EDITORIAL NOTE: NO SUPRESSION APPLIED.

IN THE DISTRICT COURT
AT DUNEDIN

CIV-2017-012-000200
[2017] NZDC 26365

BETWEEN	VIC INGLIS Appellant
AND	NATALIE MICHELLE PARRY Respondent

Hearing:	25 October 2017
Appearances:	Mr David More, counsel for the Appellant Ms Parry, the Respondent, self-represented
Judgment:	17 November 2017

RESERVED DECISION OF JUDGE K J PHILLIPS

The "tenancy"

[1] By a Residential Tenancy Agreement, dated 30 July 2016, the Appellant, Mr Inglis, rented a property situated at 33 Luke Street, Ocean Grove, Dunedin to the Respondent, Natalie Michelle Parry. The evidence before the Tenancy Tribunal Adjudicator on 19 April 2017 from Ms Parry was that the tenancy started on 30 July 2016.

[2] There is nothing remarkable about the tenancy agreement itself. It was on a form approved for use as a tenancy agreement by the Office of the Tenancy Tribunal. It described the Appellant as the landlord, and Ms Parry as the tenant. It provided on the front page, the following agreement between the parties:

> "5. The rights and obligations set out in the Residential Tenancies Act 1986 are implied in every residential tenancy agreement (see the back of this agreement for a brief outline of some of the key provisions of the Residential Tenancies Act 1986).

6. No terms or conditions added to this agreement are valid if they are contrary to the Residential Tenancies Act 1986."

[3] It provided for the tenant to pay a bond to the landlord; it described the tenancy as a "…periodic tenancy…", which could be terminated by notice as required under the Residential Tenancies Act 1986 ("RTA"); it provided for a minimum period of notice which appears to be a minimum of a number of months, but the actual number is illegible (nothing rests on that however). Other terms of the tenancy were that there were to be no additional tenants (over and above Ms Parry's son) without the landlord's consent (at the Tribunal hearing, there were issues raised about that particular condition); the agreement provided for a weekly rental to be paid in advance, but did not specify the actual amount that was to be paid each week (the evidence before the Tribunal was somewhat confusing in that the Appellant told the Tribunal that the rental was $380 per week, but then said that that was a reduction from the original rent of $395 per week, with $15 per week to cover "…ad hoc maintenance…".) The Respondent was paying $380 per week.

[4] Notice of termination of the tenancy was given by the landlord in a letter dated 11 January 2017, giving six weeks' notice - the final day of the tenancy being 21 February 2017. The evidence of the Respondent was that she moved out of the property on 20 February 2017.

[5] There was evidence before the Tribunal that the Respondent had a tenant occupying part of the property. The evidence was that that "…flatmate…" was in the property for some two and a half months and was paying rent at the rate of $230 per week. There was evidence before the Adjudicator that David Deans, the Respondent's partner, also resided at the property.

The application

[6] By an application dated 19 April 2017, the Respondent filed an application to the Tenancy Tribunal, seeking compensation/damages under s 77(2)(n) of the RTA, and for a refund of the bond she had paid under ss 22 and 127(4)(a) of the RTA. The claim was on the basis that the bond should be refunded as the tenancy had ended. She sought total compensation of $12,640. The Respondent, as part of the application,

disputed any issues relating to the condition of the property upon her vacating the property and under the heading "Additional information", said:

> "I moved into this home under the impression that this was a permitted property with Council sign-off and inspections done properly … however upon my departure I overheard the land agent and real estate agent talking about permits being signed off for the downstairs part of where I was living. This previously was a basement area converted into:
>
> Lounge;
>
> Tiled hall;
>
> Bathroom;
>
> Toilet;
>
> Bathroom;
>
> My son and I resided in this home, and reflecting the rent, it would have bene nice to know before signing the agreement. I feel this is very misleading.
>
> A homeowner needs a permit (to be sold) but tenant does not?
>
> My contribution $395 a week, does not speak for any of this, and I am seeking a full refund in rent."

[7] The application filed by the Respondent advised the Tribunal that the rent she paid per week was $395, and the bond she paid was $1185. The tenancy commenced on 31 July 2016, and she vacated the premises on 14 January 2017.

[8] By a "landlord application" (which appears undated and not stamped with a receipt date), the Appellant applied to the Tribunal seeking orders for the forfeiture of the bond and the payment of $2519 by way of compensation for damage to the property, together with general compensation for cleaning costs of $1000; a total compensation claim of $3519. He also claimed for exemplary damages for various alleged breaches of the RTA, and the tenancy agreement. It is noted in the application filed by the landlord, that the rent paid per week is stated to have been $380, with the bond paid of $760.

[9] The applications were heard together, in a hearing before Adjudicator J Wilson, on 19 April 2017.

