

TENANCY TRIBUNAL AT AUCKLAND

APPLICANT: James Alan Wallath
Tenant

RESPONDENT: Alan John Wallath
Landlord

TENANCY ADDRESS: Flat 7, 9 Esplanade Road, Mount Eden, Auckland 1024

ORDER

The application is dismissed.

Reasons:

1. This is a *de novo* rehearing of the application filed by James Wallath ('James') against his father Alan Wallath ('Alan').
2. Adjudicator B King directed in his order dated 24 November 2020 granting a rehearing of the application that "all issues determined in the [initial] 25 September Order should be reheard."
3. Both parties attended the rehearing before me on 25 January 2021. Alan's father and James' grandfather Robert Wallath ('Robert') also attended the rehearing and testified before the Tribunal.
4. James is applying to invalidate a 90-day notice issued to him by Alan on grounds that it is retaliatory under the Residential Tenancies Act 1986 ('RTA'); he also sought compensation and exemplary damages for the landlord's unlawful entry into the premises and the landlord's failure to prevent neighbouring tenants occupying their premises in a way that interrupted his right to quiet enjoyment of the premises.

5. James contends that he is a tenant to which the RTA applies and offers him statutory protection. This is notwithstanding the absence of a written tenancy agreement for his occupation of the residential premises that is owned by a trust of which his grandfather Robert is the settlor and a trustee. The other trustees are an independent professional and the James' father Alan who is named as landlord in this application.
6. As this is a *de novo* rehearing of the application, I am not bound by the findings of the previous adjudicator nor am I constrained to consider only the issues identified by the previous adjudicator.
7. In my decision which follows, I consider the issue first and foremost is whether the parties had a residential tenancy to which the RTA applied.

Is there a tenancy for residential premises?

8. Pursuant to section 2(1) RTA, the term "tenancy" in relation to any residential premises means the right to occupy the premises, whether exclusively or otherwise, in consideration of rent.
9. The material fact remains that James was never granted any the right to occupy the premises *in consideration of rent*. James paid no rent nor was he expected to pay any rent throughout his occupation of the premises.
10. James was only given a licence to occupy the residential premises at Flat 7, 9 Esplanade Road, Mount Eden, Auckland by his grandfather Robert in September 2011 who wishes to support him by providing him with free accommodation at one of the properties owned by Robert's family trust while James was studying.
11. As aptly summarised by adjudicator King at [5] through [8] of his initial order of 25 September 2020:
 5. The premises are owned by a trust of which the tenant's grandfather (Robert Wallath) is the settlor and a trustee. The other trustees are an independent professional and the tenant's father Alan Wallath, the landlord in this application.
 6. The trust owns a number of a rental properties which Alan Wallath and his wife Donna Wallath manage through their property management business.
 7. Through an approach by the tenant to his grandfather it was arranged that the tenant would have the opportunity to live in one of the trust's flats, rent free, to support to him while he was studying.
 8. The agreement is not recorded in writing.
12. For the purposes of the Property Law Act 2007 ('PLA') a licence means a licence to occupy land in consideration of rent, a payment in the nature of rent, or a payment in kind of any form – see section 207 Property Law Act 2007.

13. Like the definition of rent under the PLA, the definition of rent under the RTA is equally broad, it encompasses consideration in the nature of rent - *Cashmere Capital Ltd v Crossdale Properties Ltd* (2008) 9 NZCPR 766.
14. Rent under section 2(1) RTA means “any money, goods, services, or other valuable consideration in the nature of rent to be paid or supplied under a tenancy agreement by the tenant; but does not include any sum of money payable or paid by way of bond”.
15. At the hearing before me, James concedes that he pays no rent of any kind; James pays no form of money, goods, services, or other valuable consideration to his father Alan or his grandfather Robert in return for the right to occupy the residential premises. It is clear to me that James was only allowed exclusive occupancy of the premises by virtue of his grandfather Robert’s exercise of goodwill, familial affection and generosity towards his grandson James.
16. He therefore does not have a “tenancy” under the RTA to which this Tribunal can adjudicate his claims upon. James is also not entitled to any rights and protection accorded by the RTA to tenants, such as his claims to do with alleged breaches of his quiet enjoyment and the ability to challenge a notice to quit as retaliatory.
17. It is clear from section 2(1) RTA that James’ right to occupy the premises, whether exclusively or otherwise, must be premised upon and in consideration of rent (or any form of valuable consideration) being paid to a landlord or grantor of the purported tenancy.
18. This absence of obligation to pay rent (or in the nature of rent, or a payment in kind of any form) is fatal to James’ assertion that a residential tenancy under the RTA had being created in September 2011 when he was allowed to occupy the premises.
19. Lord Templeman in the seminal case of *Street v Mountford* [1985] AC 809 (HL) referred to rent as one of three indicia of a lease.
20. The English House of Lords’ case has been cited with approval in New Zealand’s Court of Appeal judgment in *Fatac Ltd (in liq) v Commissioner of Inland Revenue* [2002] 3 NZLR 648 at [39].
21. In a non-commercial setting where there is no other consideration, the absence of rent also suggests that there is no intention to create legal relations - *Heslop v Burns* [1974] 1 WLR 1241 (CA).
22. In *Heslop v Burns* T allowed a family (Mr and Mrs Burns) to live rent-free in a house he owned for many years. He covered all of the outgoings. This action was inspired by sympathy and affection for them. When T died, his executors argued that they were licensees and sought to evict the family. Mr and Mrs Burns argued that they had been tenants at will. If this succeeded, they would be able to rely on a statute of limitation to resist eviction.

