EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT MANUKAU

CIV-2018-092-000869
[2018] NZDC 9082

BETWEEN	LUMINOUS PROPERTY INVESTMENTS LIMITED Appellant
AND	SANDRA ELIZABETH ARUA Respondent

Hearing: 30 April 2018

Appearances: D Jaques for the Appellant
Respondent in Person

Judgment: 9 May 2018

JUDGMENT OF JUDGE C J McGUIRE

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[1] This is an appeal against the decision of the Tenancy Tribunal at Manukau dated 25 January 2018.

[2] The Tribunal's decision ordered that the appellant repay all the rent paid by the respondent, namely $10,297.02 that she had paid for her tenancy at [the address], Papatoetoe.

[3] The Tribunal found that during the tenancy between August 2016 and 2017 the premises had flooded twice.

[4] The Tribunal found as follows:

> 20. Auckland City Council gave notice on 14 July 2017 regarding unauthorised building work being carried out at the premises, namely installation of a kitchen sink within the garage and associated plumbing and additional sanitary fixtures without a building consent which is in breach of the Building Act.

21. The Council took issue with the garage being used as a separate residential unit. The garage is noted by Council to be on an overland flow path and prone to flooding.

22. The Council is of the view that the area is "not a habitable space." The Council observed that "if a tenant were to occupy this area of the building in its current state, it would make the building potentially insanitary" which is in contravention of section 123 of the Building Act.

23. The Council also noted that due to flooding within the garage area, the rotten kitchen cabinetry, mould and dampness within the garage would make it insanitary if rented out to a tenant.

24. Finally, the Council also noted that the use of the garage as a separate unit would also potentially need fire separation and resource consent (which has not been obtained).

[5] Mr Jaques for the appellant submitted that the appellant had purchased the property in good faith and had not been made aware that the rental premises in question which from photographs on the file appears to be an outwardly well presented "granny flat" immediately adjacent and on the same level as a downstairs garage of a good quality home built on a section that slopes up from the road was unpermitted.

[6] The Tribunal reviewed a number of cases relating to tenancies where the premises was not the subject of resource consent approval. In particular, it relied on a Tenancy Tribunal decision in *Riddler v Beesley* TT 4032041 Masterton (20 October 2016). The Tribunal quotes paragraph 12 of that decision:

> In some circumstances, particularly where a lack of building consent relates to a part of a property, or is an oversight and only a technical breach that has caused no detriment, return of all rent could be contrary to the purpose of the Act, and unjust. The Tribunal would also have to consider the merits where it is concerned that a tenant has taken advantage of accommodation, expecting to later seek return of the rent, or brings a claim for a part tenancy about which, at the time, they made no complaint or suffered no detriment.

[7] The Tribunal also quotes paragraph 15 of the *Riddler* decision:

> "In summary, where a property cannot lawfully be used as residential premises, the starting position is that the Tribunal can only make orders under s 137 for exemplary damages (where appropriate), and an award that all rent be paid back. In limited situations where the illegality arises only from a technicality and has not created detriment, it is open to the Tribunal to decline to make orders under s 137. However, it would be for the landlord to prove that an award under s 137 would be unjust for reasons other than the simple fact that the tenant has had the benefit of the accommodation.

> Section 137 prohibits any person from entering into any transaction or make any contract that contravenes any provisions of the Residential Tenancies Act and subsection (4) provides that all money paid and the value of any other consideration for the tenancy provided by the tenant . . . shall be recoverable as a debt due to the tenant . . .”

[8] In our case, the Tribunal found that:

> 42. By preparing and entering into the tenancy agreement of the garage as a residential premises, the landlord has directly entered into a transaction and made a contract that contravenes the provisions of the Act or which has the effect of directly or indirectly defeating, evading or preventing the operation of the Act.

[9] Mr Jaques submits that the premises was rented in good faith. It was in good condition and that when things went wrong the landlord tried to help by offering the tenant the house upstairs from the tenanted premises.

[10] In reply, the respondent said that she believes the landlord must have known that there was a problem with her premises. She said there was a musty smell when she moved in and remained throughout her tenancy. She said there was mould and rot in a cupboard. She also said that the whole property had only one mailbox and that there was an inference from that to be drawn that there was only one residential premises.

[11] I enquired of Mr Jaques as to whether his client had sought redress from the former owner.

[12] Given the amount here was just over $10,000, he indicated that the costs of such a proceeding could not be justified.

[13] It may well be that the appellant nevertheless has recourse through the Disputes Tribunal should that avenue be sought.

[14] In the end, however, I find that the Tribunal in this case has determined the dispute in the manner that s 85 requires. Accordingly, I must dismiss this appeal.

C J McGuire
District Court Judge