The Residential Tenancies Act 1986

Brian Davis*

In May 1985 the Property Law and Equity Reform Committee issued a report on the law of residential tenancies which, while leaving some matters for further consideration, represented nonetheless a thorough reappraisal of the law. In its seven point approach to reform[1] *the Committee sought to provide a law which stated simply all the basic obligations of landlord and tenant, and provided for a speedy resolution of tenancy disputes with a minimum of criminal penalties.*

While perhaps not all the suggestions made by the Committee are incorporated into the Residential Tenancies Act 1986, it is clear that the main thrust of the report formed the basis of this new legislation. In particular, the main reforms brought about by the Act, which came into force on 1 February 1987, incorporate the innovative recommendation of the Committee for a simple "stake-holder" solution to the problem of bonds paid by a tenant, and an expeditious two-level procedure for determining disputes between landlord and tenant. In this paper Dr. Davis discusses the new Act.

1. INTRODUCTION

The object of the Residential Tenancies Act 1986, as stated in its title, is ". . . to reform and restate the law relatingto residential tenancies, [and] to define the rights and obligations of landlords and tenants of residential properties . . .". Consequently, all the principal matters of concern to landlords and tenants have been collected into a single statute, namely provisions relating to rents and other payments by tenants, the termination of tenancies, and the basic terms of tenancy agreements. The Residential Tenancies Act 1986 is, however, more than a consolidation of the previous legislation, but something less than a codification of the law of residential tenancies. A few, possibly rare, situations remain governed by the rules of Common Law and Equity. Examples include the effect of the death of a tenant,[2] the problem of flat sharing and the problem of terminating a joint tenancy of residential premises by one joint tenant,[3] and other matters in paragraphs 78-81 of the Committee's Report which it considered required further study. The 1986 Act repeals both the Tenancy Act 1955, and the Rent Appeal Act 1973, and excludes the application of Part VIII of the Property Law Act 1952, as

* Senior Lecturer in Law, Victoria University of Wellington.

1 See Report, para 17.

2 See *Youngmin* v. *Heath* [1974] 1 W.L.R. 135.

3 See Webb "Notices to Quit by One Joint Tenant" (1983) 47 Conv. 194.

particularly amended in 1975, from premises regulated by the new legislation. Where it applies the new Act replaces the often lengthy and cumbersome provisions of those former statutes with a simple modified statement of obligations of the parties, and a somewhat freer rent regulation procedure.

Before outlining the new provisions and procedures, and the major reforms effected by the Act, a fundamental change of approach which appears throughout the Act should be noted. Possibly the most significant feature of the Act is the increased flexibility introduced into the relationship of landlord and tenant in an attempt to make the legislation more fairly applicable to the various circumstances in which residential premises become tenanted. In this regard the new Act can perhaps be said to confer a comparative freedom of contract with safeguards.

This flexibility may be seen in the prohibitions on charging key money and on refusing to let to tenants with children. These prohibitions were formerly absolute, but under the 1986 Act they can be relaxed in appropriate cases by the Tenancy Tribunal. There is also a more relaxed prohibition against contracting out of the Act. Instead of the blanket prohibition of earlier legislation, the Tribunal may now authorise variation from the Act where it ". . . is satisfied that, having regard to the nature of the tenancy, the provisions of the tenancy agreement, the interests of the parties, and all other relevant circumstances of the case, the inconsistency, exclusion, modification or restriction should be permitted".[4] In addition the landlord, but not the tenant, may waive any rights or powers conferred by the Act.

II. THE APPLICATION OF THE ACT

The Act is obviously limited to residential premises defined as ". . . any premises used or intended to be used for occupation by any person as a place of residence", and it binds the Crown equally with the private sector. However, there are exceptions to this generality. For example section 6 contains the expected range of exceptions for hostels, hotels, boarding houses, holiday lettings or premises which ". . . continue to be used, during the tenancy, principally as a place of residence by the landlord or by any member of the landlord's family". It is perhaps significant that the Act in section 7, restores something of the philosophy of the Tenancy Act 1955 to the extent that, unlike the legislation of 1973-5, residential premises let "for a fixed-term tenancy of at least 5 years" are excluded.[5] There is also a partial exclusion, principally from the rent control provisions, for short fixed term tenancies not exceeding 120 days where there is a prior written agreement that the tenancy will not be extended or renewed beyond 120 days.[6] The exceptions and exclusions, however, are subject to the rider in section 8 that the parties to an excluded tenancy may nonetheless agree that the Act shall apply.

