

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2025-404-2296
[2026] NZHC 2780**

UNDER	the Residential Tenancies Act 1986
BETWEEN	TROY WHILE Appellant
AND	GRANT MOFFITT and DENISE WEST Respondents
	COMMUNITY LAW CENTRES AOTEAROA INCORPORATED Intervener

Hearing: 29 July 2026

Appearances: L J Turner for the Appellant
I M Hutcheson for the Respondents
S P Pope and N Y Murray-Ragg for the Intervener

Judgment: 10 September 2026

JUDGMENT OF GARDINER J

*This judgment was delivered by me on 10 September 2026 at 4.00 pm
pursuant to r 11.5 of the High Court Rules 2016.*

Registrar/Deputy Registrar

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Solicitors:
Kemps Weir Lawyers, Auckland
Jespersen & Associates, Auckland
Russell McVeagh, Auckland

Introduction

[1] Mr While applies for leave to appeal a decision of this Court, to the Court of Appeal. Leave to appeal is sought on the basis that the proposed appeal raises questions of law regarding s 78A(4) of the Residential Tenancies Act 1986 (Act), which governs the approach to compensation in situations in which a tenant has paid rent for unlawful residential tenancies.

[2] The issue is whether the proposed appeal involves a question of law that, because of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[3] At the outset, I granted the application of Community Law Centres Aotearoa Incorporated (CLCA) to be joined as an intervener. I did so because I considered that CLCA could assist the Court to determine whether the proposed appeal raises a question of law that is of general or public importance. Residential tenancy is a core subject area for CLCA, whose solicitors regularly provide advice and representation to tenants in the Tenancy Tribunal (Tribunal) and in the District Court. I considered that CLCA could provide helpful context to the question of law raised by the appellant and its significance to residential tenants and landlords. CLCA's involvement did not expand the issues or materially elongate the hearing.

Background

[4] Mr While rented a unit from the respondents for over three years and paid a total of \$113,825 in rent. The unit was situated downstairs from the respondents' dwelling. The respondents' conservatory and deck overhung the unit's outdoor area.

[5] At the conclusion of the tenancy, Mr While brought proceedings in the Tribunal seeking return of the rent he had paid the respondents and exemplary damages. His claim was based on breaches of the Act. The respondents did not have the requisite consent for a second dwelling. Furthermore, Mr While alleged that the overhanging deck and conservatory was unsafe throughout the tenancy. The Tribunal

made an order requiring compensation of \$4,000 to be paid by the respondents to Mr While under s 78A of the Act.¹

[6] That decision was appealed to the District Court. Judge K G Davenport KC upheld the award of \$4,000 for breach of s 78A and awarded an additional sum of \$1,000 for exemplary damages under s 45 of the Act.²

[7] Mr While appealed that decision to this Court. Second appeals to the High Court can only proceed on questions of law.³ The appeal was dismissed by Venning J on 6 March 2026.⁴

[8] Mr While now seeks leave under s 120 of the Act to appeal this Court's decision to the Court of Appeal. The respondents oppose the application.

Approach to leave

[9] Under s 120 of the Act, leave can be granted if the appeal involves a question of law that, because of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[10] The test has a high threshold, requiring a question of law that is of such general or public importance that it deserves the benefit of a further decision, from the Court of Appeal. As has been emphasised on many occasions, it is not the function of the Court of Appeal on a third-tier appeal to make a general correction of error.⁵

The question of law

[11] The question of law concerns the correct interpretation of s 78A of the Act which governs the approach to compensation in situations in which a tenant has paid rent for unlawful residential tenancies. The context for this question requires some explanation.

¹ *While v Moffitt* [2024] NZTT 4761009 [*Tenancy Tribunal Decision*].

² *While v Moffitt* [2024] NZDC 14821 [*District Court Decision*].

³ Residential Tenancies Act 1986, s 119.

⁴ *While v Moffitt* [2026] NZHC 490 [*High Court Decision*].

⁵ *Cook v Housing New Zealand Corporation* [2014] NZCA 504 at [3]; *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.