Order of the Tenancy Tribunal

[10] By an order made 27 April 2017, the Tribunal found that a floor plan of the property, as produced by the Respondent, and a Dunedin City Council property report, confirmed the only building permits for the property were for the erection of the dwelling in 1986, and an addition of a porch in 1982. The Adjudicator noted that there had been a Certificate of Acceptance issued by the Dunedin City Council for these alterations on 28 March 2017. The finding of the Adjudicator was that the premises, during the term of the tenancy, did not constitute "residential premises" within the definition of that term in s 2 of the RTA, giving the reason for that as the conversion of the downstairs area not being authorised by a building consent. In the view of the Adjudicator, the fact that the landlord obtained a Certificate of Acceptance did not retrospectively make the tenancy 'lawful'. In then considering what remedies were available, the Adjudicator used s 137 of the RTA. She decided that the Respondent was entitled to the refund of all of the rent she actually paid, for a period calculated to be 29 weeks and four days, amounting to $11,237.14. However, because of a "lack of evidence", the refund that was ordered to be paid was $10,940. The Adjudicator also ordered that the bond be refunded to the Respondent and that the Appellant pay the Respondent's filing fee on the application.

[11] In relation to the landlord's application for compensation, the Adjudicator held that the premises were excluded from the RTA other than to the extent that s 137 applied. In reaching this conclusion the Adjudicator relied on a decision of the High Court in *Anderson v FM Custodians Limited*[1] and she did not consider or decide upon the Appellant's claims.

[12] The Appellant applied for a rehearing. By order of the same Adjudicator, Ms Wilson, dated 14 June 2017, that application was dismissed. The issue as to whether the authority of *Anderson v FM Custodians Limited* had been correctly applied by the Adjudicator was left for determination by the District Court on appeal. The Adjudicator held that the Appellant had failed to establish grounds for a rehearing to be granted.

[13] Hence the matter came to the District Court on appeal.

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[1] *Anderson v FM Custodians Limited* [2013] NZHC 2423

The appeal

[14] The original appeal was filed by the Appellant personally, but upon instructing counsel, Mr More, an Amended Notice of Appeal set out as the appeal grounds as follows:

(i) The Tenancy Tribunal was wrong in law in finding that the premises did not constitute residential premises, under s 2 of the RTA. The particulars, as pleaded, are that the premises were let in the terms of the tenancy agreement, which was a residential tenancy agreement. The premises were used by the Respondent as a place of residence. A further ground was that the Tribunal was wrong in its finding that the tenancy between the Appellant and the Respondent was unlawful. The particularisation of that ground included the pleading that the conversion of the downstairs area of the property without a building consent, did not affect the status of the property as residential premises;

(ii) There was a Certificate of Acceptance for the conversion, retrospective to the date of the conversion. The Appellant therefore complied with s 45 (1)(c) of the RTA.

(iii) The Appellant argued that the Tribunal was wrong in law in holding that s 137 of the RTA entitled the Respondent to a refund of rent paid as the agreement between the Appellant and the Respondent did not contravene the provisions of the RTA. In the alternative, the rent was rent lawfully recoverable by the landlord, in the terms of 137 (4) of the RTA.

(iv) The further ground argued was that the claim for compensation and its rejection by the Tribunal, was a matter where the Tribunal had erred in law, in that the Appellant was entitled to such compensation, and further that in any event, under s 7 of the Illegal Contracts Act 1970 – (s 76 of the Contract and Commercial Law Act 2017), the Appellant was entitled to relief.

[15] The Respondent in her reply on the appeal was that the premises did not qualify as a residential premises, pursuant to s 2 of the RTA. Therefore, as the premises were not residential premises, the Appellant could not obtain relief.

[16] Both parties provided the Court with substantial material relating to their various arguments. Numerous authorities were put to the Court in support of their respective cases.

The legal position

[17] Section 85 of the RTA provides the manner in which the Tribunal is to exercise its jurisdiction:

> **85 Manner in which jurisdiction is to be exercised**
>
> (1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises to which this Act applies.
>
> (2) The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

[18] I note, that in the terms of s 85(1) RTA, the Tribunal's task is to resolve disputes between "…landlords and tenants…" so it is necessary for a Tribunal to be satisfied that that relationship was in existence. Section 85(2) notes the requirement of the Tribunal to determine such disputes, but the placing of a dispute before the Tribunal does not give jurisdiction unless the relationship of landlord and tenant is in existence.

[19] Appeals from the Tenancy Tribunal are made pursuant to s177 RTA and in the terms of that section, are to be by way of rehearing. In relation to a "rehearing", the provisions of the decision in *Shotover Gorge Jetboats v Jamieson*[2] details the manner in which a rehearing should be conducted. I also note and approve Judge Joyce QC's decision in *Housing New Zealand Corporation v Salt*[3] in discussing such an appeal

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[2] *Shotover Gorge Jetboats v Jamieson* [1987] 1 NZLR 437.
[3] *Housing New Zealand Corporation v Salt* [2008] DCR 697

and noting that it was to be by way of rehearing. Judge Joyce QC at page 699, stated (inter alia) as follows:

> [13] On an appeal by way of rehearing, the Appellant body is not restricted by findings which the lower Court or Tribunal has made, but the appellate body nevertheless, acknowledges the advantage employed by the decision maker at various instance, which may have seen and heard the witnesses.
>
> [14] There is something akin to a presumption that the decision appealed from is correct, and it is also customary for the appellate body to exercise restraint in interfering with discretionary decisions.
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> [15] Thus, ordinarily the Appellant body will only differ from the factual findings of the decision maker at first instance if:
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> - The conclusion reached was not open on the evidence, that is, where there is no evidence to support it;
> - But the lower body was plainly wrong in the conclusion it reached.

