

Order of the Tenancy Tribunal

Residential Tenancies Act 1986

Office of the Tenancy Tribunal

Tenancy Tribunal at Manukau**Tenancy Address**

25B Sturdee Road, Manurewa, Auckland 2102

Applicant

Full Name

Chief Executive, Ministry of Business, Innovation and Employment on behalf of Samoanagalo loelu	Tenant
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Respondents

Full Name

Satya Silan	Landlord
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Order of the Tribunal**The Tribunal hereby orders:**

- Satya Silan is to pay the Chief Executive of the Ministry of Business, Innovation and Employment the sum of **\$16,590.00** immediately being:

- | | |
|------------------------|-----------------|
| a. Refund of rent paid | \$15,840.00 |
| b. Exemplary damages | <u>\$750.00</u> |

Amount to pay	<u>\$16,590.00</u>
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- The application for a restraining order and a filing fee is dismissed.

Sections 2(1), 77(2)(a), 109, 109A, 124A, Schedule 1A

Residential Tenancies Act 1986

Reasons

- The landlord Mr Silan converted a garage into a household unit.

2. He did so without obtaining a building consent under the Building Act 2004 and in non-compliance with the requirements of the Resource Management Act 1991 and the relevant rules of the Auckland Council District Plan (“the unlawful conversion”).
3. On 1 October 2015 Mr Silan then rented the property to Ms Samaoanagalo loelu (“the tenant”).
4. A residential tenancy agreement was duly signed by both parties and the tenant moved in.
5. However it appears a previous tenant reported the unlawful conversion to the Auckland Council and in August 2016 a notice to fix and abatement notices were served by the Council on Mr Silan.
6. An article in the NZ Herald regarding the tenancy then appeared on 21 August 2016 (“the article”).
7. The article quoted Mr Silan as saying that *“The Council had told him to evict the family by October because he did not get a building permit for the conversion and the concrete floor is only fractionally above ground”*.
8. As a consequence of Auckland Council involvement the tenant had to vacate the premises and eventually did so on 30 November 2016.
9. In the meantime the article had also come to the notice of the Chief Executive of the Ministry of Business, Innovation and Employment (“the Chief Executive”).
10. The Chief Executive has responsibility for the administration of the Residential Tenancies Act 1986 (“the Act”) and pursuant to section 124A of the Act may, if it is satisfied it is in the public interest to do so, initiate proceedings in the Tribunal, as if it were the tenant.
11. Accordingly the Chief Executive filed this application in the Tribunal and is seeking on behalf of the tenant:
 - a. An order that Mr Silan pay the sum of \$15,840.00 being a refund of rent paid by the tenant.
 - b. An order that Mr Silan pay \$1,000.00 exemplary damages.
 - c. An order pursuant to section 109(1) restraining Mr Silan from committing an unlawful act of the same kind for 6 years.
 - d. An order that Mr Silan pay the Tribunal filing fee.

Decision

12. The essential facts in this application were not disputed.
 13. The residential premises were not lawfully compliant but were tenanted nevertheless.
 14. The Tribunal has jurisdiction to determine if any premises are *“residential premises”*.
 15. The Act defines *“residential premises”* as *“any premises used or intended to be used for occupation by any person as a place of residence.”*
 16. In determining this application Ms Thompson acting as counsel for the Chief Executive, submitted that the Tribunal was bound by the High Court decision of Duffy J in *Anderson v FM Custodians Ltd*^[1].
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17. In *Anderson v FM Custodians Ltd* [2] the 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. Accordingly the Court determined that residential premises that cannot be used lawfully for residential purposes are outside the general provisions of the Act and any purported tenancy results in a “prohibited transaction” to which only section 137 of the Act applies.
19. While the decision was lengthy, her Honour Duffy J’s reasons were carefully and compellingly traversed between paragraphs [60] to [70].
20. Until *Anderson v FM Custodians Ltd* and only recently in the Tenancy Tribunal, the legal issues concerning unlawfully occupied residential premises and the interpretation of “residential premises” in the Act, had not been addressed.
21. I accept that the Tribunal is bound by *Anderson v FM Custodians Ltd*.
22. That finding was supported by an earlier seminal decision in the Tenancy Tribunal regarding an unlawful residential premises and the use of section 137, *Pihama and Abbott v Xuan Yinwen*. [3]
23. 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”.

Rent Refund and Exemplary Damages

24. The above summation addresses the Chief Executive’s entitlement to orders for a refund of rent paid and exemplary damages.
25. The residential premises were not lawfully compliant but were tenanted by Mr Silan nevertheless.
26. To do so was a prohibited transaction pursuant to section 137 and accordingly pursuant to section 137(4), the Chief Executive is entitled to an order that all rent paid be refunded.
27. Further, to his credit, Mr Silan honestly acknowledged that he had tenanted the premises

intentionally, knowing the premises were not lawfully compliant but he considered he was under financial pressure to do so due to personal issues that he outlined.

28. He also submitted that he felt he was assisting the tenant by providing somewhere to live and asked me to take that into account.
29. However it cannot be in the broader public interest that Mr Silan can purport to tenant an unlawfully occupied residential premises (with all the health and safety risks that involves) outside the scope of the Act and conversely it cannot be in the public interest that he could potentially rely on the legal remedies of the Act to sustain that unlawful situation.
30. Accordingly the exemplary damages test in section 109 is satisfied and the Chief Executive is also entitled to an award of exemplary damages pursuant to sections 137(3).
31. I accept these cases can be difficult as to a lesser or greater extent (as Mr Silan submitted) tenants may have had the benefit of accommodation, frequently for a lengthy period.
32. The question may then arise as to whether it is fair to order a complete refund of rent and also the question of "*what about the housing shortage*"?
33. With respect to those questions, I accept Ms Thompson's submissions that the fairness issue is trumped by the broader public interest and the housing shortage issue is "*a matter for Parliament*".
34. In addition, in my view the requirement of section 137 (4) is mandatory. It is simply a matter of law in appropriate cases that "*all money paid....shall be recoverable as a debt due*".

Section 85

35. Further, while the Tribunal is required by section 85 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*", the application of that provision in my view is limited by and cannot trump the clear principles set out in *Anderson v FM Custodians Ltd*.

Restraining order

36. The Chief Executive has also applied for an order that Mr Silan be restrained for six years from committing a further unlawful act of the same kind.
37. Having made an order pursuant to section 109 (facilitated by section 137), I am entitled to make such a restraining order pursuant to section 109A.
38. However, while what Mr Silan did was unacceptable and unlawful, I am satisfied by the honesty he exhibited in his submissions and at the hearing that he does appreciate the seriousness of what he has done.
39. It was apparent that these proceedings have been a major cause of concern for him and given the monetary orders made above, it is unlikely in my view that Mr Silan will commit a further unlawful act of a similar kind. Accordingly no restraining order is made.

Tribunal Filing Fee

40. Finally, as my potential remedies in this proceeding are limited to those facilitated by section 137 only, I do not have the jurisdiction to rely on section 102(4) to order payment of the Tribunal filing fee.

[1] *Anderson v FM Custodians Ltd* [2013] NZHC 2423.

[2] Also see subsequent leave 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]

[3] *Pihama & Abbott v Yinwen* TT 4045048/4045152, Lower Hutt, 16 December 2016.