the hearing on his own and Ms Edward's behalf. I will refer to them as the applicants. Mr Wongeeon attended on behalf of the respondent.
 2. The application was originally for an order reducing the term of the fixed term tenancy that commenced on 6 December 2016 and that was due to end on 6 December 2017. The applicants' relationship had ended and they relied on that as
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an unforeseen change in their circumstances under section 66 of the Residential Tenancies Act 1986 (the Act).

3. Subsequently, the applicants learned that the building, of which the premises form part, had been converted from a single dwelling to three dwellings and did not have building or resource consent. They then amended their application to allege various defects in the premises. At the hearing, Mr Townsend sought repayment of the \$9,440 in rent that he and Ms Edwards have paid.
4. The respondent does not seek to argue that the premises can lawfully be occupied as residential premises. In a text message from the owner of the premises to Mr Townsend, the owner accepts that the premises cannot be lawfully occupied as residential premises. The applicants have vacated the premises and both the owner and the respondent accept that the tenancy has ended. There is no cross claim for rent.
5. The High Court decision in *Anderson v FM Custodians* [2013] NZHC 2423 is authority for the proposition that premises that cannot be lawfully used by the occupier as residential premises are not residential premises for the purposes of the Act. That in turn means that the Tribunal does not have jurisdiction to determine a dispute that relates to such premises.
6. The Tribunal is of course bound by that decision and so, on the face of it, the Tribunal cannot make any order on this application, apart from an order determining that the premises are not residential premises for the purposes of the Act.
7. In *Anderson*, Duffy J suggested that the Tribunal would still have jurisdiction to make orders under section 137 of the Act (Prohibited Transactions). Section 137 provides:

137 Prohibited transactions

(1) No person shall—

(a) enter into any transaction, or make any contract or arrangement, purporting to do, whether presently or at some future time or upon the happening of any event or contingency, anything that contravenes or will contravene any of the provisions of this Act; or

(b) enter into any transaction or make any contract or arrangement, whether orally or in writing, or do anything, for the purpose of or having the effect of, in any way, whether directly or indirectly, defeating, evading, or preventing the operation of any of the provisions of this Act.

(2) Requiring any person to enter into any transaction, or to make any contract or arrangement, in contravention of subsection (1) is hereby declared to be an unlawful act.

(3) Subject to subsection (4), any provision of any transaction, contract, or arrangement entered into in contravention of subsection (1) that would have the effect of, in any way, whether directly or indirectly, defeating, evading, or preventing the operation of any of the provisions of this Act

shall be of no effect.

(4) All money paid and the value of any other consideration for the tenancy provided by the tenant (not being rent lawfully recoverable by the landlord) or, where the transaction takes the form of an option to purchase the premises to which the transaction relates, by the person on whom the option to purchase is conferred, shall be recoverable as a debt due to the tenant or prospective purchaser by the landlord.

8. There have been cases decided in the Tribunal under section 137(4) of the Act in which landlords have been ordered to repay all the rent paid by the tenant.
9. However, in Anderson, section 137 of the Act was not in issue. Therefore Duffy J's comments on the Tribunal's ability to exercise its powers under it in cases where the premises are not residential premises for the purposes of the Act, were not part of her decision in that case. Therefore, the case is not authority for the proposition that the Tribunal retains its powers under section 137 in such circumstances, let alone authority for the proposition that the Tribunal has the power to order repayment of rent in such circumstances.
10. It goes without saying that the Tribunal should give the respect that is due to comments made by a High Court Judge. Such comments that are not part of the decision often carry considerable weight. One of the considerations that is relevant to the weight to be given to such comments is the extent to which the Court has considered the issue. In Anderson, there was no analysis of the meaning and effect of section 137. Nor, as far as I am aware, has there been any such analysis carried out in any other case.
11. One of the most striking features of section 137 is how broad it is. Subsection 1(a) prohibits the making of any contract that has the effect of defeating, evading or preventing the operation of any of the provisions of the Act. That is so broad that, on the face of it, it would apply to any tenancy agreement that falls outside the Act. It would capture any agreement that was excluded from the operation of the Act by section 5 of the Act for example because such an agreement would have the effect of preventing the operation of the Act. Quite obviously that would be a nonsense and that cannot have been Parliament's intention. The section's ambit must be narrower than it appears.
12. Subsection (3) provides that any contract that contravenes subsection (1) that would have the effect of preventing the operation of any of the provisions of the Act shall be of no effect. That is very similar to section 11(1) of the Act except that section 11 applies to any agreement "in respect of a tenancy to which this Act applies". The point is that the purpose of subsection (3) appears to be to bring an agreement that purports to evade the Act, back within the ambit of the Act. But that is not apt in the case of an agreement that concerns premises that are not residential premises for the purposes of the Act. Such an agreement can ever be brought back within the ambit of the Act.
13. Subsection (3) is substantially to the same effect as section 11(1) except that section 11(1) does not apply to exclusions that are expressly permitted by the Act

(thus permitting agreements excluded by section 5 of the Act) and the Tribunal can permit the exclusion in certain circumstances. Section 11 plainly applies to tenancy agreements. It is difficult to see why there would be two sections of the Act that essentially say the same thing and have the same effect. That suggests to me that scope of section 137(3) must be different from the scope of section 11(1).