Anderson v FM Custodians Ltd

[12] Up to 2013, the Tribunal made orders in relation to tenancies of “unlawful residential premises” in the same way as a lawful residential premises, so long as the use and intention of the parties was for residential purposes.⁶

[13] That approach was brought into question because of a 2013 decision of this Court. In *Anderson v FM Custodians Ltd*, Duffy J held that where a property is not lawfully able to be used for residential purposes, it is not a “residential premises” as defined in s 2 of the Act.⁷

[14] The Judge considered whether this conclusion would create “a group of essentially second-class tenancies, by reason of falling outside the cover of” the Act.⁸ A risk was that the Tribunal would not have jurisdiction to grant relief to tenants where a landlord had rented them unlawful premises. Duffy J dismissed this risk by relying on the availability of relief under s 137 of the Act.⁹ Section 137 of the Act is titled “Prohibited transactions”. It prohibits transactions that have the effect of defeating, evading, or preventing the operation of provisions of the Act. Contracts which would have such an effect have no legal effect, and all money paid by a tenant under a prohibited transaction is recoverable as a debt due from the landlord.

[15] *Anderson v FM Custodians Ltd* led to fundamental uncertainty as to the Tribunal’s jurisdiction. Many Tribunal adjudicators found they had no jurisdiction in unlawful residential tenancies at all and could not make orders, including s 137 refunds. Tribunal adjudicators were divided as to whether *Anderson* left open jurisdiction to award full or partial refunds of rental.¹⁰

⁶ Ministry Business, Innovation and Employment *Regulatory Impact Statement: Application of the Residential Tenancies Act 1986 to rental premises which are not lawful for residential purposes* (15 February 2017) [Statement] at [3].

⁷ *Anderson v FM Custodians Ltd* [2013] NZHC 2423 at [73].

⁸ At [67].

⁹ At [67].

¹⁰ Statement, n 6, at [6]-[8].

Section 78A introduced

[16] In February 2017, the Ministry of Business, Innovation and Employment recommended a legislative response to address this jurisdictional uncertainty.¹¹ The Ministry recommended amending the Act to include specific orders and remedies available to address tenancies of unlawful residential premises.¹²

[17] Parliament accepted the Ministry’s recommendation. In 2017 the Residential Tenancies Amendment Bill (No 2) (Bill) was introduced to Parliament. The Bill proposed the enactment of a specific provision granting jurisdiction to the Tribunal to grant orders and remedies relating to unlawful residential tenancies: s 78A.

Parbhu v Want

[18] In 2018, while the Bill was going through the legislative process, this Court issued its decision in *Parbhu v Want*.¹³ Cooke J diverged from *Anderson v FM Custodians*. The Judge found that s 137 is directed at improper agreements that seek to contract out of the requirements of the Act, not cases like the one before him “where there are regulatory problems with the residential tenancy but no attempt to contract inconsistently with the Act, or to avoid or override the Act in the contract”.¹⁴ Cooke J went on to note that the Tribunal will accordingly have jurisdiction to deal with issues affecting the tenancy, which could lead to a remedy if the landlord let out substandard premises, or no remedy if the regulatory failures had no meaningful adverse impact on the tenant.¹⁵

[19] The following year, the Court of Appeal upheld Cooke J’s decision in *Parbhu v Want*.¹⁶ Although s 78A had been enacted by that time, the Court specifically observed that the section did not apply because it was not retrospective.¹⁷ The Court

¹¹ Statement, n 6.

¹² Statement, above n 6, at [17] and following.

¹³ *Parbhu v Want* [2018] NZHC 2079.

¹⁴ At [46].

¹⁵ At [47].

¹⁶ *Want v Parbhu* [2019] NZCA 674.

