BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

Decision No. [2018] NZEnvC 120

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal under s 325(2) of the Act
BETWEEN	JAYASHREE LIMITED
	(ENV-2017-AKL-000133)
	Appellant
AND	AUCKLAND COUNCIL
	Respondent

Court:	Principal Environment Judge LJ Newhook Environment Commissioner RM Bartlett
Hearing:	at Auckland on 25 July 2018
Appearances:	MH Karmarkar, Director of Jayashree Limited AR Govind for Respondent
Date of Decision:	30 July 2018
Date of Issue:	31 July 2018

DECISION OF THE ENVIRONMENT COURT REFUSING APPEAL AGAINST ABATEMENT NOTICE

A: Appeal against abatement notice refused.

B: Costs reserved.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

REASONS

Introduction

[1] On 13 September 2017 Jayshree Limited ("the company") appealed against an abatement notice issued on 31 August 2017 by Auckland Council.

[2] The abatement notice required the company to cease using or allowing the use of a property at 34 White Swan Road, Mount Roskill, Lot 1 DP212178, as a boarding house, in breach of Rule H4.4.1 (A12) of the Auckland Unitary Plan (Operative in Part) and s 9 (3) of the Resource Management Act 1991.

[3] The appeal asserted that the use of the dwelling was not contrary to the Rule or s 9(3) of the Act; but instead the property is rented as a fixed term tenancy under the Residential Tenancies Act 1986; and use of the dwelling is not generating any adverse effects on the environment and is not likely to generate such and is therefore not contrary to s 322(1)(b) RMA.

[4] The appeal sought cancellation of the notice.

[5] A stay of the abatement notice was sought, and granted by consent in the short-term.

[6] The delays in reaching a hearing of this appeal have been occasioned by the parties having agreed that this Court should await the outcome of proceedings in the High Court concerning matters under the Residential Tenancies Act, because both proceedings concern interpretation of the term "boarding house" in that Act, and a similar fact situation.

The Legal Provisions

[7] By Table H4.4.1, Item (A12) of the Auckland Unitary Plan, boarding houses accommodating greater than 10 people per site inclusive of staff and residents are a restricted discretionary activity requiring resource consent to be obtained, and certain standards in the Unitary Plan to be met. Resource consent has not been granted in this regard for this property.

[8] The property is zoned Residential – Mixed Housing Suburban zone, and is found within an overlay – Infrastructure: National Grid Corridor Overlay – National Grid Uncompromised.

[9] "Boarding house" is defined in the Unitary Plan as having the same meaning as in s 66B of the Residential Tenancies Act 1986 (RTA), which we set out as follows:

> **66B Interpretation for this Part**
>
> In this Part, unless the context otherwise requires, —
>
> **boarding house** means residential premises —
>
> (a) containing 1 or more boarding rooms along with facilities for communal use by the tenants of the boarding house; and
> (b) occupied, or intended by the landlord to be occupied, by at least 6 tenants at any one time
>
> **boarding house tenancy** means a residential tenancy in a boarding house —
>
> (a) that is intended to, or that does in fact, last for 28 days or more; and
> (b) under which the tenant is granted exclusive rights to occupy particular sleeping quarters in the boarding house, and has the right to the shared use of the facilities of the boarding house
>
> **boarding house tenancy agreement** means a tenancy agreement (as defined in section 2(1)) relating to a boarding house tenancy

[10] It is because the definition of boarding house in the Unitary Plan is drawn from that in the RTA, that recent proceedings by Mr Karmarkar before the Tenancy Tribunal, the District Court on appeal, and the High Court on further appeal, have strong similarities for the present proceedings. In those other proceedings, Mr Karmarkar argued that the premises were subject to a fixed tenancy, not a boarding house tenancy, in respect of which he sought to enforce the payment of outstanding rent from several tenants. The Tenancy Tribunal[1] found against him in that regard, and its decision was upheld first in the District Court[2], then in the High Court[3] and ultimately a decision of the High Court refusing leave to appeal to the Court of Appeal.[4]

[11] After the High Court issued its decision, Mr Karmarkar complied with this Court's direction to lodge copies of the four decisions about matters under the RTA, and a copy of the current agreement between himself as landlord and numbers of "flatmates".

---

1 Application number: 4080094.

2 [2017] NZDC 22771.

3 [2018] NZHC 693.

4 [2018] NZHC 1110.

The Factual Matrix

[12] It appeared to us that the factual matrix was little different from that which had been considered before the Tenancy Tribunal, the District Court and the High Court. We relied primarily however on affidavits of Ms KE Burson, Ms CL Maroc, and Mr PJF Moss. The latter is a planner in the central resource consents unit of the Auckland Council and the other two witnesses are compliance investigators with the Council. In addition, statements were gathered by the Respondent from two tenants about the rooms and the living arrangements in the house.

[13] All Council witnesses were barely cross-examined by Mr Karmarkar, such that we are able to find that there was little dispute as to the facts at all.