[20] In noting those authorities, I also note that a Tenancy Tribunal is a specialist body dealing with tenancy matters. From that, I take it as therefore experienced in assessing the credibility, reliability and truthfulness of witnesses, in drawing inferences, applying facts, and reaching appropriately correct decisions.

[21] Section 118 RTA allows me as the District Court Judge on this appeal to quash the order of the Tribunal; to order a rehearing by the Tribunal; substitute any orders that the Tribunal could have made; or to dismiss the appeal. The procedure to be followed at the hearing is what I, as the appellate Judge, determine. As it is a rehearing, I come to my own view by considering and weighing all of the materials which were before the Tenancy Tribunal.

[22] As a result, I have carefully considered the Notes of Evidence from the hearing before the Tenancy Tribunal Adjudicator. Although I have a discretionary power to receive further evidence on questions of fact, there has been no application in this Court for any further evidence to be adduced.

***Anderson v F M Custodians Limited* [2013] NZHC 2423 (*Anderson*)**

[23] I refer to Adjudicator Wilson's decision 27 April 2017, with particular reference to the paragraphs headed "Law", (paragraphs 4 through to 7). In those

paragraphs, the Adjudicator discusses the definition in s 2 of the RTA and her view of the ruling in *Anderson,* on s 137 of the RTA. In the discussion paragraphs that then follow, Adjudicator Wilson cites a number of Tenancy Tribunal's decisions, which she considered to be helpful. At paragraph 11 she states:

> "If the tenancy premises are not consented or permitted as required by law, then the Tribunal does not have jurisdiction to hear claims which would usually consider under the Residential Tenancies Act."

Appellant's argument

[24] Mr More makes the submission that in using the decision in *Anderson* as she did, the Adjudicator incorrectly stated the law. He noted the provisions of s 45 of the RTA in relation to "landlord's responsibilities". He submitted that that section did not provide that an unlawful act by a landlord resulted in the residential premises being excluded from the definition of "residential premises" in s 2. Mr More's argument on the "ratio" in *Anderson*, was that the resource consent condition restricting the occupancy of the facility to people aged 55 years and over, was in breach of s 12 of the RTA, a section which prohibits discrimination pursuant to the provisions of the Human Rights Act 1993, particularly when relating to the age of tenants or potential tenants. Justice Duffy held that such discrimination is an unlawful act. Mr More's submissions at paragraphs 20 – 21 state:

> "20. Duffy J held that the resource consent condition was age discrimination and therefore in breach of s 12 (1)(A). In those circumstances the letting arrangement with Mr and Mrs Anderson was outside the definition of residential premises. That is the ratio of the Judgment.
>
> 21. Duffy J went on to hold that residential premises let in breach of the Act, or in breach of other enactments were outside the definition of residential premises in the Act. That is obiter and not binding on the District Court or the Tenancy Tribunal. It is this obiter statement which has been latched onto by Tenancy Tribunals, including the Tribunal in this case."

[25] Mr More's argument is therefore on the basis that *Anderson* cannot be authority for the proposition that residential premises let where the landlord is in breach of s 45(1)(c) of the RTA are outside the definition of residential premises in s 2.

[26] Mr More discusses the provisions of ss 45 and 109 of the RTA. He makes the submission that s 45 does not provide that an unlawful act by a landlord excludes the

premises from the definition "residential premises" in s 2 of the RTA. I note that under s 45(1A), failure by the landlord to comply with building health and safety requirements under any enactment, is declared to be an "unlawful act". Further, as Mr More submits, s 109 of the RTA provides for remedies where a landlord has committed an unlawful act. The requirements under s 109(3) require a Tribunal to be "satisfied that the person against whom the order is sought committed the unlawful act intentionally, and having regard to certain acts, that it would just to require a person whom an order is made against, to pay a sum in the nature of exemplary damages. The maximum amounts to be paid are detailed in Schedule 1A of the RTA. For a breach of the provisions of s 45(1A), the sum of $4000 is detailed. I note, particularly, that the provision is detailed in s 109(3) is that the unlawful act has to have been committed intentionally.

Respondent's argument

[27] The case for the Respondent is in support of the findings of the Tenancy Tribunal. The Respondent submits that the premises do not qualify as "residential premises", as defined in s 2 of the RTA. The Respondent bases that submission on the Dunedin City Council file, which confirmed that the only building permits for the property were in relation to the erection of the dwelling in 1986, and the addition of a porch in 1992. She accepts that there was a Certificate of Acceptance dated 28 March 2017, issued five weeks after the conclusion of her tenancy. She submits that *Anderson* was a determination that the premises did not constitute "residential premises" within the meaning of s 2 of the RTA. The argument is on the premise that the definition of "residential premises" in the RTA, requires the use to be lawful in terms of not contravening other enactments. The Respondent argues that Duffy J in *Anderson* used the overall purposes and policy objectives of the RTA in coming to her decision. The Respondent discusses at paragraph 27 of her written submissions her view that Duffy J at paragraph [69] in *Anderson,* was giving a strict interpretation to s 2, to ensure that "illegal" conduct was not profitable. The submission of the Respondent is that *Anderson* should not be looked upon as a "…fact specific case…" and she argued for a wide application of *Anderson*. The Respondent also discussed a number of other Tenancy Tribunal cases that use the *Anderson* decision.

