CASE NOTE:
WINTHER V HOUSING NEW ZEALAND CORPORATION

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I. INTRODUCTION

Few law students express the aim of specialising in residential tenancies for their careers. Those seeking riches may pursue jobs in corporate law, financing, or commercial property – even commercial leases. Those with a political bent might focus on public law, and those holding themselves out as having more of a conscience may focus their interests on environmental, family, or human rights law. But residential tenancies are generally tucked away as part of a general course on property law, and are not, it might be said, the 'field of dreams' of anyone.[1]

Nevertheless, residential tenancies cases can give rise to some fascinating legal issues. The key issue in *Winther v Housing New Zealand Corporation*[2] was: if Housing New Zealand terminated a residential tenancy for an unlawful reason, did that invalidate the notice of termination? In answering this question, the Court traversed a range of public and private law issues, from the application of the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1986; through statutory interpretation; and into the jurisdictional detail of the Residential Tenancies Act 1986. This note examines these issues, touching on both the 'public' and 'private' elements of the decision.

II. FACTS

Each of Winther, Tamaka and Taylor was the tenant of a residence in Pomare, Lower Hutt. On 3 March, Housing New Zealand gave each 90 days' notice terminating the tenancy.[3] Attached to each notice was an internal memorandum indicating the reasons for termination. These stated that that each tenant had breached the Residential Tenancies Act 1986 (the 'Act') by interfering with the reasonable peace, comfort or privacy of other persons in the neighbourhood.[4] In one case, the reasons also referred to a warrant having been executed against an appellant's partner for police intimidation, and that this partner's actions were a serious breach of the tenancy agreement. On 20 May, each appellant applied to the Tenancy Tribunal for an order that the eviction notice was unlawful. HNZ responded by seeking a possession order under section 64 of the Act. As at the hearing date of 7 October, each tenant remained in residence.

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1 That said, most students are entirely familiar with residential tenancies themselves, as many students live in rented accommodations.

2 High Court, Wellington, CIV-2009-485-001954, Wild J, 9 October 2009. Hereinafter, '*Winther*'.

3 Pursuant to the Residential Tenancies Act, s 51(1)(d).

4 See Residential Tenancies Act, s 40(2)(c).

III. Case History

The matter was initially heard by the Tenancy Tribunal. A range of issues were raised: most notably, that HNZ's termination of the tenancies had breached sections 17 and 19 of the New Zealand Bill of Rights Act 1990.[5]

The first argument made was that HNZ had chosen to discriminate, and had then tried to 'sanitise' this unlawful act by its 90 days' notice; and that HNZ had no obligation to give reasons for its 90 days' termination, but if reasons existed, these should be examined for lawfulness. On this point, the Tribunal held that there was no requirement for a landlord terminating a residential tenancy on 90 days' notice to give reasons, and further held that since there was no legal requirement to give reasons, a disaffected party could not attack a termination notice that did provide reasons. It was also noted that there was nothing in the Act to enable the Tribunal to examine reasons.[6] The second argument was that HNZ was to be treated differently from other landlords because it was subject to the New Zealand Bill of Rights Act 1990, and through that the Human Rights Act 1993. On this point, the Tribunal reasoned that the Residential Tenancies Act governed all landlords, and all landlords were subject to the anti-discrimination provisions of the Human Rights Act, whether or not the New Zealand Bill of Rights Act applied to HNZ. HNZ was 'in no different position to any other landlord'.[7] In the Tribunal's view, the tenants' remedies were in damages;[8] in addition, a tenant complaining of discrimination could apply to the Tribunal or make a complaint to the Human Rights Commissioner, but not both.[9] The Tribunal granted the relevant possession order to HNZ.

The appellants took the matter to the District Court, where the issue was whether the termination notice was effective, entitling HNZ to the possession order. Essentially following the path laid down by the Tribunal, the District Court held that there was no jurisdiction to examine any reasons given for the issue of a termination notice, nor to exercise any discretion as to whether a possession order would be made. The tenants' remedy was limited to exemplary damages, and not any declaratory or injunctive relief.[10] The District Court also agreed that HNZ was in the same position as a private landlord. Despite being a Crown Entity – and so having a public function, being subject to the New Zealand Bill of Rights Act, and potentially judicial review – HNZ was subject to the universal application of the Residential Tenancies Act, which did not create any special considerations for HNZ or any other public landlord.[11]

IV. Appeal

The tenants appealed to the High Court,[12] arguing that HNZ had breached sections 17 and 19 of the New Zealand Bill of Rights Act, and that the Tenancy Tribunal had misunderstood their powers in respect of such a breach: section 109 of the Residential Tenancies Act provided that exem-

5 S 17 guarantees the democratic and civil right of association. S 19 provides that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993.

6 *Winther*, [11], citing the Tenancy Tribunal decision.

7 *Winther*, [12], citing the Tenancy Tribunal decision.

8 See Residential Tenancies Act 1986, ss 12, 77(2)(n) and 109.

9 Residential Tenancies Act 1986, s 12A.

10 *Winther*, [16], citing the District Court decision.

11 *Winther*, [17] citing the District Court decision.

12 On a question of law, pursuant to Residential Tenancies Act, s 119.

plary damages could be in addition to compensation in respect of an unlawful act. At the least, it was argued, there should be power to enquire into a power of termination being exercised in a discriminatory way, to prevent an eviction effected by unlawful discrimination, and to declare a termination notice unlawful. That is, termination was subject to the Tribunal's jurisdiction under section 77, allowing an order under section 78.

