

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2009-485-001954**

UNDER Section 119 of The Residential Tenancies  
Act 1986

BETWEEN ROBYN WINTHER, HUIA TAMAKA  
AND BILLY TAYLOR  
Appellants

AND HOUSING NEW ZEALAND  
CORPORATION  
Respondent

Hearing: 7 October 2009

Counsel: R M Lithgow QC and E A Hall for Appellants  
S N Haszard and C Paterson for Respondent

Judgment: 9 October 2009

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**JUDGMENT OF WILD J**

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**Introduction**

[1] If Housing New Zealand Corporation (HNZ) terminates a residential tenancy for an unlawful reason, does that invalidate the notice of termination?

[2] That is the broad issue on this appeal, brought by the appellants by notice filed on 30 September. The appeal is against a judgment of the District Court given by Judge Walker at Lower Hutt on 29 September. That judgment upheld a decision of the Tenancy Tribunal given on 30 July, also at Lower Hutt.

[3] This appeal is on questions of law, and is pursuant to s 119 Residential Tenancies Act 1986 (the RT Act).

[4] The appellants contend the Judge erred in upholding the Tribunal's decision that the Tribunal had no jurisdiction to examine the lawfulness of the reasons given by HNZ when it terminated the appellants' residential tenancies. In particular, the appellants submit that the Judge erred in holding that:

- HNZ is in the same position under the RT Act as any other landlord, notwithstanding that the New Zealand Bill of Rights Act 1990 applies to HNZ (by virtue of s 3 of that Act);
- Neither the Tribunal nor the District Court has jurisdiction to examine the lawfulness of a landlord's reasons for issuing a notice terminating a tenancy, pursuant to s 51(1)(d) RT Act i.e. giving 90 days' notice.
- The Tribunal does not have a discretion to decline to make a possession order under s 64 RT Act, upon expiry of a notice of termination given in compliance with s 51; and
- The only remedy provided under the RT Act for an unlawful act by a landlord (e.g. unlawful discrimination in terminating a tenancy) is an award of exemplary damages.

### **Background facts**

[5] Each appellant held, from HNZ, a periodic tenancy of a residence in Pomare in Lower Hutt. On 3 March this year the HNZ served on each appellant a notice giving her the required 90 days' notice of termination of her tenancy. The termination date was 1 June. Although the RT Act does not require a landlord to give reasons for a 90 days termination notice, the HNZ attached, to each termination notice, an internal memorandum indicating the reasons for its decision to terminate. As set out in the Tribunal's decision for Ms Taylor, those reasons were that:

- (a) the tenant had breached section 40(2)(c) of the RT Act by interfering with the reasonable peace, comfort or privacy of the landlord's other tenants or of persons residing in the neighbourhood.

- (b) a warrant was executed against the tenant's partner, Micki Rangi, a patched member of the Mongrel Mob and he had been charged by the Police with intimidation.
- (c) Mr Rangi's actions were a serious breach of the tenancy agreement and had severely disturbed other tenants in Pomare.

The internal memorandum attached to the notice of termination given to each of the other two appellants gave similar reasons. It named the particular appellant's partner, also asserting that he was a patched member of the Mongrel Mob. In each case the notice stated that the partner had been charged with burglary. It recorded that that burglary had occurred on 3 February at a property in Pomare Crescent. The property was owned by HNZ and occupied by another tenant. The burglary had caused that tenant to relinquish her tenancy. The memorandum stated that the Police had investigated and arrested three people, including the particular appellant's partner.

[6] Each appellant refused to leave and remains in the residence the HNZ had been renting to her.

[7] On 20 May each appellant applied to the Tribunal for an order that she had not breached her tenancy agreement and that the eviction notice was unlawful. HNZ responded by applying, on 22 May, for a possession order pursuant to s 64.