4 Residential Tenancies Act 1986, s.11 (1)(b).

5 From section 2 and the decision in *Robins* v. *Teletax Corp.*, unreported 26 March 1984 T.T. No. 42/87, a tenancy for 5 years but which is expressly terminable by notice, is not excluded from the Act.

6 Residential Tenancies Act 1986, s.7.

It is noteworthy that the New Zealand Act has made a clear attempt to overcome one applicability problem revealed under the South Australian Act, to which the New Zealand Act is expressly parallel, and that is its application to existing tenancies at the commencement of the Act.[7] It may, however, be questioned whether another problem revealed in *McDonald* v. *Reicht*[8] (although possibly rare and possibly subject to the need for any planning consent implicit in the landlord's obligation under section 36), has been as adequately guarded against in the New Zealand Act as was contemplated by the Committee[9] and provided for in the original Bill.[10] The problem in *McDonald* v. *Reicht* concerned a motel where, during a downturn in patronage, a few units were let as residences for more permanent terms. It was held that such lettings were outside the scope of the Residential Tenancies Act 1978-81 (S.A.) which provided simply that that Act should not apply to "any part of a hotel or motel". In New Zealand the original Residential Tenancies Bill expressly brought such lettings within its ambit. The Act has been passed omitting any such provision but provides that it shall not apply "where the premises constitute part of any hotel, motel, boarding house or lodging house used for the provision of temporary or transient accommodation". It remains a question of fine interpretation whether the qualifying description refer to the premises as a whole, or to each letting.

III. DISPUTE SETTLEMENT AND THE TRIBUNAL

Perhaps the most important parts of the Act are those establishing the Tenancy Tribunal and the system of tenancy mediation. The Act contemplates a two tier process with a distinct split administration for the settling of disputes between landlords and tenants, in which recourse to the judicial function of the Tenancy Tribunal is the last resort. Emphasis is given in the first instance to mediation, which is administered not through the Department of Justice, as is the Tribunal, but through the Housing Corporation. Thus, where there is a dispute involving a tenancy to which the Act applies, and where regulations do not provide for direct referral to the Tribunal, a tenancy mediator is first "... to attempt to bring the parties to the dispute to an agreed settlement", and where agreement is reached, to exercise the functions of the Tribunal.[11] Either party may apply to the Tribunal requesting that the order of the mediator be sealed by adjudicator, which must be done unless the adjudicator believes the mediator's order is ultra vires, in which case the matter may be referred back to the mediator with appropriate directions, or referred for the determination of the Tribunal.[12]

7 Ibid., s.9 and cf. *Re Belajev* (1980) 22 S.A.S.R. 1.
8 (1984) 36 S.A.S.R. 295.
9 Report, para. 57 (j).
10 Residential Tenancies Bill 1986, cl.6.
11 Residential Tenancies Act 1986, s.88 (2).
12 Ibid., s.88 (5) & (6).

The second tier of the dispute settling process is the Tenancy Tribunal established by section 67, and presided over by Tenancy adjudicators having either a legal background or some special knowledge or experience. Although constituted as a single unit, the Tribunal is to be accessible in various places[13] and it seems that the proper quorum is one adjudicator in each place.[14]

The purpose of the Tribunal is "to determine in accordance with this Act all disputes arising between landlords and tenants in relation to any tenancy to which this Act applies or to which this Act did apply at any material time". This wide statement is more specifically broken down into a list of particular matters and possible orders set out in sections 77 & 78. The scope of the Tribunal's jurisdiction is, thus, not limited to questions of rent, but extends to all aspects of the tenancy relationship covered by the Act, and it is to be noted that the jurisdiction is exclusive. Not only may the jurisdiction not be excluded by agreement between the landlord and tenant,[15] it is also exclusive as against other courts, except in certain specified circumstances, and, of course subject to appeals. Section 82 provides that no other court ". . . shall have originating jurisdiction any matter within the jurisdiction of the Tribunal," except in the case of matters begun before the commencement of the Act, or referred by the Tribunal to the District Court at the request of the parties.[16] Of particular significance is the exclusive jurisdiction of the Tribunal to make orders for the possession of property subject to a tenancy.[17] One wonders whether this will create any difficulty where another court makes a vesting order under other legislation, for example section 28 of the Matrimonial Property Act 1976.