A. Reasons

The High Court started by noting that the Residential Tenancies Act did not require a landlord to give a reason for termination of a tenancy on 90 days notice. Therefore, the lawfulness of any reason could not be a legitimate concern when considering whether a notice under section 51(1)(d) was effective. To add this requirement would be to add words to the statute that were not present, and there was no 'gap' in the Act requiring this.[13] The reasons were not considered unlawful or otherwise: they were not to be considered at all.

B. Structure of Residential Tenancies Act

The Court also held that sections 77 and 78 (relating to the jurisdiction and orders of the Tribunal) did not override section 51, but in terms of the structure of the Act, were designed to enable the Tribunal to give effect to the 'nuts and bolts' provisions – particularly as the jurisdiction under section 77 was to be exercised 'in accordance with the Act'.[14]

C. Public Law Remedies (?)

It then followed that as long as it complied with the Act, a landlord could act contrary to the New Zealand Bill of Rights Act or the Human Rights Act and still obtain a possession order.[15] Furthermore, as the tenants had pursued remedies under the Human Rights Act, section 12A(1)(b) precluded them from seeking the monetary remedies that would otherwise have been available under the Act.[16]

If – *if* – any unlawful discrimination or breach of the New Zealand Bill of Rights Act had occurred, section 12 would apply. The notion that the courts could do nothing about an eviction actuated by unlawful discrimination was 'patently wrong': the remedies under the Act would have been available to the tenants if they had chosen the procedure under section 12A(1)(a) of the Act (invoking the procedures under the Act, rather than making a complaint under the Human Rights Act). The remedies under the Act were however monetary only, as if an unlawful act could invalidate an otherwise valid termination notice, 'great uncertainty' would arise, as neither landlord nor tenant would know where they stood, with the landlord being unable to re-let. The issue could drag on for months (as this one had); one of the key aims of the Act was to allow certainty and simplicity in the law of residential tenancies.[17]

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13 Cf, *Northern Milk Vendors Association v Northern Milk Ltd* [1988] 1 NZLR 530, 538, per Cooke J, cited in *Winther*, [22].

14 *Winther*, [23]-[24].

15 *Winther*, [27].

16 *Winther*, [28].

17 *Winther*, [32]-[37]. It was also noted at [38] that s 54 permitted a termination notice to be declared invalid if retaliatory, but no other grounds for invalidity were provided for.

The District Court had referred to the possible availability of judicial review of an unlawful decision of HNZ. While counsel for the tenants argued this was beyond their means, if this was the case, it was 'a submission that the law is not serving the New Zealand public' to be 'more properly directed to this country's lawmakers than to this Court'.[18] In any event, there was no jurisdiction on the part of the Tribunal 'review' the lawfulness of a termination notice.[19] The argument was also made that section 92I of the Human Rights Act would permit the Human Rights Review Tribunal to invalidate a termination notice. The Court noted that this was an issue removed from the matters on appeal, with no comment made as complaints to the Human Rights Commission were pending.[20]

D. Findings

The Court found no error of law in the decisions of the Tenancy Tribunal or District Court, and the appeal was dismissed, with the possession order in favour of HNZ to stand. As a final point, it was noted that this was a test case with significant implications for the country's largest landlord, HNZ. HNZ was therefore to meet the appellants' costs on a 2B basis.

V. Comment

In a notable essay, Andrew Butler has commented that 'the broad conclusion can be drawn, and needs to be appreciated, that a "public law" case can arise in settings far removed from those traditionally thought of as "public law" ones'.[21] Interestingly for these purposes, Butler noted that (generally) 'governmental institutions are regarded differently from private persons … the standards of propriety and accountability which are demanded of government are often much higher than those demanded of private persons.'[22] This case provides an exception to Butler's proposition, as it concerned a 'public' entity (Housing New Zealand) that was 'in the same position as any other landlord', and to be treated no differently to any private person for the purposes of the Residential Tenancies Act.

Is *Winther* then a public law case or a private law case? It is submitted here that it is both. HNZ was treated the same as a private landlord for the purposes of the validity of the termination notice, but public law issues are woven throughout the quilt of the decision. At various points, the Court touched on:

- The application of the New Zealand Bill of Rights Act.
- The application of the Human Rights Act.
- The need for a particular body to give reasons for a decision.
- Whether certain actions constituted unlawful discrimination.
- Whether the Court should fill a 'gap' in the statute (finding that no gap existed).
- The availability of a remedy by way of a complaint to the Human Rights Commission.
- Parliamentary material as a guide to interpretation.
- Matters more properly to be dealt with by Parliament than the Courts.

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18 *Winther*, [39]-[40].

19 *Winther*, [41].

20 *Winther*, [42].

21 Andrew Butler, 'Is this a Public Law Case?' (2000) 31 *Victoria University of Wellington Law Review* 747 [online version, available at <http://www.austlii.edu.au/nz/journals/VUWLRev/2000/38.html> section IV].

22 Ibid s I.

- That the Courts should not make law (not being 'this country's lawmakers').
- The jurisdiction of the Human Rights Review Tribunal.
- The decision being a 'test case', with application beyond the parties at hand.

It is worth asking again: is this a public law case? Clearly it is, when the above matters are considered. But it also shows that public law rights and remedies can be limited, and can be subject to private law considerations. The tenants had public law remedies, but ultimately, the Court ruled that HNZ was to be treated like any other landlord: a 'private' outcome, with broadly public implications.[23]

23 An approach that might well find some support: see Carlow Harlow: 'Public' and 'Private' Law: Definition without Distinction' (1980) 43 *The Modern Law Review* 241, 242 and generally.