## **The decisions of the Tribunal and District Court**

### ***Tribunal***

[8] After backgrounding the facts, the Tribunal's decision summarised the argument presented by Mr Lithgow for each appellant. The essence of this was that, in terminating each appellant's tenancy, the HNZ had acted unlawfully, in that it had breached two of the rights guaranteed to each appellant by the Bill of Rights Act. Those rights were the democratic and civil right of association guaranteed by s 17 of the Act, and the right to freedom from discrimination guaranteed by s 19 of the Act. Section 19 provides:

## **19 Freedom from discrimination**

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

[9] The Tribunal summarised the next step in Mr Lithgow's argument thus (and I take this from the Tribunal's decision dealing with the appellant Ms Taylor):

... Instead, the Corporation had chosen to discriminate against her, and then tried to sanitise its unlawful act by giving her 90 days notice. There was no obligation upon the Corporation to give reasons for the notice, but if reasons existed, then the Tribunal was mandated by section 3 of BORA to intervene by examining the lawfulness of those reasons. Section 6 assisted the Tribunal in that regard. There was nothing in the Act to the contrary. The Tribunal could intervene notwithstanding that Ms Taylor had made a complaint to the Human Rights Commission; she was not seeking an order under section 12 of the Act.

[10] The Tribunal next recorded counsel's agreement that there was no requirement for a landlord to give a reason for a 90 days notice under s 51(d). The Tribunal agreed, explaining its reasons, by referring to ss 50 and 51. In particular, the Tribunal noted that there was no requirement for a tenant to give reasons when giving the 21 days notice of termination required by s 51(2). Nor had it ever been suggested that a tenant must give a reason for the notice. The Tribunal observed:

The same consideration must surely apply to notices given by landlords under s 51(1)(d).

[11] The Tribunal then referred to the fact that HNZ's reasons for terminating the tenancies were not in the notices themselves, but in the internal memorandum attached to each notice. The Tribunal regarded that difference as immaterial, and considered that the real issue was whether it was entitled to examine the lawfulness of reasons for termination if given in the notice itself. It held that it was not, reasoning in this way:

If there is no legal requirement to give a reason for a notice, then, if a reason happens to be given in the notice, can the disaffected party attack the notice by challenging the reason in the Tribunal? In my view, the logical answer must be "no". If there is no condition precedent for the doing of an act then,

provided the act is done, it must stand notwithstanding that there is an unlawful reason for it.

I see nothing in the scheme of the Act which justifies the Tribunal examining a reason in a landlord's notice and setting aside the notice if the reason is unlawful, any more than the Tribunal is justified in examining a reason in a tenant's notice and setting aside the notice if the reason is unlawful. If the Tribunal was intended to have such a power, then it would have been expressly provided in the Act. It must follow that there is no basis for the Tribunal to examine a reason for a landlord's notice where the reason appears in an ancillary document, and to set aside the notice if the reason is unlawful.

I return to the present case, where the Corporation in an internal memorandum gave reasons for its notice. Even if those reasons are unlawful, I see no basis for setting aside the notice.

[12] The Tribunal then disposed of Mr Lithgow's argument that HNZ was in a different position from other landlords in this way:

Mr Lithgow argued, if I understood him correctly, that the Corporation was different from other landlords in New Zealand because it was subject to BORA, and through that the HRA. In my view, the rights and obligations of all landlords and tenants are governed by the provisions of the Act. The Act makes all landlords subject to the anti-discrimination provisions of the HRA. The Corporation is in no different position to any other landlord, and even if it is subject to BORA, it does not thereby assume any extra obligation not already imposed upon it by a combination of the Act and HRA.

[13] The Tribunal also expressed the view that the remedies available to a tenant who sought an order from the Tribunal under s 12, complaining of discrimination prohibited by s 21 Human Rights Act, was an award of exemplary damages pursuant to s 12 (but in fact, I think, pursuant to s 109), together with compensatory damages which the Tribunal could award under s 77(2)(n).

[14] Finally, the Tribunal agreed with a submission for HNZ that a tenant complaining of unlawful discrimination could apply to the Tribunal or make a complaint to the Human Rights Commission under the Human Rights Act, but not both: s 12A RT Act.

## *District Court*

[15] The Judge's decision records the parties' acceptance that the real issue was whether the termination notice was effective, entitling HNZ to the possession order the Tribunal made.