¹⁷ At [23]–[24].

of Appeal accepted that s 137 does not justify a conclusion that unlawful residential premises are not “residential premises” under the Act. The Court stated:¹⁸

Fourthly, we agree with Cooke J that s 137 does not justify the approach taken in *FM Custodians*. The effect of relying on that provision is that any relatively footling breach by a landlord (for instance, the incomplete planning or building consenting of an otherwise eminently safe and sound accessory unit) would mean the reasonable dispute resolution provisions of the Act would not apply (again, because these were not “residential premises” after all), but s 137(3) would make the transaction void and s 137(4) would compel total restitution of rent paid regardless of the degree of benefit achieved by the tenant under the voided tenancy. Rather, and for the reasons given by Cooke J, we agree that s 137 has a more limited remit — it is directed at agreements “that seek to contract out of the requirements of the Act”. The purpose of s 137 is not to apply the twin sledgehammers of voiding and total restitution at every incidental regulatory non-compliance.

Section 78A

[20] In the meantime, s 78A was enacted, with effect from 27 August 2019. Section 78A provides for specific consequences for unlawful residential tenancies:

- (a) The Tribunal must not order the tenant to pay to the landlord rent in arrears, damages or compensation, unless it would be unjust not to do so, having regard to the “special circumstances” of the matter.¹⁹
- (b) The Tribunal may order the landlord to pay to the tenant:
 - (i) the whole of the rent paid for the period for which the premises were unlawful residential premises;²⁰ or
 - (ii) the whole of the rent paid less any amount that the Tribunal is satisfied, having regard to the special circumstances of the matter, it is fair to deduct.²¹

[21] While *Want v Parbhu* was concerned with s 137, the courts and the Tribunal have (including in this case) applied the case to govern the interpretation of s 78A(4).

¹⁸ At [31] (footnote omitted).

¹⁹ Residential Tenancies Act 1986, s 78A(3).

²⁰ Section 78A(4)(i).

²¹ Section 78A(4)(ii).

[22] The Tribunal has cited *Want v Parbhu* as authority for the proposition that any rent repayment the Tribunal orders under s 78A(4) should be proportionate to the seriousness of the breach.²²

[23] In *Johnson v Clements*, the District Court applied *Want v Parbhu* as the foundational authority for what amounts to “special circumstances” under s 78A(4).²³

[24] In this case, Venning J considered that the Court of Appeal’s approach to s 137 in *Want v Parbhu* is equally applicable when considering the appropriate compensation under s 78A(4).

Discussion

[25] I am satisfied that the threshold for leave to appeal is met here. First, I accept that there is a genuine question of law as to the correct interpretation of s 78A. That includes how the Tribunal should approach whether “special circumstances” exist in the context of s 78A(3) and (4), and whether the statements of the Court of Appeal in *Want v Parbhu*, which continue to be relied upon by the Tribunal and courts, remain relevant.

[26] This Court has only considered s 78A twice (including this case). There is no Court of Appeal (or Supreme Court) decision concerning the provision. Given the background outlined, and the fact that a Court of Appeal authority concerning a different provision continues to be applied to s 78A, clarification from that Court would be beneficial.

[27] Second, I am satisfied that the appeal raises an issue of wide public importance. Residential tenancies affect the population at large. Decisions by the Tribunal and the courts on s 78A affect landlords and tenants alike. The context heightens access to justice concerns and requires clear and consistent law. Unlawful residential tenancies have very significant impacts on tenants, particularly vulnerable tenants. The present

²² *[Tenant] v PGG Wrightson Real Estate Ltd as agent for Robert Shane Tinker* [2026] NZTT 5428868 at [22]–[23]; *[Tenant] v The May Ltd* [2024] NZTT 4627167, 4691793 at [39]–[40]; *Nikitin v Russell* [2025] NZTT 4870583, 4913633 at [31]–[32].

²³ *Johnson v Clements* [2022] NZDC 20805 at [35]–[39], cited in *While v Moffitt* [2026] NZHC 490 at [69].

lack of clarity is problematic and is resulting in inconsistency and significant divergence in awards in the Tribunal and the District Court. The threshold of general and public importance is easily met.

Decision

[28] Leave to appeal is granted.

Gardiner J