23. The English Court of Appeal found that they were licensees and not tenants because there was no intention to create legal relations; the arrangement was an instance of 'generosity on a very large scale' (Roskill LJ at 1249).
24. Roskill LJ observed:
- 'a licence will be more readily inferred than a tenancy at will first where the advantage given to the suggested "tenant" is obviously intended to be personal to him, and secondly, following what Denning L.J. subsequently pointed out in *Facchini v. Bryson* [1952] 1 T.L.R. 1386 , 1389, where there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy.' (at 1248 – 9)
25. Similarly in this case involving three generations of the Wallath family, there has been both a family arrangement and an act of familial affection and large scale generosity to negative any intention to create a tenancy for young James.
26. This leads us to a second issue, if James has not been granted a tenancy of Flat 7, 9 Esplanade Road, Mount Eden, Auckland, on what basis is he occupying the premises?
27. This calls for an exploration of the distinction between tenancy and licence.

On what basis is James occupying the premises?

28. In its conventional sense, a tenancy is an interest in land conferring the right to possess it for a limited or specific period. A licence on the other hand is a mere permission to be on the land, with or without additional permission to perform specified acts there.
29. The former creates an estate in the land; the latter does not.
30. The distinction has usually assumed significance for occupiers who would enjoy statutory protection against eviction only if they were tenants rather than licensees. Here the relevant statutory protection may be found in the RTA.
31. In *Fatac Ltd (in liq) v Commissioner of Inland Revenue* [2002] 3 NZLR 648, the Court of Appeal held at [30] that "in New Zealand any temptation to distort traditional concepts [of tenancy and licence] for the purpose of protecting residential occupiers has been removed by the Residential Tenancies Act 1986. That Act extends its protection to premises occupied by residents "whether exclusively or otherwise" (see the definition of "tenancy" in s 2(1))."
32. In its conclusions as to the tenancy/licence distinction in New Zealand, the Court of Appeal held at [66] that in this country, as elsewhere, the fundamental distinction between a tenant and a licensee is that the former alone has the right to exclusive possession. For exclusive possession to be meaningful there must be a minimum finite term, whether fixed or periodic. Rent is an important

indicator of an intention to be legally bound but its absence does not per se negate a tenancy.

33. In contrast to the judgment of the Court of Appeal however, Parliament specifically legislated pursuant to section 2(1) RTA that a residential tenancy is only created where the right of occupation, regardless of whether it is exclusive or otherwise, had been given in consideration of rent.
34. Consequently, the absence in this case for the Robert and Alan as trustees of the trust to require rent to be paid in consideration of James' occupancy of the premises remains an important indicator that the parties had no intention to be legally bound and therefore negated a tenancy in James' favour altogether.
35. Alan and Robert acting in accordance with the provisions of the RTA such as the giving of 90 day notice to vacate and prior notice to enter the premises do not by themselves give rise to an inference that a tenancy under the RTA has been created. At best, the voluntary adherence by Alan and Robert to the precepts of the RTA can only be regarded as part of their natural desire to treat their occupier who is their son and grandson with goodwill, respect and decency normally accorded when dealing with people.
36. While the inclusion of a non-exclusive right of occupation in the definition of tenancy brings licence agreements within the scope of the Act and makes it unnecessary, for the purposes of the RTA, to distinguish between tenancies/leases and licences, a distinction is nevertheless required in this case because James' occupancy and possession of the premises, albeit on an exclusive basis, is clearly not a tenancy under the RTA.
37. Because James did not have a tenancy, he only has a bare licence to occupy the premises.
38. Under common law, James' licence to occupy can be determined at will or by reasonable notice by the grantor of that licence Robert and Alan acting on behalf of the trust that owns the property. 90 days is ample notice, in my view; it does not appear to be unreasonable in the circumstances of the case.
39. Once the licence to occupy has been terminated, it is in order for the owner of the premises to seek an order of possession from a court or forum of competent jurisdiction, if it has to come to that.
40. Section 65 RTA provides:

Eviction of squatters

- (1) Where, on the application of any person entitled to possession of any residential premises, the Tribunal is satisfied that any other person is in possession of the premises as a squatter or trespasser, or otherwise than pursuant to any right of occupation granted to that person by any person having lawful authority to grant that right to that other person, the Tribunal shall make a possession order granting possession of the premises to the applicant.