[16] Essentially the Court's decision endorsed the reasoning of the Tribunal, and upheld its decision. The Court agreed with the Adjudicator that neither the Tribunal nor the Court had jurisdiction to examine any reasons given for issuing a notice of termination. The Court thus dismissed the tenants' appeal. In terms of the remedies available for an unlawful act by a landlord, the Court said this:

[20] ... The RT Act does not provide any jurisdiction for the Tribunal to enquire into the reasons for the termination or to exercise any discretion as to whether an order for possession will be made.

[21] ... the remedy is limited to an award of exemplary damages within prescribed limits. There is no provision for any other remedy such as injunctive relief or declaration that any notice is invalid by reason of such unlawful conduct.

[17] The Court held that HNZ, in material respects, was in the same position as a private landlord. It said this:

[24] By virtue of the Housing Corporation Act 1974, Housing New Zealand Corporation is a Crown Entity and there could be no argument, having regard to the objectives of HNZ, that it performs a public function. By virtue of s 3(b) of the New Zealand Bill of Rights Act 1990, the Bill of Rights applies to acts done by HNZ. It may also be that HNZ is part of the Executive branch of government and that s 3(a) brings it within the Bill of Rights.

[25] While, unlike private landlords, HNZ is subject to the Bill of Rights, that fact does not, in my view, alter the rights and obligations conferred on it by the Residential Tenancies Act 1986. That Act binds the Crown and applies to every tenancy for residential purposes (ss 3-4 of the Act). The act is therefore of universal application.

[26] The actions and decisions of HNZ may well be subject to Judicial Review examining, for example, whether its actions are in accordance with its statutory objectives and duties, and it may also be subject to a remedy in a separate proceeding for a breach of the Bill of Rights. The existence of such remedies does not alter the universal application of the Residential Tenancies Act 1986 creating special considerations for HNZ or any other public landlord. HNZ is in no different position under the Act than any other landlord.

## Submissions

[18] I trust the following summary encapsulates the appellants' submissions, comprehensively and forcefully presented by Ms Hall:

- a) HNZ evicted the appellants in breach of ss 17 and 19 Bill of Rights Act.
- b) The Tribunal and District Court both misunderstood their powers in respect of such breaches. Their powers were not limited to an award of exemplary damages under s 109 RT Act. For a start, s 109(5) makes it clear that the exemplary damages are in addition to any compensation ordered in respect of the unlawful act.
- c) At the very least, the Tribunal and District Court have power to make a declaration that a termination notice given pursuant to s 51(1)(d) was unlawful: s 78(1)(a).
- d) Paragraph [24] of the Court's judgment is correct, but [25]-[26] are not. Were the latter two paragraphs correct, the consequence would be that the Tribunal and Court are powerless to prevent an eviction actuated by unlawful discrimination. That means "Courts can do nothing about it".
- e) The Tribunal has power to declare ineffective a s 51(1)(d) notice: s 77(1), (2)(g), (l), (m), (3) and (4) (the last of those provisions giving the Tribunal the jurisdiction a Court possesses under s 264 Property Law Act 2007, to "grant relief against the refusal of the lessor to extend or renew the lease, or enter into a new lease ...").
- f) Similarly, s 78(1)(a), (b) and (f) give the Tribunal power to inquire whether the power of termination of a tenancy is being exercised in an unlawfully discriminatory way, and to grant relief if it is (e.g. to make

a declaration that the notice of termination is invalid, and to restore the tenant to the premises).

- g) In short, s 51 is subject to the Tribunal's jurisdiction as it is set out in s 77, and to its powers to make the orders detailed in s 78.
- h) Section 12 is similarly subject to ss 77 and 78, and does not limit the jurisdiction and the powers given by those sections.
- i) In any event, s 12 is not triggered in the case of the appellants. That is because they have been responding to discriminatory evictions by HNZ and have not made applications to the Tribunal in terms of s 12A(1)(a). The appellants' complaint is of two breaches of the Bill of Rights Act, not of any unlawful act in terms of s 12. The appellants have not alleged a breach of the Human Rights Act.