It is to be noted that no party before the Tribunal is entitled to be represented by counsel unless the other party consents, or the amount in dispute exceeds $3000, or the Tribunal permits such representation having regard to "the nature and complexity of the issue involved," or "any significant disparity between the parties affecting their ability to represent their respective cases". If one party is so represented, or that party's case is being conducted in the public interest by the Director General of the Housing Corporation under section 124, the other party may also be legally represented.[18]

IV. OFFENCES

One of the guidelines proposed by the Property Law and Equity Reform Committee was that "criminal offences should be introduced most sparingly". In line with this, the Act provides only a few such offences and then principally in connection with proceedings before the Tribunal, for example contempt of the Tribunal[19] and entry

13 Listed ibid., schedule 1.
14 Ibid., s.67(6).
15 Ibid., s.81.
16 Ibid., s.83(2).
17 Ibid., ss. 63 and 64.
18 Ibid., s.93.
19 Ibid., s.112.

onto premises without the consent of the Tribunal.[20] Instead, breaches of statutory obligations or duties by landlords, (or in one case the tenant[21]) such as, breach of the non-discrimination provision,[22] requiring unlawful key money[23] or an excessive bond[24] and many matters which under the previous legislation were offences, now form a new category of "unlawful acts", which are within the jurisdiction of the Tenancy Tribunal. These do not automatically, upon commission, bring down a criminal penalty, but rather a sum of exemplary damages, specified in section 109 (4), where the Tribunal is satisfied that the act was committed intentionally and having regard to the intention of the person concerned, the effect of the unlawful act, the interest of the parties and the public interest, it would be just to order such payment.

V. BONDS

One of the important new features of the Act is that the Housing Corporation, instead of, as hitherto the landlord, shall hold bonds, or other payments howsoever called "as security for the observance and performace of the tenant's obligations".[25] No doubt one of the motives behind this "stake-holder" provision, apart from the contribution made by the interest from the investment of the bonds to the running costs of administering the Act and the Tribunal, is to alleviate the wrangling noted by the Property Law and Equity Reform Committee's Working Paper[26] and the problem of recovering the bond from a landlord who had purchased the freehold subject to the tenancy, but who had not personally received the original bond, and who, therefore, was reluctant to return money not actually received. This reluctance has now been supported by the Privy Council on appeal from Hong Kong in *Hua Chiao Commercial Bank Ltd* v. *Chiaphua Industries Ltd*[27] where it was held that a bond or security deposit was not an obligation having ". . . reference to the subject matter of the lease" for the purposes of the equivalent of section 118 of the Property Law Act 1952.

The obligation contained in section 19 for a landlord to remit the bond received to the Housing Corporation, unless under section 21 the tenant pays the bond direct to the Corporation, arises only where a bond is actually demanded and one initial reaction of some landlords was to suggest a private insurance policy instead of a bond. Where a bond is actually paid it is limited to a maximum of the equivalent of four weeks rent, but, as a further indication of the flexibility introduced into the law, there is the possibility of augmenting the bond where the rent rises[28] and of a reciprocal repayment of part of the bond should the rent be decreased.[29] Claims against bonds by either party to the tenancy

20 Ibid., s.63.
21 Ibid., s.48(4).
22 Ibid., s.12(3).
23 Ibid., s.17(3).
24 Ibid., s.18(2).
25 Ibid., s.2 and see *Robins* v. *Teletax Corp.* supra n.5.
26 Appended to the Report, p.60 paras. 37 and 38.
27 [1987] 2 W.L.R. 179.
28 Residential Tenancies Act 1986, s.18(2).
29 Ibid., s.18(3).

are made by application to the Housing Corporation and contents claims are to be referred to the Tribunal for determination.[30]

VI. RENTS

On the important matter of rents, the Act (subject to transitional provisions where rents fixed under earlier legislation were extant when the new legislation came into force) appears to contemplate that the rent payable for any tenancy shall be principally a matter for agreement between the parties on market principles and may be increased comparatively freely by not less than sixty days notice in writing, except in the case of fixed term leases.[31] There are, however, two particular safeguards. First, unless the tenancy agreement provides for regular annual reviews, rent cannot be increased at intervals of less than 180 days. Secondly, the Tribunal may determine, on application of the tenant, whether the rent payable under the agreement exceeds the market rent "... by a substantial amount". The market rent is a new concept which replaces the older concepts of fair or equitable rents, and sets aside the determining criteria of the previous rent legislation. The market rent is defined simply as

> ... the rent that, without regard to the personal circumstances of the landlord or the tenant, a willing landlord might reasonable expect to receive and a willing tenant might reasonably expect to pay for the tenancy, taking into consideration the general level of rents for comparable tenancies of comparable premises in the locality or in similar localities and such other matters as the Tribunal consider relevant.

