

Order of the Tenancy Tribunal*Residential Tenancies Act 1986**Office of the Tenancy Tribunal***Tenancy Tribunal at North Shore****Tenancy Address**

436 Paremoremo Road, Paremoremo, Auckland 0632

Applicant

Full Name

Di Ran

Tenant

Yang Chen

Tenant

Respondents

Full Name

Cindy Property Management Ltd

Landlord

Cindy Cao

Landlord

Order of the Tribunal**The Tribunal hereby orders:**

1. Cindy Property Management Limited and Cindy Cao also known as Xinwenko Cao (as agent for Cindy Property Management Limited) are to pay Di Ran and Yang Chen the sum of **\$4,198.57** being:

- a. Full rent refund for period of tenancy 31/07/16 to 11/09/16
(@ \$340.00 per week) \$2,088.57
- b. Refund of bond paid \$1,360.00
- c. Exemplary damages for contracting the tenant into a prohibited transaction being the tenancy agreement \$750.00

Total to pay**\$4,198.57***Section 137, Residential Tenancies Act 1986*

Reasons

2. The tenants entered into a residential tenancy agreement with the landlord and the landlord's agent.
3. The subject premise is 436 Paremoro Road, Albany, Auckland.
4. The tenancy began 31 July 2016 and ended when the tenants vacated on 11 September 2016, a period of 6 weeks and 1 day.

Were the premises able to be lawfully occupied for residential purposes?

5. The premise consisted of:
 - a. A main house divided into 3 tenancies;
 - b. A garage building converted into 1 tenancy; and
 - c. A relocated house divided into 5 tenancies.
6. Certain documentation from the Auckland Council was exhibited.
7. It appears that none of the tenancies were of premise that had been lawfully consented as a separate residential premise.
8. In particular, by way of a "insanitary building notice" dated 31 August 2016, issued under section 124 of the Building Act 2004, the premises were considered to be insanitary.
9. The notice stated:

"Auckland Council is satisfied that the building identified above (the building) poses a danger to the safety of people/property in that the building is insanitary in accordance with s123(a)(i) and (ii) and (d).

- *There are unconsented sanitary systems in place that are not adequate for their intended use.*
- *There is a sanitary system serving the main house which has been divided into 3 tenancies, the garage that has been made into a tenancy and the relocated house that has been divided into 5 tenancies, the system is not adequate for its intended use and is visibly failing.*

To prohibit the safety of the occupants, take all measures to prohibit access to the buildings by any persons, and continue to prohibit access to the buildings until the buildings and property have been made sanitary."

10. The notice effectively prohibited the premises from being occupied.
11. There was also no evidence exhibited to me at the hearing that contradicted a Council officer's comments contained in copies of exhibited emails stating that the tenant's premise had been converted into a residential unit without required building consent, also that there was no fire separation, and that the unit had been established and used as a separate residential unit without required consent.
12. In addition, a copy of a "notice to fix" issued by the Auckland Council and dated 25 November

2016 was also exhibited (**notice to fix**).

13. The particulars of contravention or non-compliance detailed in the notice to fix was as follows:

"Contrary to section 40 of the Building Act 2004, the following building works have been carried out that is not in accordance with the building consent.

- *There are 3 buildings on the property that have an unconsented sanitary system and sanitary fixtures, fittings and pipe work.*
- *There has been a deck covering built that exceeds 20m² to the relocated house.*
- *There has been work carried out that has created 5 tenancies within the relocated building and 3 tenancies within the main house including walls that require fire separation. Contrary to s116B of the Building Act, the building is knowingly being used that has inadequate means of escape from fire and is not sanitary.*
- *The main house and relocated house have had work carried out that does not provide adequate fire separation.*
- *All buildings have had work carried out that has made them insanitary. Contrary to section 17 of the Act, building works do not comply with the requirements of Schedule 1 of the Building Regulations 1992 (the Building Code) as follows:*
- *Clause G13: All buildings have a sanitary system installed that does not adequately meet the required standard."*

14. Pursuant to the notice, the owners of the building were instructed to immediately remove access to persons using the buildings.

Does the Tribunal have jurisdiction to determine applications relating to unlawfully occupied residential premises?

13. The tenancy agreement submitted purports to be a contract for residential purposes pursuant to the Residential Tenancies Act 1986 ("the Act").

15. Section 77(2) (a) of the Act gives the Tribunal the jurisdiction to determine if any premises are "*residential premises*."

16. Section 2(1) of the RTA defines "*residential premises*" as:

"Means any premises used or intended to be used for occupation by any person as a place of residence."

17. In *Anderson v FM Custodians Ltd [2013] NZHC 2423* ("Anderson") the High Court held that the definition of "*residential premises*" in section 2 of the Act, requires the use of the premises for residential purposes to be lawful.