[19] The appellants seek a judgment allowing their appeals, directing the Tribunal that it did have jurisdiction to consider whether HNZ's reasons for terminating the appellant's tenancies were unlawful, and remitting the appellants' cases to the Tribunal for reconsideration.

[20] I do not intend summarising Mr Haszard's submissions for HNZ, as my decision substantially accepts them.

## **Decision**

[21] Nothing in Ms Hall's submissions for the appellants persuades me that the Tribunal and District Court erred in law. The Act does not require a landlord – or for that matter a tenant – to give a reason for terminating a tenancy. It specifies the minimum notice periods (s 51(1) and (2)) and is specific as to what must be in a notice to terminate (s 51(3)) e.g. that the notice must be in writing.

[22] As no reason for termination is required, I agree with the Tribunal and the District Court that the lawfulness of any reason(s) given cannot be a legitimate

concern of the Tribunal or Court when considering whether a notice to terminate given under s 51(1)(d) is effective. To inquire into those reasons would simply be to engage in the irrelevant. Indeed, any such inquiry could only be viewed as tantamount to adding, to s 51(3), an additional requirement that any reasons given must be lawful. As there is no “gap” in s 51 of the Act, that interpretative approach cannot be correct: *Northland Milk Vendors Association v Northern Milk Ltd* [1988] 1 NZLR 530 at 538 per Cooke P; *Statute Law in New Zealand / J F Burrows, R I Carter*, 4th ed., 2009 at 212. The Tribunal specifically – and quite rightly – did not decide whether the reasons given by the Corporation for terminating Ms Taylor’s tenancy were lawful. Nor did the Court. I also make no determination about that. That is an important point. The appellants’ submissions constantly referred to ‘unlawful discrimination by HNZ’. That is an assertion, not an established fact.

[23] The appellants’ argument depends on reading s 51 as subject to ss 77 and 78. Indeed, Ms Hall submitted that those two sections “override” s 51. For four reasons, I do not accept that. My first reason is the structure of the RT Act. Part 1 deals with the application of the Act. For example, s 3 provides that it binds the Crown i.e. binds HNZ. Part 2 contains detailed requirements about tenancy agreements, including setting out the rights and obligations of parties to them, and providing for the termination of tenancies and recovery of possession. Section 51 is one of the sections under the latter heading. Part 3 is positioned after all those “nuts and bolts” provisions (as Ms Hall termed them). It deals with the Tribunal: its constitution and administration; its jurisdiction; its procedure; enforcement of its orders and offences for non-compliance with those orders, and appeals to the Courts. For the reasons I will explain, I do not accept that ss 77 and 78 “override” s 51. On the contrary, I consider they are sections which are intended to enable the Tribunal to give effect to s 51, along with all the other “nuts and bolts” provisions in the RT Act.

[24] Secondly, the Tribunal’s jurisdiction under s 77 is to be exercised “in accordance with the Act”: s 77(1). Section 51 is part of the Act. The Tribunal must therefore exercise its jurisdiction so as to give effect to s 51, not to negate its effect. For example, the Tribunal could not substitute, when the notice is given under s 51(1)(d) requiring 90 days notice, a requirement for 20 days notice, or 180 days notice. Nor could it properly interpret and apply s 51 as if it read: “90 days notice

must be given unless termination is for an unlawful reason in which case the notice is ineffective”.

[25] Thirdly, the appellants relied specifically on the Tribunal’s jurisdiction under s 77(2)(g), (l) and (m). But s 77(2) expressly states that it does not limit the generality of s 77(1). Thus, the 17 areas of jurisdiction specified in s 77(2) are to be exercised “in accordance with this Act”.

[26] Fourthly, without limiting the generality of the Tribunal’s jurisdiction as specified in s 77, s 78 lists orders the Tribunal may make “in respect of any claim within its jurisdiction”. As that jurisdiction is to be exercised “in accordance with the Act”, including s 51, s 78 does not alter the position.

[27] It follows that I do not accept Ms Hall’s submission that a landlord cannot obtain a possession order under s 64 if it has acted contrary to the Bill of Rights Act or the Human Rights Act. Provided the landlord has complied with the relevant provisions of the RT Act, in particular s 51 in terms of the notice given, s 64 provides that the Tribunal “shall” make an order granting the landlord possession of the premises.

