Order of the Tenancy Tribunal

Residential Tenancies Act 1986 *Office of the Tenancy Tribunal*

Tenancy Tribunal at North Shore

Tenancy Address

21 County Road, Torbay, Auckland 0630

Applicant

Full Name	
Qiuzi (Tina) Chen	Tenant

Respondent

Full Name	
Keke (Coco) Tang	Landlord

Order of the Tribunal

The Tribunal orders

Keke (Coco) Tang to pay Qiuzi (Tina) Chen the sum of $2,060.44 immediately calculated as follows:

Electricity supply, hot water	$760.00
Leak	$300.00
Refund bond	$580.00
Non-lodgement of bond	$400.00
Filing fee	$20.44
Amount payable by Landlord to Tenant	$2,060.44

(Sections 77(2)(k) and 78(1)(d) Residential Tenancies Act 1986)

Reasons

[1] This tenancy was from 14 August 2016 to 7 May 2017. Ms Chen (the tenant) sought a refund of all rent and bond on the ground that the premises could not be legally occupied as a residence. She also claimed compensation because the premises leaked; the electricity supply was defective and unsafe; the water supply was inadequate; Ms Tang (the landlord) unlawfully entered the tenancy premises without notice; and Ms Tang did not lodge or refund the bond.

Illegal premises

[2] Ms Chen said that the tenancy premises had an ensuite, toilet, hot water system and laundry; but that this was “illegal” based on two documents from the council:

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> 13 January 2003 – the North Shore City Council issued a code compliance certificate for the installation of a garage at the property.
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> 15 May 2017 – a building information advisor from the Auckland Council (including the former North Shore City Council) stated in an email to Ms Chen that "from the system I have access to, there has not been a building consent applied for at the [tenancy address] for adding an ensuite and laundry to the garage of the [tenancy] address".

[3] Ms Chen said that the garage was for parking cars, not a residential dwelling and sought a refund of all her rent, relying on the case Riddler v Beesley [2016] NZTT Masterton 4032041, where, without council consent, a garage was converted to a dwelling. The Riddler case was an adaptation of the High Court decision in Anderson v FM Custodians Ltd [2013] NZHC 2423, (2013) 15 NZCPR 123:

> The Residential Tenancies Act 1986 applied to "residential premises", meaning "any premises" lawfully "used or intended for occupation by any person as a place of residence" (adding the word "lawful" in the definition of "residential premises", Residential Tenancies Act 1986, section 2(1))
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> A tenancy of premises not lawfully used as residential premises was excluded from general orders of the Act (such as possession, rent arrears, and compensation for cleaning, damage or maintenance)
>
> However, the Tribunal's jurisdiction as to prohibited transactions (section 137) was not ousted and the Tribunal could order recovery by the tenant of all money (rent) paid to the landlord (section 137(4)) and a penalty (exemplary damages) (section 137(2))
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> The landlord should therefore be ordered to refund all rent and bond to the tenant

[4] "All the rent" was based on section 137(4) of the Act, which stated that "all money paid" was "recoverable" by the tenant:

> **137 Prohibited transactions**
>
> … (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) … shall be recoverable as a debt due to the tenant or prospective purchaser by the landlord.

[5] Riddler v Beesley, however, stated that this would not apply where, for example, lack of a building consent related only to part of a property, was an oversight or technicality and return of all rent would be "contrary to the purpose of the Act, and unjust" – under section 85 of the Act, the Tenancy Tribunal determined cases according to general principles of law, the substantial merits and justice and was not bound to give effect to strict legal rights or obligations (see paragraph [13]).

[6] Anderson v FM Custodians Ltd was about a retirement village where a resource consent allowed occupation by persons aged 55 years or older for the purposes of a retirement village, not as residential premises under a residential tenancy agreement. In Riddler v Beasley, it was said there was "no consent" for "transformation from a garage into a dwelling"; and other cases were cited:

> Rattey v Wen Asset Holdings Limited [2016] NZTT Auckland 4003442 – a tenant rented a unit upstairs from commercial premises; the Council said that the units were not "lawfully established" for residential use and use as a residence breached the Resource Management Act 1991 and Building Act 2004 (refund of rent $15,590).

Weir v Giles [2016] NZTT Lower Hutt 4017655 – the tenants rented a Skyline garage converted for residential use without Council consent (refund of rent $1,600, exemplary damages $300).

Shields v Stone Property Management Ltd [2016] NZTT Auckland 4027787 – the tenants alleged maintenance, mould and damp in a house without "required consents" (refund of rent $30,870).

Bellinger v Zhang [2016] NZTT North Shore 4015460, 4022449 – the council required tenants to vacate a shipping container converted to residential use (refund of rent, $5,622.86).