[28] The Respondent submits that a failure by the Appellant to obtain a Land Information Memorandum when he purchased the property was a "…breach of the law…", and that the Appellant had "…chosen to circumvent what is now regarded as routine due diligence before acquiring the property." The Respondent submits that that deliberate action on the part of the Appellant, warranted an award of exemplary damages under s 109 of the RTA.

The RTA

[29] The long title of the RTA provides:

> An Act to reform and restate the law relating to residential tenancies, to define the rights and obligations of landlords and tenants of residential properties, to establish a tribunal to determine expeditiously disputes arising between such landlords and tenants, to establish a fund in which bonds payable by such tenants are to be held, and to repeal the Tenancy Act 1955 and the Rent Appeal Act 1973 and their amendments.

[30] Justice Asher considered these purposes in the case of *Ziki Investments (Properties) Limited v McDonald*.[4] The Judge considered that the RTA was designed to protect both landlord and tenant by fair and readily enforceable rules. This case was pointed to by Duffy J at paragraphs 61 – 63 of *Anderson,* I quote from paragraph 62 of *Anderson*:

> [62] At paragraph [53] Asher J referred to an earlier decision of this Court in *Anquetil v North Canterbury Nassella Tussock Board*, HC Christchurch AP 93/89, 30 October 1989, in which the view was expressed that the RTA was designed to protect tenants, although Asher J considered that it served a dual purpose of protecting both landlord and tenant:
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> > "The purpose of the Act was also considered in *Anquetil v North Canterbury Nasella Tussock Board* HC Christchurch AP 93/89, 30 October 1989, where Holland J stated:
> >
> > > "There cannot be the slightest doubt that the Residential Tenancies Act was designed substantially to protect tenants, and any cases of ambiguity should be interpreted in that light."
> >
> > "With respect to that view, I consider it is clear that the drafters of the RTA thought to protect both the landlord and the tenant by fair and readily enforceable rules and not just the tenant. The Court should

[4] *Ziki Investments (Properties) Limited v McDonald* [2008] 3 NZLR 417

strive to find a solution that is fair to both a reasonable landlord and a reasonable tenant, rather than to the tenant alone."

[31] Justice Duffy emphasises that Asher J also considered s 85 which states:

86 Manner in which jurisdiction is to be exercised

(1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises to which this Act applies.

(2) The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

[32] In having regard to the questions raised in *Anderson*, I note the following:

(i) The definition of "residential premises" in s 2 of the RTA:

"Residential premises means any premises used or intended for occupation by any person as a place of residence."

(ii) The definition of "tenancy" in s 2 of the RTA:

"Tenancy in relation to any residential premises, means the right to occupy the premises (whether exclusively or otherwise), in consideration for rent; and includes any tenancy of residential premises or implied or created by any enactment; and, where appropriate, also includes a former tenancy."

(iii) "Unlawful act" in defined in s 2 of the RTA as:

Unlawful act means anything declared by any of the provisions of this Act to be an unlawful act.

(iv) Section 4 of the RTA provides that:

This Act applies to every tenancy for residential purposes, except as specifically provided.

(v) Section 4 must be read in conjunction with s 5 which provides that the RTA is excluded in certain specified cases. The provisions detailed in s 5 are specific and numerous. There have been decisions of the Court, such as Asher J in *Ziki,* where it has been held that in terms of s 4, the

provisions of the RTA apply to all tenancies of residential premises, unless they fall within the specific exclusions, with the onus or responsibility of proof being on the party who contends that the tenancy in question is excluded. The standard of proof is on the balance of probabilities. See also *Adams v Massey University*[5]. The exemptions are to be construed and interpreted strictly, not liberally.

(vi) Section 10 of the RTA, where a party contends the RTA does not apply in respect of any tenancy of any residential premises, it shall be for that party to establish the facts upon which it is contended that the RTA does not apply.

(vii) For the purposes of the *Anderson* decision, I also note that paragraph 5 (1) of the RTA says:

> "Where the tenant occupies the premises under an occupation right agreement within the meaning of the Retirement Villages Act 2003"

the Act is excluded.

The findings detailed in paragraph 8 of *Anderson* related specifically to the Andersons; who were residing in unit Q in their capacity as managers of the village. It had been held by the Tribunal that the village was not registered under the RTA. I have some difficulty in reconciling that particular finding as upon my reading of the Retirement Villages Act 2003, the RTA is not excluded by the fact of the village not being registered under that Act. There is no requirement in the Retirement Villages Act 2003 to register such a village under the RTA. The evidence before the Tribunal was that the Andersons' refusal to vacate the premises was on the basis that they had an unregistered Deed of Life Interest which gave them rights.

