

**TENANCY TRIBUNAL AT Blenheim**

APPLICANT: Robert Alexander Bain  
Tenant

RESPONDENT: Sonya Thomas  
Landlord

TENANCY ADDRESS: 46 Ward Street, Kaikoura, Kaikoura 7300

**ORDER**

1. The application for exemplary damages is dismissed.
2. The application for defamation is struck out.
3. The respondent may file a Memorandum of costs as timetabled below.

**Reasons:**

1. Both parties attended the hearing. Ms Y. Clarisse appeared as counsel for the respondent. Ms Thomas joined via teleconference. In filed documentation Mr Bain requested all correspondence between the parties regarding the dispute be copied or sent to his lawyer, Mr P. Eastgate. Ms Clarisse was engaged by Ms Thomas as counsel and Ms Clarisse engaged with Mr Eastgate on the basis she understood he was acting for Mr Bain, although no responses from Mr Eastgate were provided to me. At the hearing, Mr Bain defined the legal relationship with Mr Eastgate as a less formal one (despite stating he had engaged Mr Eastgate in his application).
2. For the benefit of the applicant, there are two main factors leading to a successful claim. The first is the burden/onus of proof which rests on the applicant; and the second is the standard of proof. For matters, such as this, heard by the Tenancy Tribunal, the civil standard of proof is applied, being what is on balance of probability. Meaning, I seek to answer the question: Is it more

likely than not that the alleged event happened? Further, the evidence must be reasonable with no probable defects such as inconsistency or improbability. The evidence must be consistent and supported by other acceptable evidence.

3. In the decision that follows I may not have referred to all the oral testimony and other evidence presented, but the parties should know it has been considered.

### *Jurisdiction*

4. The respondent sought to have the application struck out for lack of jurisdiction. The premises is a room in an established B&B, The Peninsula View. An Extended Stay Agreement was signed between the parties. The brother of the landlord, Mr Rex Cook, acted as manager on her behalf. The absence of a co-signed Extended Stay agreement forms part of this dispute, however, the copy I have received clearly establishes the parties and terms of the agreement and the lack of a co-signed agreement is not a barrier to determining a tenancy agreement formed.
5. Section 10 Residential Tenancies Act 1986 "RTA" places the onus in any proceedings before the Tribunal, where a party contends that this Act 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 this Act does not apply.
6. Two possible grounds for exclusion were submitted.
7. Firstly, Section 5 (n) RTA states the Act shall not apply:
  - n. where the premises, not being a boarding house, continue to be used, during the tenancy, principally as a place of residence by the landlord or the owner of the premises or by any member of the landlord's or owner's family:
8. Ms Clarisse submitted that an exclusion applies for this reason. That being that Mr Cook is the brother of Ms Thomas. However, it appears Mr Cook typically resided on a caravan on the property and the property had been purchased with the intention of operating it as a B&B. I do not consider this exclusion should apply here. Mr Cook resided outside of the main building and the building was neither intended to be his principal place of residence but rather an accommodation business managed by him.
9. Secondly, Section 5 (k) RTA states the Act shall not apply where the premises:
  - i. are intended to provide temporary or transient accommodation (such as that provided by hotels and motels), being accommodation that is ordinarily provided for periods of less than 28 days at a time; and
  - ii. are subject to an agreement that has been entered into for the purpose of providing temporary or transient accommodation that continues to be provided under the agreement:
10. While a stay at a B&B might typically fall under this exclusion provision, the actual agreement here differs. It is an Extended Stay Agreement with

provisions more typical of longer terms than transient stays of 28 days or less. This agreement included separate charges for utilities, guests provide their own linen and conduct their own cleaning. The agreement was a fixed term from 22 June 2020 to 31 December 2020.