Gilchrist v Challenge Rentals Property Management Ltd [2016] NZTT Wellington 4016628 – 13 tenants with a fixed-term residential tenancy agreement for commercial premises without "appropriate consents" under the Resource Management Act 1991 and Building Act 2004 (refund of rent and other payments, $14,000.00+).

[7] Ms Tang argued that Ms Chen had to prove her case – the house was 60 years old, before resource consents were needed; it was therefore understandable that there was no building consent or code compliance certificate which arrived under the Resource Management 1991, Building Act 1991 and Building Act 2004; and the code compliance certificate referred to building a garage – there was a garage, but also a separate living area; and the status of the certificate was unclear.

[8] Under section 10 of the Residential Tenancies Act, Ms Chen, as the party arguing that the Act did not apply in respect of the tenancy had to prove the facts for that claim (see, for example, Walker v Benseman [2014] NZTT Hamilton 14/01141/HN, Goodwillie v Champagne Developments Ltd [2017] NZTT Christchurch 4072032). The evidence was important. Rules about building consents and resource consents were not straightforward. For example, not all building work required a building consent – see section 42A(1) of the Building Act 2004, which referred to categories of work within schedule 1 of the Act, parts 1, 2 and 3; a resource consent was not required if an activity was described as a permitted activity by the Resource Management Act 1991 (1991 Act, section 87A(1)); certain existing use rights were protected (section 10); and council documents could be difficult to interpret (Bennett v Munce [2017] NZTT Pukekohe 4066816, 4067266). Ms Chen's evidence left unanswered questions:

> The code compliance certificate (13 January 2003) was a single document which was not explained – for example, did it apply to the premises occupied by Ms Chen; what was the meaning of the words "final code compliance certificate issued in respect of all the building work under the above building consent"; what were the terms of the building consent; what did the document mean in the context of council's rules; and were there other relevant documents.
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> What was the status or qualifications of the "building information advisor" who wrote the email (15 May 2017); and what did the limitation "the system that I have access to" mean.

[9] Ms Chen did not prove by sufficient evidence that the premises were "illegal".

Repair

[10] Ms Chen said that:

> (a) The electrical system was inadequate – the supply would trip and cut out if she ran more than one appliance or hot water for more than 15 to 20 minutes (including when in the

shower); and she could not always access the switchboard in the main house next door to reset the supply.

(b) Her boyfriend (who had some electrical qualifications) said that the electrical works were substandard and there was a risk of electrocution. For example, no cover on the junction box installed close to the floor level; only one RCD (residual current device), not three, to protect from electrocution if there was a short circuit; electrical wiring on wooden framing below the unlined roof was dangerous; an outside light not waterproof; and he referred to extracts from “relevant electrical regulations” from a “regulations manual 2010 online edition”.

(c) There was very weak water pressure for the shower and tap, in particular when water was used in the main house.

(d) On 4 April 2017, there were bad leaks from the roof into the garage area, making the roof lining damp, breaking the lining in one area and leaving a puddle on the floor Ms Chen's car and the door to the flat; she told Ms Tang by text; and she took photographs and a video.

(e) From 14 to 17 April 2017, there were more leaks during storms.

(f) When Ms Chen contacted Ms Tang on 18 April (telephone) and 19 April (text) to complain, Ms Tang said that she would increase rent in two weeks time from $290 to $330 per week and did not fix the leaks.

(g) By 23 April, Ms Chen had discovered from the council that there were building problems; and she told Ms Tang that she would leave on 7 May and make a claim to the Tenancy Tribunal.

(h) On 27 April, Ms Chen filed her claim in the Tenancy Tribunal; that day, at 9pm or later, Ms Tang came to her flat on the pretext of showing a prospective tenant (in fact, Ms Tang’s husband) and started arguing about the Tenancy Tribunal claim; Ms Chen asked Ms Tang to leave, but Ms Tang refused for a time and continued arguing.

(i) Despite knowing about building problems, on 28 April, Ms Tang arranged a viewing by a prospective tenant.

[11] Ms Tang replied that:

(a) She told Ms Chen about the electricity supply at the start of the tenancy.

(b) Ms Tang understood that there were two RCDs, one for the hot water heater and one for “general usages”; and she told Ms Chen, before taking the flat, that the electrical supply might not work if appliances were running while she took a shower.

(c) There was a recent compliance and electrical safety certificate for electrical works (July 2016); and a statement from her electrician explained that only some lights and power points were added.

(d) A tradesperson examined the roof from outside and the video, gave a quote for repair (9 April 2017, gutter cleaning $250), but needed access to the neighbour’s property to remove tree branches and to put up scaffolding; and she wanted to increase rent as the flat was only for one person, but Ms Chen’s boyfriend also stayed there.

(e) She spoke to Ms Chen after receiving notice of the Tenancy Tribunal claim to see if they could resolve the case.