[28] As I outlined in [18]i), the appellants submitted that s 12 is not engaged here. Ms Hall explained that that was because the appellants were responding to discrimination, not proactively complaining about it. I do not accept that. Since unlawful discrimination (at least alleged) by a landlord is necessary before a tenant can either complain about such discrimination, or respond to it, attempting to draw a distinction between responding and complaining makes little sense in terms of s 12. In any event, the appellants did complain. First, on 20 May 2009, each of them filed an application with the Tribunal seeking an order that “the tenant has not breached the tenancy agreement and that the eviction notice is unlawful”. Secondly, Ms Hall confirmed that each of the appellants has made a complaint to the Human Rights Commission. Thus, each of them seems to have chosen the alternative procedure open to them under s 12A(1)(b) RT Act, precluding them from seeking the monetary remedies that would otherwise have been available to them under the RT Act.

[29] I accept Mr Haszard's submission for HNZ that s 12 is relevant to these appeals. The appellants assert that HNZ, in terminating their tenancies, unlawfully discriminated against them. They say the discrimination was because of their family status. If (and I reiterate that this has never been determined) that was the case, it would be unlawful, because discrimination on the ground of family status is prohibited by s 21(1)(l)(iii) Human Rights Act (discrimination on the ground of family status – being in a de facto relationship with a particular person).

[30] If there was unlawful discrimination of that type, s 12 applies. That is because, in terms of the definition of “unlawful act” in s 2 RT Act, termination of a tenancy in contravention of the Human Rights Act is declared by s 12(1)(a) to be an unlawful act.

[31] The fact that the appellants allege also a breach of s 17 Bill of Rights Act does not affect the position. Any remedy for that cannot be sought under the RT Act, because the Tribunal's jurisdiction as to unlawful acts (and denial of a s 17 freedom would be an unlawful act) is prescribed by s 12. I need not comment about Mr Haszard's suggested reasons why Parliament did not give the Tribunal jurisdiction in respect of a breach of the Bill of Rights Act.

[32] In [18]d) I recorded Ms Hall's submission that the result of rejecting her argument would be that “Courts can do nothing about” an eviction actuated by unlawful discrimination. That submission may have been loosely made, directed more at the media in Court. But it is patently wrong. Had the appellants chosen the procedure available to them under s 12A(1)(a), the remedies available under the RT Act would have been available to them. Certainly, those remedies are monetary ones only. The explanation for that is obvious. If an unlawful act could affect the validity of a termination notice given in compliance with s 51, then great uncertainty could, and almost surely would, arise. A landlord would not know where it stood if a tenant challenged the validity of the termination notice. A tenant would not know where he or she stood until the Tribunal determined the challenge to the validity of the notice. Any new tenant let into premises vacated by the tenant would also be in an uncertain position. Might that tenant have to vacate the premises if the Tribunal subsequently held the termination notice to be ineffective? After all, in that event,

the new tenant would have possession of a residence still lawfully tenanted by the previous (evicted) tenant.

[33] The cases of the three appellants are instructive. The 90 days notice to each expired on 1 June. None of them vacated. In its three decisions on 30 July, the Tribunal made a possession order against each appellant in favour of HNZ. Appeals followed, first to the District Court and now to this Court. Four and a half months have gone by since HNZ's termination notices expired. Until delivery of this judgment, neither the appellants nor HNZ have known where they stand. And there is the potential for a still further (third) appeal to the Court of Appeal: s 120 RT Act.

[34] The interpretation of the RT Act contended for by the appellants risks multiplying that sort of uncertainty many, many times over. I can envisage the Tribunal being deluged with cases requiring it to determine the validity of termination notices given in compliance with s 51.

[35] I am in no doubt that Parliament, in enacting the RT Act, intended to avoid, not create, that sort of uncertainty. The long title to the RT Act states:

An Act to reform and restate the law relating to residential tenancies, to define the rights and obligations of landlords and tenants of residential properties ...