11. I also considered where in *Holler & Rouse v Osaki* [2016] NZCA 130, the Court of Appeal stated that the Residential Tenancies Act 1986 is “consumer protection legislation”. Where there is any uncertainty as to whether any particular arrangement falls within the scope of the RTA, consideration of this consumer protection aspect of the RTA ought to weigh in favour of bringing the arrangement under the umbrella of the Act, and giving the parties access to the remedies that the Tenancy Tribunal can provide.
12. It is hard to categorise this agreement as falling into the exclusion of s 5 (k), nor s 5 (n) earlier, therefore jurisdiction of this Tribunal was determined, and the hearing continued.
13. However, within the application itself, there were claims made that are outside of my jurisdiction and they are dealt with below.

#### *Discussion*

14. Unlike the onus vis-a-vis jurisdiction, the applicant is required to establish their claim to the civil law standard of proof, on the balance of probabilities.
15. Mr Bain sought exemplary damages for the landlord’s refusal to provide a co-signed copy of the Extended Stay Agreement and defamation for a claimed statement by Ms Thomas to his employer that he had removed the only copy of the co-signed agreement from Mr Cook’s office. He claimed harassment by Mr Cook from the start of the tenancy.
16. Ms Clarisse submitted, in the event jurisdiction was accepted, that the application, while claiming exemplary damages for unlawful acts, fails to identify any unlawful acts per Schedule 1A RTA. While I agree regarding defamation claims, s 38 does provide for quiet enjoyment contraventions that amount to harassment to be declared an unlawful act.
17. While Mr Bain is silent in his exemplary damages claim section regarding harassment, for completeness I considered it. I also note it was not disputed that when Mr Bain requested Mr Cook not have contact this request was respected.
18. The term “Harassment” is not defined in the Act. It is defined in s 3 of the Harassment Act 1997 which deals with harassment in the context of either a criminal charge or the making of a restraining order against a person. However Judge Harland in *MacDonald v Dodds* (CIV-2009-019-1524, District Court Hamilton, 26 February 2010), considered that the dictionary definition of “harassment” was more appropriate in the context of s 38(3), rather than the

definition in the Harassment Act. The Court in this case adopted the definition in the Oxford English Dictionary, which defines “harassment” as “to trouble, worry, or distress” or “to wear out, tire out or exhaust”. The Judge accepted that harassment indicates a particular pattern of behaviour directed towards another person.

19. In the Concise Oxford Dictionary “harass” is defined as “torment by subjecting to constant interference or intimidation”. Further assistance can be obtained from the definition in Black’s Law Dictionary where harassment is defined as:

*“Words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.”*

20. From these definitions it seems that there must be evidence of some ongoing intentional actions directed at a specific person which causes distress to them.
21. The terms of the agreement for this tenancy includes terms regarding the use of the premises. I consider 22(d) anticipates the need for prioritisation of the kitchen use for the manager, for the benefit of short-term guests. Mr Bain appears to take umbrage with interactions with Mr Cook but it is not clear why. Some direction from Mr Cook, in his capacity as manager, may be reasonably expected based on the terms of the agreement. When Mr Bain requested of Ms Thomas that there be no contact with Mr Cook during his notice period this was respected.
22. Having heard from both parties and carefully reviewed the written submissions, I find that Ms Bain has failed to establish any unlawful act per s 38. I am left with no clear understanding of the genesis of this dispute between Mr Bain and Mr Cook.
23. I make this finding noting the absence of any such claim in the relevant section of Mr Bain’s application, but I do so for clarity and to avoid any subsequent confusion if believed the issue was not considered.

### *Defamation*

24. On 31 July 2020, Ms Clarisse sent an email to Mr Eastgate. This email notes the relationship breakdown between Mr Bain and Mr Cook and made a without prejudice offer to settle. This email was BCC’d to Ms Thomas as client.
25. The email footer contained a standard privacy caution in the event of an unintended recipient receiving the email. This included, in part, that “if you are not the intended recipient you must not peruse, use, disseminate, distribute or copy this communication.” Ms Thomas was an intended recipient, albeit undisclosed through the use of BCC. Mr Bain appeared to believe she received a copy inappropriately and had no right to forward it later. This is not the case.