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[12] A landlord must provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises (Residential Tenancies Act 1986, section 45(1)(b)). This was not an absolute obligation. A landlord did not have to foresee a latent and unobservable defect before it caused damage (Barfoot & Thompson Ltd v Casey DC Auckland, CIV-2005-004-001762, 7 November 2007, citing Body Corporate 126001 v Chan [1998] DCR 270); and a tenant had to notify the landlord, as soon as possible after discovery, of damage to the premises or the need for repair (section 40(1)(d)). A landlord therefore had to repair on knowledge of the need for repair, either from observing the property or notice from the tenant:

> ... the obligation of the landlord, under s 45, is to investigate and repair a defect brought to its attention within a timeframe which is reasonable in the circumstances; and as to what that time is, I think, depends not only on the gravity of the problem but also on the objective evidence of the attempts made by the landlord to investigate, and put right, whatever the problem may be – Collins v Professionals Hutt City Ltd DC Wellington, CIV-2009-085-001431, 24 February 2010

[13] The obligation to repair the premises included facilities (section 45(5)), such as the garage to which Ms Chen had access. In this case:

> (a) The evidence as to electrical compliance was unconvincing – Ms Chen's boyfriend was not an electrician and had limited qualifications; and there was limited, but conflicting, evidence from Ms Tang's electrician.
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> (b) However, a tenancy property was not in a reasonable repair if the water supply dwindled when water was used in the main house and electricity cut out when Ms Chen was in the shower more than 15 to 20 minutes or used more than one appliance. Ms Chen's knowledge of th eelectricity supply at the start of th etenancy did not excuse Ms Tang – the obligation to repair applied even if the tenant had notice of the state of the premises when the tenancy agreement was entered into (section 45(3)).
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> (c) Ms Tang knew of leaks in the garage (not the flat) in early April 2017 and failed to repair within a reasonable time – a serious leak into an area with electrical fittings required an urgent response; there was no proper investigation (no examination inside the garage); and the Tribunal had no confidence that the work quoted by the contractor (cleaning gutters) would resolve the leak; and there was no acceptable explanation why even this work was not done before the end of the tenancy

[14] The Tribunal awarded fair compensation of $760 ($20 per week for this 38-week tenancy) for the electricity supply and hot water; and $300 for the leak as this was near the end of the tenancy, but leaks into the garage where there were electrical wires and fittings just outside the flat was a disturbing situation for Ms Chen.

Unlawful entry

[15] Ms Chen said that Ms Tang claimed to have checked the leaks, which would mean entry to the property without notice. However, the Tribunal accepted that the leaks were checked from outside without entry to the premises (part of Ms Tang's failure to properly investigate and repair). There was also the meeting between Ms Chen and Ms Tang on 27 April, but it appeared that Ms Chen gave consent to entry immediately before entry (section 48(1)(a)). The claim for unlawful entry was therefore dismissed.

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Bond

[16] If a tenant applied to the Tribunal and the landlord sought payment of the bond in whole or in part, the landlord must file an application with the Tribunal setting out the landlord's counterclaim (section 22B(2)). No claim was filed by Ms Tang. Ms Chen was therefore entitled to the bond.

[17] Ms Chen paid the bond at the start of the tenancy; and Ms Tang did not lodge the bond with the Bond Centre. A landlord must lodge the bond within 23 working days of payment (section 19). Failure to so was an unlawful act (section 19(2)) and a penalty (exemplary damages) could be imposed if the landlord did this intentionally and it was fair to order exemplary damages, having regard to (a) the landlord's intent in doing the unlawful act, (b) the effect of the unlawful act; (c) the interests of the tenant, and (d) the public interest (section 109(3)). The Tribunal awarded exemplary damages of $400:

> (a) Ms Tang did not lodge the bond within 23 working days of payment or at all, which was an unlawful act.
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> (b) Ms Tang did this intentionally – the bond was not even lodged after Ms Chen made her amended claim on 12 July 2017.
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> (c) The effect of the unlawful act was that Ms Chen's bond was held by Ms Tang, not the Bond Centre (an independent and solvent third party) and Ms Chen was dependent on Ms Tang's goodwill to release the bond.
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> (d) This was contrary to Ms Chen's interests as a tenant.
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> (e) This was contrary to the public interest in security of bonds (that is, held by the Bond Centre, not landlords), orderly disbursement of bonds at the end of tenancies (lessening potential pressure by landlords on tenants to accept damages and other claims) and prompt disbursement of bonds.
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> (f) Taking into account the circumstances of the case, the amount of the bond and maximum penalty ($1,000, schedule 1A), Ms Tang should a penalty of $400 to Ms Chen.

Filing fee

[18] Ms Chen had significant success in her claims. Ms Tang was therefore ordered to pay Ms Chen's filing fee ($20.44, section 102(4)).

Backing sheet

[19] A backing sheet with rights of appeal was attached to these orders when signed (section 104(2)).

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