[36] What was said in Parliament when the Residential Tenancies Bill (that became the RT Act) was introduced, makes it clear that the Bill was seen as an important consolidation and clarification of the rights and obligations of landlords and tenants. For example, Mr McLeay, for the Opposition, paraphrased the intention of the Government when introducing the Bill as an attempt to advance "fairness, speed, simplicity and equity": ((1985) 472 NZPD 2972).

[37] The appellants' interpretative approach would defeat that intent and purpose, and lead to delays, complexity and uncertainty. Thus, I do not consider it is the purposive approach to the interpretation of the RT Act which is required.

[38] Supporting this is s 54, which provides that the Tribunal may declare a retaliatory termination notice to be of no effect. That is the only situation in the RT

Act permitting the Tribunal to declare a notice of termination ineffective. The policy behind s 54 is obvious: if a retaliatory notice were effective, the rights of tenants could be negated. For example, a tenant who complained his roof was leaking badly (a breach of the landlord's "reasonable state of repair" responsibility under s 45(1)(b)), could be evicted by the landlord retaliating with a termination notice under s 51. That would obviously defeat the right of the tenant, the corollary of the landlord's s 45(1)(b) responsibility.

[39] In [26] of his decision, Judge Walker referred to the possible availability of judicial review of an unreasonable or unlawful decision or action of HNZ. Mr Lithgow, replying for the appellants, asserted that judicial review was really beyond the grasp of ordinary people such as the appellants, whereas they were able to apply for relief to the "fee-less" Tribunal.

[40] If that is correct (and the range of applicants to this Court for judicial review suggests to me that it is not), then it is a submission that the law is not serving the New Zealand public. That submission is more properly directed to this country's lawmakers than to this Court.

[41] However, if that is a submission that this Court should interpret the RT Act as conferring on the Tribunal a jurisdiction to "review" the lawfulness of a termination notice given pursuant to s 51, then I reject it. The Tribunal's powers are limited to ensuring compliance with the requirements that are in the RT Act e.g. those in ss 50-57.

[42] Finally, the appellants argued that the remedies set out in s 92I Human Rights Act would permit the Human Rights Review Tribunal to invalidate a termination notice given under s 51 RT Act, if it discriminated on grounds prohibited by s 21 Human Rights Act. Ms Hall referred particularly to s 92I(3)(b), (d) and (h). Those submissions are considerably removed from the issues on this appeal. This is not a proceeding in which any of those remedies is sought, and I think it best not to express any view about them. That is particularly the case when the appellants have complaints to the Human Rights Commission pending. Suffice it to say that, having looked at the provisions Ms Hall pointed to, I find her submission unpersuasive.

Given the clear terms of s 51, and ss 12, 12A and 109, of the RT Act, I cannot envisage the Human Rights Review Tribunal granting a remedy that negated s 51.

## **Result**

[43] I see no error of law in the District Court's decision, or in the decisions of the Tribunal which it upheld. Accordingly, the appeal is dismissed. The possession orders made by the Tribunal against each of the three appellants stand.

[44] The parties accepted that I have inherent jurisdiction to direct that those possession orders not take effect for a specified period following delivery of this judgment, and to fix an appropriate period. I direct that each of the appellants is to vacate her residence, handing possession of it back to HNZ, by midnight on Friday 30 October 2009.

## **Costs**

[45] Mr Lithgow advised me that the appellants' applications for legal aid for this appeal have not yet been determined. He contended that this was a test case in the true sense of that expression (i.e. as used in *McGechan on Procedure* HRPt14.17(1)), and sought 2B costs for two counsel, irrespective of the result.

[46] Should the appeal fail, Mr Haszard informed me that HNZ did not seek costs. He accepted that this was a test case that would be of general benefit to HNZ.

[47] I agree this is a test case that will have, for HNZ as the country's largest landlord, value extending well beyond the appellants' cases. Accordingly, I order HNZ to meet the appellants' 2B costs of the appeal: a full day's preparation and a full day's hearing, plus any proper disbursements.

Solicitors:  
Dana Maniapoto, Lower Hutt for Appellants  
Crown Solicitor, Auckland for Respondent