

TENANCY TRIBUNAL AT Auckland

APPLICANT: Sarah Tollemache
Tenant

RESPONDENT: Sheen Yun
Landlord

TENANCY ADDRESS: 2 Lintaine Place, Glen Innes, Auckland 1072

ORDER

The application is struck out for want of jurisdiction

Reasons:

1. Ms Tollemache attended in person with Andrew Beech as a support person. Sheen (Claudia) Yun attended in person with Christina Tuala as a support person; she also had assistance from Love Kim-Clayden, a Korean interpreter.
2. The tenant wished to apply for return of her bond and refund of all her rent. She was conscious that application had to precede by an inquiry into whether the Tribunal has jurisdiction.

Does the Tribunal have jurisdiction?

Background

3. The property was advertised on Trade Me as a semi self-contained flat attached to a big house, with a separate double bedroom, and own living and combined area (suitable for simple cooking), with its own entrance and separate power meter.

4. The area advertised is part of a large family home with four living areas. Two of those areas are downstairs and two are upstairs. The two downstairs areas have “kitchenette” type set-ups. These would probably not comply with legislative requirements for kitchens in separate dwellings, so if rented out separately would likely be unlawful premises. However, the occupants of the downstairs living areas would usually not use the main kitchen upstairs.
5. When Ms Tollemache went to the address, she found the area comprised a lounge/kitchenette, bedroom, bathroom, and hallway area. The kitchenette only had a microwave oven. As well as a separate entrance, the area had its own letterbox and driveway. Ms Tollemache regarded this area as being exclusively for her own use.
6. Ms Yun permitted Ms Tollemache to use the upstairs kitchen on request, although she expected that would not be a frequent request because the unit had a microwave. Ms Yun would only rarely lock off the upstairs area, so typically the downstairs occupants could access much of the upstairs area, and certainly the kitchen.
7. The landlord offered the tenant a Flat/house sharing agreement to sign which, among other things, stipulated that disputes between the parties would be determined in the Disputes Tribunal. It describes the acceptor as being a “Flatmate/border”. The “Flatmate/border” is required inform the landlord if they are having a visitor stay overnight. They must provide access to all rooms they occupy when the landlord is showing the property to prospective tenants. The agreement states the landlord will inspect the “unit” every three months.
8. Ms Yun said that she wanted everyone living in the house to share. The occupants were welcome to come upstairs even though in practice they did so infrequently. She says she just wanted the occupants to be happy.
9. The tenant declined to sign the Flat/house sharing document. She did however, pay a bond, rent in advance and move into the premises.

Law

10. Section 5(1)(n) of the Residential Tenancies Act 1986 provides that:

Act excluded in certain cases

- (1) This Act shall not apply in the following cases:

(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.

11. The question to be answered when considering the s 5(1)(n) exception is not whether the premises are used by the landlord as a principal place of residence but whether the principal *use* of the premises is as a place of residence by the landlord: *Musson v Dobrisek & Ors*, District Court Lower Hutt, CIV-2006-032-36, 16 February 2006.¹

¹ See *Green v Norrie* [2015] NZTT Christchurch TT 15/00498/CH at para 14.

12. Significantly in 2018, the Tribunal previously considered whether it had jurisdiction for to consider another tenancy at this exact address. Ms Yun was also the landlord in that case. The purported tenants in that case occupied a different area of the house to Ms Tollemache, but the circumstances were otherwise substantially the same.² The Tribunal found at paragraph 6 of its decision:

[T]he tenancy is an excluded tenancy under s 5(1)(n) of the Residential Tenancies Act 1986 *because the premise continued to be used principally as Ms Yun's place of residence*. The intention of the parties, as expressed by the agreement, was plainly that the arrangement was not to be a residential tenancy. While the downstairs area was relatively self-contained, the reality was that Mr Meiring and Ms Garrett were free to enter and use other areas of the property...Considering the circumstances as a whole, I am satisfied that Mr Meijering and Ms Garrett were housemates, not tenants, and that the dispute between the parties must therefore be heard in the Disputes Tribunal.

(Emphasis added).

Discussion

13. The living arrangements described in the Tribunal's earlier case are analogous to this case. In the earlier case, the purported tenants had signed the Flat/house sharing agreement whereas in this case, Ms Tollemache did not. I need to consider whether that makes a material difference to the outcome in this case.
14. The issue for consideration is: has Ms Yun continued to *use* the premises principally as a residence for herself? The Tribunal has previously answered that question in the affirmative. I consider Ms Tollemache's not signing the agreement does not alter the answer to that issue. She did not sign the agreement, but she paid the bond and the rent in advance as required, and moved in, which amounted to acceptance of the terms offered.
15. It would not be appropriate for me to differ from the previous highly experienced adjudicator. There is a persuasive burden of comity upon me. Further, parties are entitled to consistency of decision-making, so they have certainty in arranging their affairs. Ms Yun has relied on the Tribunal's prior decision to arrange her affairs as she did. It would be inapt for the Tribunal to pull the rug from under her by reversing itself.³
16. For these reasons, I must find that that the Tribunal cannot adjudicate on the substantive issues for want of jurisdiction.

² *Yun v Meijering & Garrett* [2018] NZTT Auckland 4142522

³ I had given thought to the idea that the tenancy premises were not the house as a whole, but only the self-contained area which Ms Tollemache spent all her time. However, it is implicit in *Meijering* that the Tribunal considered the allocation of the different living areas did not make them separate "premises" for the purposes of s 5(1)(n); the premises for the purposes of this jurisdiction enquiry are the large family home itself, not the spaces allocated for substantially separate living within it. As mentioned at para 4 of this decision, if rented out separately the premises would likely have been unlawful.

Addendum

17. During the hearing, I understood Ms Yun to express an expectation that Ms Tollemache would not need to use the upstairs kitchen much, if at all, and that she would ask to use the oven, for instance, in advance. I think in future, Ms Yun should make it clear to all her flatmates/tenants that they may use the kitchen whenever they wish to. Regulation 7 of the Housing Improvement Regulations provides, among other things:

(2) There shall be in each kitchen or kitchenette—

(a) an approved sink with a tap connected to an adequate supply of potable water; and

(b) adequate means of preparing food and of cooking food, both by boiling and by baking.

(3) There shall be provided for each kitchen or kitchenette adequate space for the storage of food, so placed, fitted, and ventilated as to protect the food from flies, dust and other contamination, and from the direct rays of the sun.

18. The downstairs units have rudimentary cooking facilities only. If tenants do not have free access to the main kitchen, they will be deprived of a fundamental housing requirement, in breach of regulation 7.



R Kee
16 November 2020

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.