- (2) Nothing in subsection (1) shall limit or affect the provisions of the Trespass Act 1980, or any other remedy that may be available to the person lawfully entitled to possession of the premises.
- (3) To avoid doubt, the Tribunal has jurisdiction under this section even though the premises are not subject to a tenancy agreement.
41. Section 65 RTA has been infelicitously titled to suggest that an order of possession may only be sought against “squatters”. The wide provisions set out under subsection (1) however makes it clear that an order for possession may be sought against any person who is in possession of residential premises otherwise than pursuant to any right of occupation granted to that person by any person having lawful authority to grant that right to that other person.
42. Section 65 RTA may therefore be applied to James’ occupation of the premises in the following manner:
- a. James did not have a tenancy of the residential premises; he only had a bare licence to occupy the premises that was granted by his grandfather Robert. This licence is determinable at will by the owner of the premises; the licence that James possesses is not protected by the RTA.
 - b. James’ licence to occupy came to an end when that licence was terminated at will by the grantor of the licence, his grandfather Robert, who instructed Alan to give a 90 day notice to James to vacate the premises.
 - c. On the expiry of the 90 day notice, James became a person who is in possession of residential premises otherwise than pursuant to any right of occupation granted to him by his grandfather.
 - d. Despite the premises not being subject to a tenancy agreement, section 65(3) RTA makes it clear that the Tribunal has jurisdiction to make an order granting possession of the premises to Robert or Alan, as trustees of the trust that owns the premises.
43. Be that as it may, there is presently no application by Robert or Alan Wallath for an order for possession before the Tribunal. Accordingly, I make no order for possession of the premises in favour of the person entitled to possession of the residential premises. I only note that they could have made such an application for possession to the Tenancy Tribunal under section 65 RTA if they wish to.
44. For this application filed by James Wallath that has now been reheard, it is sufficient for me to find that the Tenancy Tribunal have no jurisdiction to accede to any of James’ claims because he does not have a tenancy of the residential premises at Flat 7, 9 Esplanade Road, Mount Eden, Auckland.
45. For the above reasons, James only had a bare licence to occupy the premises since 2011.

46. I therefore strike out the claims filed by James Wallath against his father Alan Wallath.



J Tam
17 February 2021

Please read carefully:

Visit justice.govt.nz/tribunals/tenancy/rehearings-appeals for more information on rehearings and appeals.

Rehearings

You can apply for a rehearing if you believe that a substantial wrong or miscarriage of justice has happened. For example:

- you did not get the letter telling you the date of the hearing, **or**
- the adjudicator improperly admitted or rejected evidence, **or**
- new evidence, relating to the original application, has become available.

You must give reasons and evidence to support your application for a rehearing.

A rehearing will not be granted just because you disagree with the decision.

You must apply within five working days of the decision using the Application for Rehearing form: justice.govt.nz/assets/Documents/Forms/TT-Application-for-rehearing.pdf

Right of Appeal

Both the landlord and the tenant can file an appeal. You should file your appeal at the District Court where the original hearing took place. The cost for an appeal is \$200. You must apply within 10 working days after the decision is issued using this Appeal to the District Court form: justice.govt.nz/tribunals/tenancy/rehearings-appeals

Grounds for an appeal

You can appeal if you think the decision was wrong, but not because you don't like the decision. For some cases, there'll be no right to appeal. For example, you can't appeal:

- against an interim order
- a final order for the payment of less than \$1000
- a final order to undertake work worth less than \$1000.

Enforcement

Where the Tribunal made an order about money or property this is called a **civil debt**. The Ministry of Justice Collections Team can assist with enforcing civil debt. You can contact the collections team on **0800 233 222** or go to justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc.

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.

If you require further help or information regarding this matter, visit tenancy.govt.nz/disputes/enforcing-decisions or phone Tenancy Services on 0800 836 262.

Mēna ka hiahia koe ki ētahi atu awhina, kōrero ranei mo tēnei take, haere ki tenei ipurangi tenancy.govt.nz/disputes/enforcing-decisions, waea atu ki Ratonga Takirua ma runga 0800 836 262 ranei.

A manaomia nisi faamatalaga poo se fesoasoani, e uiga i lau mataupu, asiasi ifo le matou aupega tafailagi: tenancy.govt.nz/disputes/enforcing-decisions, pe fesoatai mai le Tenancy Services i le numera 0800 836 262.