[33] Justice Duffy was thus dealing with a factual situation where there was no tenancy agreement between the parties; where the property was part of an overall

[5] *Adams v Massey University* DC Palmerston North TT 43/94, 10 October 1994

development that had a particular resource consent; that the Andersons were the occupiers of the manager's unit, and the directors of the failed retirement village; that the application before the Tribunal and the Court was for the provisions of 65 of the RTA to apply so that the Andersons could be evicted. The High Court held (agreeing with the Tribunal), that it was not a fixed term tenancy under the RTA. The High Court in considering two specific grounds of appeal, looked at the effect that the provisions of the resource consent for the whole property had on whether the unit in question, could be characterised as a "residential premise" under the RTA. The specific nature of the resource consent required that none of the units in the retirement village were to be occupied by persons under the age of 55 years. The restrictive covenant detailing this age restriction had not been registered on any of the unit titles associated with the village, nor with the title for the particular property in question. The result of the consent condition being that the particular unit could only be lawfully occupied, in the terms of the resource consent, if persons under the age of 55 years were excluded. This the High Court found, was a breach of s 12 of the RTA, which prohibits discrimination under the Human Rights Act 1993. The finding of Duffy J was that the title in question could not be lawfully be used as residential premises by any person, and meet the requirements of the resource consent.

[34] The decision, at paragraph 60, states:

> At the core of the question raised by these two grounds of appeal, is the question as to whether the definition of "residential premises" in s 2, should be read literally to mean any premises that are in fact used or intended to be used by any person as residential, notwithstanding any law to the contrary, or whether the purpose of the legislation is better achieved by adopting a constrained meaning of "residential premises" that requires the use or intended use of such premises, to be otherwise lawful. On the later view, because unit Q could not be lawfully occupied by any person as a residence, but only by persons over 55 years of age, it would fall outside the definition of residential premises in s 2. This would mean that the Tribunal has no jurisdiction to make the orders under s 65. The Respondents would have to bring proceedings in this Court, relying on s 105 of the Land Transfer Act, to regain possession of unit Q.

[35] The High Court Judge, after discussing these competing issues in paragraph 65, was of the view that the RTA should not be interpreted in a way that saw it being applied to any situation where premises were factually in use as residential premises, and no regard was paid to their legally permitted use. The Judge said at paragraph 66:

> I see no reason why persons who let buildings that cannot be lawfully be used for residential accommodation, should be able to rely on the RTA. Indeed, I think such outcomes would be inimical to the purpose and policy of the legislation.

and at paragraph 69 says:

> I am satisfied, therefore, that the purposes and policy of the RTA will not be jeopardised by reading the definition of "residential premises" in a way that recognises the influence the resource consent in this case, has on the use of the subject premises. I also consider that this interpretation is consistent with the general public interest of ensuring that the legal conduct is not profitable.
>
> (my emphasis).

[36] At paragraph 73:

> "it follows that in relation to ground of appeal two, I find that the second Respondents intended use of the premises cannot bring them within the definition of residential premises, because the resource consent makes it unlawful for any person to use those premises as residential premises. The findings of the Tribunal and District Court were in error in this regard."

[37] As I read the decision of the Court in *Anderson*, the emphasis of the Court was on the part of the s 2 definition of residential premises that relates to "… by any person …". The decision was premised on the basis that on the particular facts in *Anderson*, the resource consent restricted the use unlawfully to persons over the age of 55 years, and as such, unit Q was not available used or intended by "…any person…" i.e. its use was for persons occupying it who were over the age of 55 years. In my view, the decision in *Anderson* is not the wide-ranging decision that the Adjudicator in the Tribunal in this present set of circumstances (and Tribunals in other cases) have seen it to be; i.e. that the premises could not be used as residential premises because at the particular point in time there was not a building consent in relation to work that had been undertaken. It is my view that the finding of the Tribunal in relation to the premises not constituting residential premises, because of the conversion of the downstairs area not being authorised by a building consent, was incorrect in the factual circumstances of these particular parties. The Adjudicator also in my view misdirected herself on the law that applies.

[38] The Respondent brought to the Court's attention a number of decisions of the Tenancy Tribunal. The analysis I conduct in that regard is as follows:

(1) *Shields and Bassett v Stone Property Management Limited*[6]. There was a residential tenancy agreement. There was a rent payment up until date of termination, 11 June 2016, totalling $30870. The property had a number of difficulties including cleanliness; faulty electrics; infestations; mould and dampness issues; leaking windows; a lack of insulation. There was evidence that an Auckland City Council report had deemed the property to be "uninhabitable, illegal and non-compliant". The property had no officially recognised address. There was a notice from the Auckland City Council requiring the property not to be used as an autonomous dwelling. The Tribunal discussed the decision in *Anderson*. It was noted that there was no permit or building consent, and as such, was unlawful to use the premise as a residential premise, who was not a member of the main household. It was in fact unlawful for many reasons to use the property as a residential premise

(2) *Gilchrist and Anors v Challenge Rental Properties Limited*[7]. The case related to 12 tenants, with a tenancy agreement in relation to a commercial building that was being converted into residential accommodation. The property was subject to a Stop Work Notice, issued by the Wellington City Council. The tenants were not able to move into the property. They sought recovery of the bond, the rent in advance and the letting fee. The Tenancy Tribunal accepted that there were no consents from the Wellington City Council for the property to be used as residential accommodation. In applying *Anderson,* the Tribunal held that such tenancy would not be able to be considered as "residential".