14. Section 137(4) provides that all money paid and the value of any other consideration for the tenancy provided by the tenant (not being rent lawfully recoverable by the landlord) shall be recoverable as a debt due to the tenant. It refers to "the tenancy" but the word "tenancy" does not appear anywhere else in the section. Consequently it is not very clear in what circumstances subsection (4) applies.
 15. It is unlikely that it would apply whenever subsection (1) applies because it would then apply in the case of any contract that contravened the Act however minor the contravention. There is reference to subsection (4) in subsection (3) (although it is unclear why subsection (3) is made subject to subsection (4) because subsection (4) appears to have no effect of subsection (3)), and so the intention appears to be that subsection (4) applies where subsection (3) applies. That is to contracts that have the effect of defeating, evading or preventing the operation of the Act (as opposed to merely contravening the Act).
 16. The difficulty with that is that such a contract would, to the extent that it purported to have that effect, be of no effect. If it is of no effect, why would it be considered appropriate to order the landlord to repay all the rent paid by the tenant?
 17. Subsection (4) refers to money paid and other consideration provided by the tenant "for the tenancy". It does not refer to rent as such and in fact it expressly excludes rent lawfully recoverable by the landlord. What does the expression "for the tenancy" mean? Does it include rent? If so, why not use the word "rent" and why exclude rent lawfully recoverable by the landlord?
 18. The conclusion that I have come to is that the expression "for the tenancy" is intended to refer to payments such as premiums for a tenancy or other payments not in the nature of rent. Rent is generally regarded as payment for the use and occupation of the premises rather than for the "tenancy" as such. Payment "for the tenancy" is more apt to refer to payment for the granting of the tenancy rather than payment in the nature of rent. The word "lawfully" has been included, in my view, to make it clear that rent legitimately payable by the tenant is excluded from the monies recoverable by the tenant.
 19. There is support for that view of rent at common law. In Hill and Redmond's Law of Landlord and Tenant, at A626, the authors state - "Rent is the recompense paid by the lessee to the lessor for the exclusive possession of corporeal hereditments". It goes on to say that one of the essential features of rent is that it is paid in return for occupation of land.
 20. I would also not accept that the rent that parties to an agreement have agreed is payable for the use and occupation of premises is not lawfully recoverable by the
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landlord simply because the premises cannot be lawfully occupied by the tenant.

To hold that it is not lawfully recoverable would require a finding to that effect after due consideration of the question. Just because the Tribunal does not have jurisdiction to determine the issue, does not mean that in another forum, the rent would not be lawfully recoverable. Indeed if the Tribunal can't determine the issue, it is difficult to see how it can ever apply section 137(4).

21. Moreover, at common law, the effect of granting a lease of premises that cannot be lawfully occupied by the tenant is not to render the lease invalid and to entitle the tenant to recover rent paid. It constitutes a breach by the lessor of the covenant of quiet enjoyment. That entitles the tenant to sue for damages for the breach. The tenant can recover the loss that arises from the breach according to the ordinary principles of compensatory damages. Rent remains fully payable subject only to the cross claim for compensation.
22. For the reasons I have given, I have come to the conclusion that section 137 is most likely aimed at transactions that are ancillary to the direct landlord and tenant relationship. For example, transactions such as options to purchase which are expressly referred to in subsection (4). Read in that way, the section makes sense and fits better with the overall scheme of the Act. The fact that it appears in the Miscellaneous Provisions section of the Act, rather than say alongside section 11, also suggests a more peripheral role than the fundamental role it would have if it could apply generally to tenancy agreements.
23. I would find it very difficult to accept that Parliament intended that the Tribunal must order a landlord to repay to a tenant all rent paid by the tenant in every case where, for whatever reason, the premises could not be lawfully occupied by the tenant. That would be a crude, all or nothing and disproportionate response in many cases. It would also be directly contrary to very well established common law principles.
24. For the reasons I have given, I find that the Tribunal does not have the power to order the respondent to repay the rent paid by the applicants. Nor does it have jurisdiction to deal with any other aspect of the application.
25. It is questionable whether the Tribunal has the power to make any order in relation to the bond. However, the parties accept that the tenancy has been terminated and there is no reason why the bond should not be paid to the applicants. I have therefore ordered the bond to be paid to the applicants. To do otherwise could put the applicants in an intolerable position.