The generality of this formula may cause problems of inconsistency if the Tribunal, which may sit in several locations with a quorum of at least one adjudicator,[32] holds in one locality that a particular facet of a tenancy is relevant, but the Tribunal, differently constituted in another place considers the identical matter irrelevant.

Incidentally, before leaving the statutory provisions for rent and its increase, it is perhaps worth noting that, when compared to the original Bill, it appears that an error has crept into section 24 (4). Between the introduction of the Bill and its final enactment, it seems that it was not noticed that a new subsection (2) had been introduced in the originally proposed section 24, so that the reference in section 24(4) to the provisions of subsection (2) should, it is suggested, be a reference to subsection (3) (i.e. subclause 2 of the original Bill). The cross reference in section 24(3) to subsection (4) appears correct.

Subsections (1) and (2) of section 24, as enacted, relate to the time limitation for the raising of rents whereas subsection (3) deals with the procedure to be used for raising rents. It would therefore seem appropriate for the provisions of subsection (4) to be read as excluding fixed-term leases from the notice procedure, rather than excluding the exemptions to the 180 day limit in rent rises. The intention of the Act seems to be to encode, in the case of a fixed term lease, something like the Common Law position that

30 Ibid., s.22(9).
31 Ibid., s.24.
32 Ibid., s.67(6)(a).

the contractual rent cannot be altered by mere notice during the currency of the lease unless the lease itself expressly so provides.

VII. THE OBLIGATIONS OF THE PARTIES

Although either party may require the tenancy agreement to be in writing[33] the basic obligations of the parties are set out in the Act principally as a simple list of tenants' responsibilities[34] and landlords responsibilities.[35] Although these provide the basic terms of the tenancy, they are not necessarily exhaustive. It appears that the parties may agree on additional appropriate terms, for example against the keeping of animals, but unless the Tribunal consents[36] such terms are not to be inconsistent with or seek to exclude, modify or restrict the statutory provisions and the Tribunal has power to vary or set aside any agreement which is harsh or unconscionable.[37]

In addition, the Act imposes on landlords some general obligations which may also be relaxed by the Tribunal under section 11. For example, the landlord is to take all reasonable steps, but apparently without penalty, to ensure that there is no legal impediment to the occupation of the premises for residential purposes.[38] This may refer to restrictions in the building and planning codes, but probably also includes matters of title. Whether reasonable steps have been taken may depend on the facts of each case, and the nature of the impediment, but a problem might arise if a landlord is in possession under an agreement for sale and purchase, with the right to grant only an equitable tenancy,[39] and is denied a decree of specific performance to perfect his or her title.

Additionally the landlord is bound to ensure vacant possession to the tenant and to ensure that the tenant has quiet enjoyment.[40] Harassment of the tenant is declared to be an unlawful act, and the landlord has no right of entry, except in the circumstances set out in section 48. This section provides that unless the tenant consents, or an emergency has arisen, the tenant must be given at least forty eight hours notice (if the entry is to inspect the state of the premises or to check on the tenant's repairs) or at least twelve hours if the landlord is to effect repairs. In either such case the landlord's right of entry is limited to the hours between 8am and 7pm.

VIII. SECURITY OF TENURE AND THE TERMINATION OF TENANCIES

The Act does not provide for any guaranteed security of tenure in the nature of the protected tenancy as found in the Tenancy Act 1955, and in some overseas legislation.

33 Ibid., s.13.
34 Ibid., ss. 40-42.
35 Ibid., s.45.
36 Ibid., s.11.
37 Ibid., s.78(1)(f).
38 Ibid., s.36.
39 As illustrated albeit in the non-residential tenancy case of *Industrial Properties* v. *A.E.I. Ltd.* [1977] 2 ALL E.R. 293.
40 Residential Tenancies Act 1986, ss. 37-38.