[14] Mr Karmarkar was questioned by counsel for the Council Mr Govind, and importantly conceded that there were more than 10 people living in the house (we note that 16 had signed the tenancy agreement); that there is a shared kitchen; that there are some shared bedrooms; and that there are shared bathroom and toilet facilities.

[15] Ms Burson was questioned by Mr Karmarkar as to whether when she entered and inspected the dwelling, there was permission from the landowner. Ms Burson had simply said in evidence that tenants she found at the property gave permission. Mr Karmarkar's question was based on the provisions of s 332(5) RMA which we set out here:

> (5) An enforcement officer may not enter, unless the permission of the landowner is obtained, any land which any other Act states may not be entered without that permission.

[16] When questioned by the Court during the delivery of his brief submissions in reply, Mr Karmarkar was unable to tell us what he considered the legal consequences might be of not having had any permission of the landowner (which we understand to be Jayashree Limited). Our own examination of subsection (5) makes it clear that it only operates in respect of any land which any other Act states may not be entered without that permission, and we have no information to that effect.

[17] In any event, the essential facts advanced by the Council were confirmed by the answers Mr Karmarkar gave to Mr Govind's questions.

[18] In his reply, Mr Karmarkar endeavoured to persuade us that there are two dwellings on this site (he claimed, a permitted activity under the Unitary Plan), because there are two kitchens. This argument cuts no ice because while the definition of a dwelling house requires the presence of a kitchen, things do not work in the opposite

direction such that for every kitchen present, there could be identified a separate dwelling house. A dwelling house could contain more than one kitchen. Furthermore, the agreement shown in evidence of the 16 signatures, is on its face, for one property at 34 White Swan Road, Mount Roskill.

[19] The facts before us in evidence are very similar to those set out at some length by Justice van Boheman in relation to another of Mr Karmarkar's properties at Hayr Road.

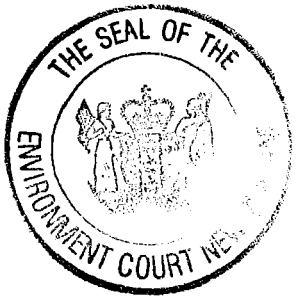
[20] We note from paragraph [16] of the first High Court decision[5] that the central issue before the Tenancy Tribunal, the District Court and the High Court was whether the arrangement between Mr Karmarkar and his tenants was a boarding house tenancy or a joint tenancy of a fixed-term.

Analysis and Consideration

[21] We could make this decision quite lengthy by undertaking a fine-grained analysis in the manner done by the District Court and the High Court, but we refrain from doing so because, not only are those decisions, with respect, completely persuasive, but indeed we are effectively bound by that of the High Court.

[22] We therefore refer the reader to the learned High Court Judge's analysis of the legislative scheme commencing at paragraph [23] and running through to the end of the decision at paragraph [42]. In the course of that analysis the High Court Judge considered and applied various decisions of the District Court cited there, and while, as did the District Court, he found that the definitions in s 66B RTA of boarding house, boarding house tenancy, and boarding room, were somewhat circular, he considered that one could determine whether a tenancy was of a boarding house, or fixed-term, by posing five questions[6]:

> (a) Does the house contain one or more bedrooms along with facilities for communal use by the tenants?
>
> (b) Is the house occupied or intended to be occupied by 6 or more tenants?
>
> (c) Is the tenancy intended to, or does in fact, last for 28 days or more?
>
> (d) Are tenants granted exclusive rights to occupy particular bedrooms, whether that occupancy is for single or shared use?



5 [2018] NZHC 693.

6 Paragraph [34] of [2018] NZHC 693.

(e) Does the right to occupy a particular bedroom derive from the tenancy agreement between the individual tenant and the landlord rather than from a collective decision of the tenants?

[23] The High Court held that if the answer to all of those questions was "yes", then the tenancy is a boarding house tenancy.

[24] The High Court had no difficulty in providing the answer "yes" to the first four questions; it needed to do a close analysis in relation to the fifth, which we note from paragraphs [39] – [41] of the decision. Part of the analysis surrounding sub-paragraph (d) of paragraph [40], was of some importance, and we find the same flavour in the present proceedings; namely that Mr Karmarkar had constructed the agreement to get around Part 2A of the RTA so that it would not be considered a boarding house tenancy agreement, whereas the practical reality was that Mr Karmarkar had been in control of room allocation and other decisions regarding the operation of the agreement.

Outcome

[25] Based on the facts found earlier in this decision, and our comparison of it with essentially similar facts in the litigation before the Tenancy Tribunal, District Court and High Court, we have no basis for finding any point of difference that would enable us to determine that 34 White Swan Road, Mount Roskill was not a boarding house by definition. It is. There is no resource consent for it; the Appellant is in breach of the quoted Rule and s 93 RMA.

[26] The appeal is refused.

[27] Costs are reserved.

For the court:

LJ Newhook
Principal Environment Judge