18. The Court considered two different approaches in interpretation.

19. At paragraph [60] the Court stated:

“At the core of the questions raised by these two grounds of appeal was the question of whether the definition of residential premises in section 2 should be read literally to mean any premises that are in fact used or intended for residential purposes, 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.”

20. After consideration of both approaches the Court came to the conclusion that the constrained meaning was the correct approach, stating at paragraph [66]:

“If the meaning of “residential premises” is read in such a way that requires the use of such premises to be lawful in terms of not contravening other enactments that preclude their use for residential purposes, the overall purposes and policy objectives of the RT Act remain intact. There is no prospect of landlords seeking to use the provisions of this Act in circumstances where the subject premises are not a permitted residential use. I see no reason why persons who let buildings that cannot lawfully be used for residential accommodation should be able to rely on the RT Act. Indeed I think it such outcomes would be inimical to the purpose and policy of this legislation.”

Then at paragraph [69]:

“I also consider that this interpretation is consistent with the public interest of ensuring that illegal conduct is not profitable.”

21. The Court was also of the view that a literal interpretation of residential premises:

“...would give a measure of legitimacy to letting arrangements and transactions that are illegal under other enactments. It would allow landlords who let premises as residential in contravention of other enactments, such as the Resource Management Act, to be able to use remedies provided by the RT Act against those tenants” – paragraph [65]

22. On the facts before me the subject premises cannot lawfully be used as residential premises.

23. What then is the jurisdiction of the Tenancy Tribunal?

24. The Court in Anderson noted at paragraph [67]:

“There is no risk that constraining the scope of the RT Act would create a group of essentially second-class tenancies, by reason of falling outside the cover of this Act. Section 137 provides for prohibited transactions that have the effect, either directly or indirectly, of defeating, evading, or preventing the operation of any of the provisions of the RT Act, and provides remedies for recovery of money paid under such transactions.”

25. 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 or evading, or preventing the operation of any of the provisions of the 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) of this section, any provision of any transaction, contract, or arrangement, entered into in contravention of subsection (1) of this section that would have the effect of, in any way, whether directly or indirectly, defeating or 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 from the landlord.”

27. Cindy Property Management Limited's tenancy contract is an attempt to defeat and/or evade the intended operation of the Act and pursuant to section 137 is a prohibited contract.
28. The premises cannot lawfully be occupied as residential premises and are therefore, apart from section 137, outside the jurisdiction and general provisions of the rest of the Act. *(Also see subsequent leave to appeal application where Duffy J confirms her findings that the RT Act does not apply to unlawful use of premises as residential premises: Anderson v FM Custodians Ltd [2014] NZHC 382 at [14]-[15])*
29. I am also of the view that invoking section 85 of the Act requiring the Tribunal 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 and obligations*”, is limited by the clear principles set out in Anderson.
30. While the use of section 137 in the Tribunal has until recently been relatively rare, my findings, as expressed in this decision, are supported by an earlier seminal decision in the Tribunal regarding unlawful residential premises and the use of section 137, *Pihama & Abbott v Yinwen TT 4045048/4045152, Lower Hutt, 16 December 2016.*
31. In Pihama Adjudicator Robertshawe said:

“The consequences of this finding are far reaching. Section 137 prohibits any person from

entering into a contract that contravenes the Act (s137 (1)). Exemplary damages of up to \$1,000.00 may be awarded for knowingly requiring a person to enter into such a transaction (s137 (2)). Any provision of a tenancy that is unlawful is of no effect (s137 (3)). Of most significance is s137 (4), which provides, "all money paid ... for the tenancy provided by the tenant (not being rent lawfully recoverable by the tenant)... shall be recoverable as a debt due to the tenant ... by the landlord".

"It can be seen from this summary that if premises are excluded from being "residential premises" under the Act, there are only two types of orders that can be made under section 137: the first is an order for exemplary damages against the landlord (subject to the principles set out in s109 of the Act); and the second is an order that all rent paid be refunded. There is no mechanism under s137 for accessing the general orders that can be made under the Act..... Landlord's face the prospect of paying back all rent received, regardless of the length of the tenancy or any assessment of the scale of any breach or its impact on the tenant. In addition, both landlords and tenants are locked out of the usual provisions of the Act for the orders usually sought for possession, rent, compensation and work orders".

15. Accordingly, with respect to this application, the Tribunal only has the jurisdiction to facilitate the remedies specified in section 137.
16. Pursuant to section 137(2), it is unlawful act for a landlord to make a contract that has the effect in any way of defeating, evading or preventing the operation of any of the provisions of the Act.
17. As such Schedule 1A of the Act describes the amounts of exemplary damages that may be awarded with respect to unlawful acts.
18. The premise was in my view knowingly and intentionally tenanted uncompliant and I have ordered the sum of \$750.00 exemplary damages.
19. In addition, pursuant to section 137(4), all money paid by the tenant "shall be recoverable as a debt due to the tenant ... by the landlord".
20. Accordingly I have also ordered a full refund of rent and a return of the bond paid by the tenant.