(3) *Weir v Jiles*[8]. A tenancy agreement, which was for a Skyline building at the rear of a residential property, with no separate consent to be used as a dwelling; without bathroom facilities; not meeting the fire regulatory requirements for use a residential property. The Tribunal

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[6] *Shields and Bassett v Stone Property Management Limited* TT 4027787 Auckland, 12 July 2016.
[7] *Gilchrist and Anors v Challenge Rental Properties Limited* TT 4009288/4016628 Wellington, 27 June 2016.
[8] *Weir v Jiles* TT 4017655 Lower Hutt, 11 May 2016.

finding that the premises were occupied unlawfully for residential purposes, when applying *Anderson*. The Tenancy Tribunal held that the tenancy of the premises was illegal.

(4) *Bellinger v Wang*[9]. The tenancy was of a container, which had been converted into a residential premise which was not lawfully compliant as a residential premise, and there was a direction from the Auckland City Council that the tenant had to vacate. The occupation was therefore clearly unlawful. Using *Anderson,* the Tribunal was of the view, that the premises not being able to be lawfully used as residential premises, using s 137(1B) of the RTA. As the premises could not lawfully be occupied as a residential premise, allowing the tenant's claim.

(5) *Ioelu v Silan*[10]. This involved the conversion of a garage into a household unit, without any form of building consent and was non-compliant with the requirements of the Resource Management Act. The conversion was found to be unlawful. "Fix" Abatement notices had been served on the landlord. The Auckland City Council required the tenant to vacate the property. These facts were not disputed. The premises were not lawfully compliant. Using *Anderson* the Tribunal found that the tenant was entitled to recover the rent accordingly.

(6) *Pihama and Abbott v Yinwen*[11]. The landlord had converted a lower floor area into a self-contained flat had installed an oven, closed off stairs, and changed it into a self-contained flat when it had been a bathroom, laundry and rumpus room area. The premises were cold and damp, causing health issues. No building consent had been obtained; the work did not meet the construction standards of the Building Act 2004; and breached the minimum site area requirements normally required for Resource Consent approval. The Tribunal held that the flat

[9] *Bellinger v Wang* TT 4015460/4022449 North Shore, 20 June 2016.
[10] *Ioelu v Silan* TT 4057600 Manukau, 15 March 2017.
[11] *Pihama and Abbott v Yinwen* TT 4045048/4045152 Lower Hutt, 16 December 2016.

did not qualify as a residential premise as the conversion was not authorised and did not meet either the construction standards or the minimum site area and requirements. There were issues in relation to cracks under the windows; mould; hazardous location of an electrical appliance; gaps and structural deficiency. Again, using *Anderson,* the Tribunal was of the view that the premises should not have been rented and ordered the return of the rent.

[39] It appears to me that each of these decisions has been made by the Tribunal, having due regard to the facts relevant to each of the particular cases, with emphasis being placed on the proven unlawful nature of the tenanted premises, and the issues raised in relation to the landlord's duties under s 45(1)(c) of the RTA (the landlord's duties to comply with building health and safety requirements). The failure to do that is declared in the terms of s 45(1A) to be an unlawful act.

[40] On the Appellant's side, there are the following decisions of the Tenancy Tribunal:

(1) *Liow v Arzi*[12]. The Tribunal in this case held that the relationship was not one of landlord and tenant. It related to the tenants occupying an outbuilding on the same piece of land where a property was tenanted by Mr Arzi. The outbuilding did not have any consent for occupation as a separate dwelling, and the Auckland City Council Building Compliance investigator, determined that the garage as converted was illegal, with plumbing, sanitary and cooking facilities issues not being consented to. A Notice to Stop the use was to be issued. The Tribunal discussed the definition in s 2 of residential premises. It referred to the Court of Appeal in *Main v Main*[13]. The Tribunal at paragraph 23 of its decision, considered the essential elements in *Anderson* could be the subject to an amended definition of residential premises. It went on to discuss the result of any narrowing of a definition in an Act, which

[12] *Liow v ArziI* TT 4024444 Manukau, 7 November 2016.
[13] *Main v Main* [2007] NZCA 306.

detailed the legal position of landlord and tenants. The Tribunal said at paragraph 41 of its decision:

> The contrast between the factual matrix in *Anderson's* case and the factual matrix of the case now before me is striking. *Anderson* was concerned entirely with s 65, which is headed, "Eviction of Squatters". In the Residential Tenancies Act, s 65 is an island. It stands apart from all other sections of the Act, whose focus is on landlord and tenant relations. Section 65 is the only section of the Act under which the past, present or future existence of a tenancy agreement is unnecessary to the Tribunal's jurisdiction.

[41] I agree with the Adjudicator's comments. The Tribunal decided that Anderson was not a case about a landlord or a tenant. The Tribunal discussed what it perceived as "anomalies" in applying Anderson to landlord and tenant cases. It referred to the Tribunal's wide jurisdiction and that Anderson attempted to limit that jurisdiction. The Tribunal concluded that Anderson should not be followed in landlord and tenant cases.