26. At this time Mr Bain was sending a number of emails from his Kaikoura High School email account to Ms Thomas. She was concerned with some of the content.
27. On the advice of counsel, Ms Thomas engaged with the Ministry of Education regarding the emails. This issue was escalated to the school principal, Mr Tait. He requested the emails from Ms Thomas. I was told by Ms Thomas he acknowledged he could retrieve them from the school email server but it would be quicker if he was forwarded the emails by Ms Thomas. This she did.
28. Mr Bain believes, in a subsequent telephone conversation with Mr Tait, that Ms Thomas alleged he had removed the one co-signed Extended Stay Agreement from Mr Cook's office. He believes this defamed him. Ms Thomas denies making such an accusation. Mr Tait did not appear at the hearing and I rely on the respective recounting of Ms Thomas regarding her call with him, and Mr Bain's regarding his subsequent meetings with Mr Tait. I understand Mr Tait's involvement was a result of Mr Bain's use of his school email account for corresponding regarding this dispute.
29. Section 77 RTA defines the Jurisdiction of this Tribunal while 78 RTA defines Orders that this Tribunal may make. I find I have no basis to consider or make any order regarding the claimed defamation. For this reason, I strike out the claim regarding defamation.

#### *Bond*

30. Mr Bain makes no reference to any return of the bond of \$300 in his application, but he did seek it returned in his written submission (incorrectly claiming \$600.00).
31. Section 22B(2) requires the landlord file an application where the tenant has applied to the Tribunal for the bond. No application was made by Mr Bain but it is expedient (refer s 85 RTA) to consider this. I reserve any order regarding the bond until I have considered costs as outlined below

#### *Costs*

32. Mr Bain claimed in an email to Ms Thomas (29 July 2020) to have successfully been to the High Court on tenancy matters and that he knows "property and tenancy law better than most landlord – or indeed even lawyers – ever will."
33. Legal representation was applied for by the respondent but initially declined. A further request (dated 5 October 2020) provided further grounds and was approved.
34. This was approved on the basis of Section 93(3)(b) RTA and essentially rests on the claims of Mr Bain regarding his own knowledge, and his stated

engagement of Mr Eastgate, with his insistence all correspondence during this dispute either be sent to Mr Eastgate or he be CC'd.

35. Section 102 RTA provides grounds for costs as outlined below (relevant parts only):

(1) Except in a case to which any of subsections (2), (4), or (5) apply, the Tribunal shall have no power to award costs to or against any party to proceedings before it.

(2) The Tribunal may make an order of a kind referred to in subsection (3) in any of the following cases:

(a) where, in the opinion of the Tribunal, the proceedings are frivolous or vexatious or ought not to have been brought:

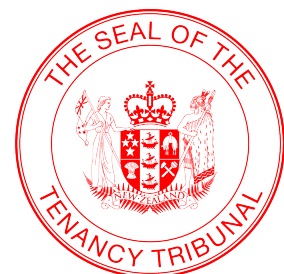
(b) where any of the parties was represented by counsel:

(3) In any case to which subsection (2) applies, the Tribunal may order a party to pay—

(b) to another party, the reasonable costs of that other party in connection with the proceedings.

36. I accept the landlord, at least partially, sought representation based on assertions of Mr Bain that reasonably created a perception of a significant disparity between the parties. The landlord may file an application for costs, setting out the amount of the costs claimed. This is to be provided within 10 working days of this decision. The tenant may then file memoranda on the costs claimed, within 10 working days of receipt of the landlords claim.

37. The Tribunal will consider any costs claimed at that time and issue a further order in due course. That order will also address the \$300 bond. If it has been returned to the tenant, the landlord should advise so in any application for costs filed. If no application for costs is made and resolution of the bond is still required, the Tribunal is to be so notified by the landlord.



M Brennan  
3 November 2020

## **Please read carefully:**

Visit [justice.govt.nz/tribunals/tenancy/rehearings-appeals](https://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](https://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](https://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](https://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.

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If you require further help or information regarding this matter, visit [tenancy.govt.nz/disputes/enforcing-decisions](https://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](https://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](https://tenancy.govt.nz/disputes/enforcing-decisions), pe fesoatai mai le Tenancy Services i le numera 0800 836 262.