Rather it incorporates essentially the ordinary law for terminating residential tenancies which are seen in the circumstances listed in section 50. These include surrender by the tenant, acquisition by the tenant of the landlord's interest, lawful disclaimer, effluxion of time in the case of fixed term tenancies, and termination by notice in the case of periodic tenancies and other tenancies which expressly provide for termination by notice.

Without having to specify reasons the landlord or tenant may terminate the tenancy (with special provisions in section 57 as to subtenancies) by giving clear written notice in the appropriate length of time. Unless the Tribunal permits a shorter period[41] and subject to the special provision for service tenancies[42] or to the destruction of the premises[43] the period of a notice to be served by a tenant is twenty one days while the landlord must normally give ninety days notice, but reduced to forty two days if the landlord requires the premises for family or personal occupation, for the purposes of sale with vacant possession, or for the occupation of an employee where the premises are customarily so used. If a landlord serves a notice to quit "... motivated wholly or partly by the exercise or proposed exercise by the tenant" of any statutory right or power, it may be declared by the Tribunal to be of no effect.[44] It may also order that a tenancy of any type shall be terminated in circumstances analogous to forfeiture in cases of non-payment of rent, damage or assault,[45] or for other breaches of covenant.[46]

IX. GENERAL

Such, in as brief a manner as possible, are the main features of the Act, set in the context of the deliberations of reform in the report of the Property Law and Equity Reform Committee. The law of residential tenancy is perhaps, as a result, closer to a regulated free market situation, approaching the trend seen in other areas of present government policy. Compared with its predecessors, the Act is a long one (144 sections and 4 schedules) and more widely ranging. In the compass of a note such as the present, it is neither possible nor desirable to comment on all its detailed provisions (for example on matters of squatters, abandonment, or holding over) nor to comment on the minutiae of problems, of pure law or otherwise, which may be lurking within, and which may provoke amendment or a political redirection of the legislation.

In conclusion, however, one particular aspect of the Act may be conveniently commented upon because of the effect it may have upon another more general principle of property law. While the 1986 Act allows a tenant only a qualified right of assignment with the consent of the landlord, the landlord's right to alienate is unaffected, except that the tenant is to be protected against the surprise, and possibly immediate ending of

41 Ibid., s.52.
42 Ibid., s.53.
43 Ibid., s.59.
44 Ibid., s.54.
45 Ibid., s.55.
46 Ibid., s.56.

the tenancy by a sale of the reversions. Thus the landlord must give the tenant written notice of any pending sale, and the purchaser of the reversion must give the tenant certain basic information on becoming the owner of the property. The effect of these and other related provisions of the Act is to create, or perhaps rather to reinforce, an exception to the indefeasibility of title of a purchaser of the reversion without fraud, in favour of the tenant of an unregistered residential tenancy.

The intention of section 115 (2) of the Land Transfer Act 1952, may have been to preserve the legal interest of a short-term tenant against a subsequent transferee of the registered reversion, in line with the general effect of such transfers at Common Law, and to avoid cluttering the register with short-lived transactions. This was modified, however, by the well-known dictum of Salmond J in *Domb* v. *Owler*[47] which equated the unregistered tenancy with other unregistered interests for the purpose of section 182 of the Land Transfer Act 1952.

Now the effect of the Residential Tenancies Act is that, in the case of unregistered residential tenancies to which that Act applies, if[48]

> . . . a mortgagee or other person [surely including a purchaser] becomes entitled (as against the landlord) to possession of the premises, . . . (a) the tenancy shall continue notwithstanding that . . . the other person has become . . . entitled to possession of the premises [and] notwithstanding anything to the contrary in the . . . Land Transfer Act 1952 or any other enactment.

The same effect would seem to apply to those residential tenancies of between three and five years duration (or longer if made subject to the 1986 Act by agreement) to which the 1986 Act applies, but which ought to be registered under the Land Transfer Act. Of course, the Residential Tenancies Act 1986 is not concerned with the legal status of the tenancy but with its existence.[49]

47 [1924] N.Z.L.R. 532, 536.
48 Residential Tenancies Act 1986, s.58.
49 See *Stratford* v. *Syrett* [1957] 3 ALL E.R. 363.