[42] I have also considered the Tenancy Tribunal's decision in *Riddler v Beesley*[14]. There, there had been a major "fallout" between the tenant and the landlord where the tenant had rented the cottage which was an outbuilding, on a 9-acre property. There were difficulties over the supply of water which lead to an investigation where the Masterton District Council advised the landlord, that the building was not suitable to be used as a dwelling as it would be classified as an insanitary building, in the terms of the Building Act 2004. The Tribunal again, at considerable length, discussed *Anderson* in that factual context. The Tribunal's decision contained a detailed analysis of a number of Tribunal decisions where *Anderson* had been used and s 137 of the RTA invoked, in accordance with the *Anderson* decision. The Tribunal in *Riddler* said at paragraph 12:

> In some circumstances, particularly where a lack of building consent relates to a part of a property, or as an oversight and only a technical breach that has caused no detriment, the return of all rent could be contrary to the purpose of the Act and unjust. The Tribunal would also have to consider the merits where it is concerned that a tenant had taken advantage of accommodation, expecting to later seek return of the rent, or brings a claim for a past tenancy about which at the time, they made no complaint or suffered no detriment.

[14] *Riddler v Beesley* TT4032041 Masterton, 20 October 2016.

[43] As stated earlier, it has been noted by the High Court that the Tribunal is required to determine each dispute "according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations" (s 85). In considering the purpose of the Act, the Court also quoted Asher J in *Ziki*. Where he said:

> The drafters of the Act sought to protect both the landlord and the tenant by fair and readily enforceable rules and not just the tenant. The Court should strive to find a solution that is fair to both a reasonable landlord and a reasonable tenant, rather than to the tenant.

[44] The Tribunal in *Riddler* noted various Tribunal authorities where in relation to breaches of the Building Act that were more than technical and actual detriment had arisen for the tenants as a result were a strengthening of the claims under s 137 of the RTA. At paragraph 15 of the *Riddler* decision the Tribunal said:

> In summary, where a property cannot be lawfully used as residential premises, the starting position is that the Tribunal can only make orders under s 137 for exemplary damages (where appropriate), and an award that all rent to be paid back. In limited situations, were the illegality arises only from a technicality and does not cause detriment, it is open to the Tribunal to decline to make orders under s 137. However, it would be for the landlord to prove that an award under s 137 would be unjust for reasons other than the simple fact that the tenant has had the benefit of the accommodation.

The Tribunal, in its decision, noted that the work done on the property could not be retrospectively approved in its current form to enable the property to obtain a Certificate of Acceptance; there were questions about dampness; walls and staircase being non-compliant; the tenant suffering poor health and the building deemed to be insanitary under the Building Act 2004. The Tribunal held s 137 applied.

Discussion

[45] All of the above are matters that have been considered in my overall duty on this appeal that is clearly detailed in the terms of completing the appeal as a rehearing, (ss 117 and 118 of the RTA), compiled with the duty on this Court on appeal to consider the issues in a similar way as a Tribunal might do in exercising its jurisdiction under s 85.

[46] The facts that relate to the case before the Court is that the Respondent was in possession of the property as tenant for a period of time, without complaint about the premises themselves. Issues arose only upon determination of the tenancy and after the tenant had vacated the property. The further matter that must be considered is that the questioned part of the property downstairs in the tenanted premises was completed to a standard where the Appellant was able to obtain the necessary certificate in "very short order" in regards to the works that had been undertaken. The certificate being obtained within days of the Appellant first becoming aware of the problem. Further, there was photographic evidence available to the Tribunal, establishing in my view after having regard to the photographs, that the work that had been done had been done to a high standard. There is no evidence that the tenant made complaints concerning the health of the tenants, dampness, mould or any issues relating to the sanitary operation of the area in question. There was no ingress of dampness or mould. It was undisputed in the evidence at the hearing before the Tribunal that the Appellant was not aware of the lack of a consent to the works that were undertaken prior to his purchase of the property. He, upon becoming aware, immediately rectified the position by obtaining the necessary certificate from the local authority. The overall situation therefore, is that the premises were deficient only in regard to a formal certification. That deficiency during the tenancy, not being known to the Appellant. The issue was no more than of a technical kind.

[47] I therefore find, that the premises in question, namely 33 Luke Street, Ocean Grove, Dunedin, were residential premises as they were being used and intended to be used for occupation by any person, as a place of residence. Quite clearly, no question can be raised as regards to the upstairs of the Luke Street property, as there is no issue about the consents for that part of the property. In relation to the downstairs area, I find that the lack of a building consent has been cured by the Certificate of Acceptance for the bathroom, bedroom and living area in the existing ground floor space as given on 22 March 2017, and has rectified a technical breach of the position. I find that the tenant did not suffer any detriment of any kind as a result of that technical breach.

[48] I find that the Tribunal in considering the authority of *Anderson,* used her wide-ranging opinion of the decision in *Anderson* and erred in law in the manner she so applied it. As a result, she did not consider the factual basis of the use in the particular

case before it, but rather considered that any residential premises which had any form of issue in relation to any Code of Compliance Building Consent, could not lawfully be used as residential premises and thus in the terms of *Anderson,* these premises were excluded from the definition of residential premises in the RTA. In coming to that position the Tribunal, in my view of the facts, was plainly wrong. I refer to the previously stated purposes of the RTA and the various definitions therein contained. I find that the use in these present circumstances, of the residential premises for the purposes of occupation, was not of the kind or nature that Duffy J was considering in *Anderson*.

[49] I note that the RTA is in place to define the rights and obligations of landlords and tenants of residential properties; that the scope of the RTA is wide and is designed as such to protect both the landlord and tenant by putting in place rules that are both and fair and readily enforceable. The definition of residential premises appears to apply to all properties intended for occupation. The definition does not raise the issue of legality. Other relevant legislative provisions exist to protect tenants against a landlord's non-compliance with requirements which strike at the heart of their occupation of the premises. It is clear that the RTA applies to all residential tenancies, other than as specifically provided in s 5. The provisions of s 5 do not include buildings that were found to be non-compliant with building consents and local authority health and safety requirements. Rather, the legislation provides by s 45, a detailed analysis of the responsibility of the landlord, stating at s 45(1)(c), the landlord is "to comply with all requirements in respect of building, health and safety under any enactment so far as they apply to the premises". A failure to comply under s 45(1A) is an unlawful act, and s 109 gives the tenant remedies in respect of any such unlawful act.

[50] I remind myself that Duffy J in *Anderson* was dealing with matters in terms of s 65 of the RTA. Not relating to a landlord, which the Appellant clearly was, and a tenant, which the Respondent clearly was. Outside of the High Court's ruling on the s 65 issue before it, I consider the matters discussed by Duffy J not as a ratio, but as obiter comments by her, and persuasive only on my Court.

[51] If I am found to be wrong in this view, in the terms of s 137, I note, that the Appellant's evidence that he was not aware of the deficiency in relation to the Compliance Certificate until the determination of the tenancy, was not argued against at the Tribunal's hearing. It must be accepted by me as being the true position. Therefore, I find that when the Appellant entered into the tenancy agreement with the Respondent, he was unaware of the property not complying with the compliance/consent matter. Section 137 prohibits transactions being "entered into" which contravene or will contravene the provisions of the Act, or doing anything with the purpose of or having the effect of, directly or indirectly defeating, evading or preventing the operation of the provisions of the RTA, or under terms of s 137(2):

> Requiring any person to enter into any transaction, or to make any contractual arrangement, in contravention of ss 1 of this section, is hereby declared to be an unlawful act.

[52] The provisions of s 137 require, in my view, that at the time the tenancy agreement was entered into, the Appellant knew of the deficiency, but required the Respondent to enter into the tenancy agreement in any event. On the evidence before the Tribunal, that is not the case here. I do not accept that this tenancy agreement was such that the Appellant was requiring the Respondent to enter into a tenancy agreement contravening the provisions of the RTA.

[53] I consider that the position of the Tenancy Tribunal in considering the technical breach to be an unlawful act, was wrong. I note that the finding of the Adjudicator at paragraph 16 was a determination that "the premises were unlawful". The Tribunal did not appear, in my view, to consider at all whether the technical breach was an unlawful act in the terms of the definition of such an act, as detailed in s 2 of the RTA. I repeat, an unlawful act means "… anything declared by any of the provisions of this Act to be an unlawful act."

[54] Repeating that any issue as to illegality (rather than unlawfulness), the technical lack of consent was no more than that i.e. a technical breach and the Respondent could not argue that she had suffered detriment. The terms of s 85 and the duty on the Tribunal to use fairness and justice in applying the principles of the Act, have been overlooked. Rather, the Tribunal has taken a wide view of *Anderson*

and decided the case incorrectly on the basis of *Anderson,* without having regard to the actual facts of the matter that were before her.

[55] I note also, that there did not appear to be any consideration given as to whether or not the tenant was unjustly enriched by the order that was made by the Tribunal, as there does not appear to have been any reckoning in relation to the rental being paid to her, by her subletting of the property which she accepted she had done.

Decision

[56] I allow the appeal. I require the Respondent to repay to the Appellant the sum of $10960.44 by 30 November 2017. The Appellant also sought indemnity costs on the appeal, referring to paragraph 32 of Mr More's submissions. I do not accept that there is any basis for the claim for indemnity costs. Indeed in my view, each party's costs should lay where they fall at the hearing of this appeal. I do not accept that the Appellant by doing no more than using the law that had been expounded by various Tenancy Tribunals in making the application she did, she was doing no more than what she considered the law was (as had been expressed by a number of Tenancy Tribunals). I do not allow costs to either party.

[57] However, the Tribunal as part of its decision, in using *Anderson* and s 137 of the RTA in refunding the rent to the tenant then considered that the landlord's claims in relation to the matter, could not be dealt with by her. The finding of this Court is against the Tribunal's decision ordering the refund of the rent. I consider that it is appropriate for the Adjudicator to make a decision in relation to the landlord's claims against the tenant, in relation to the bond and the various damages claimed by the landlord.

[58] I hold accordingly.

K J Phillips
District Court Judge