TENANCY TRIBUNAL AT Hamilton

APPLICANT: COCORA LIMITED

Landlord

RESPONDENT: Albert Paul Haggar

Tenant

TENANCY ADDRESS: 60 Mansel Avenue, Hillcrest, Hamilton 3216

ORDER

1. The landlord's application for termination of the tenancy, compensation and exemplary damages for unlawful subletting is dismissed.
2. I am not satisfied that the parties had an agreement that the tenant would provide services in lieu of rent.
3. The tenancy will end and the tenant will vacate the property by 31 December 2019.
4. The tenants counterclaim for breach of quiet enjoyment and harassment is dismissed.
5. Albert Paul Haggar must pay COCORA LIMITED $4,300.44 immediately, calculated as shown in the table below:

Description	**Landlord**	**Tenant**
Rent arrears to 12 December 2019	$4,280.00	
Filing fee reimbursement	$20.44	
Total award	**$4,300.44**	
Total payable by Tenant to Landlord	**$4,300.44**	

Reasons:

1. Mr Wood appeared for Cocora Limited supported by Mr Tydeman. Mr Haggar appeared as tenant.

2. The landlord has applied for termination of the tenancy for rent arrears. The landlord also claims that the tenant has sublet the property (Air BnB) without consent and is seeking the tenant account for profit and exemplary damages.

3. The tenant denies that he is in rent arrears as he has provided services in lieu of rent, which have not been taken into account. The tenant also claims that the landlord has breached his right to quiet enjoyment and is seeking compensation, and further that the landlord's conduct has amounted to harassment for which he is seeking exemplary damages.

4. The landlord filed their claim on 26 September 2019 and the matter was first listed on 23 October 2019. On 16 October 2019 the tenant filed a counterclaim. When both sets of matters came before me on 23 October 2019 it was clear that there would be insufficient time to deal with the all claims, and the evidence and the matter was adjourned to 10 December 2019, when it was concluded.

5. The parties have known each other for approximately 15 years. Consequently, both parties have knowledge of each other's personal affairs over and above that commonly found in a usual landlord/tenant relationship.

6. Both parties have provided the tribunal with written material in support of their applications. The tenant has raised an objection to some of the material provided by the landlord which he states is not relevant to the matters in dispute. While the tribunal is not bound by the strict rules of evidence set out in the Evidence Act 2006, pursuant to section 97(6) of the Residential Tenancies Act 1986 (The "Act"), the tribunal can refuse to accept any evidence or submissions that are irrelevant or repetitious. It is accepted that evidence is relevant in a proceeding if it has the tendency to prove or disprove anything that is of consequence to the determination of the proceeding. The material in dispute is contained in statements provided by Mr Wood dated 23 October 2019, 20 November 2019 and 09 December 2019. I have read the statements carefully and discussed the disputed content with the parties. I will not set out the evidence in dispute but have identified to the parties the parts of the statements which I view as not being particularly relevant to the claims made by the landlord.

7. I have been advised by the parties that since the last hearing the tenant has served the landlord with notice and will vacate the property by 31 December 2019.

Should the tenancy be terminated for rent arrears?

8. The tenancy began on 23 July 2017. The parties did not record the terms of the agreement in writing. A bond was not taken. The parties have told me that the rent was $440 per week. Apart from an agreement that the landlord retain use of

half of the garage, Mr Haggar otherwise had exclusive possession of the property. Initially the rent was shared between Mr Haggar and another, until January 2018 when Mr Haggar became solely reliable for the rent.

9. The rent arrears in dispute are historic in the sense that the landlord states they have accrued in the period up to January 2018 after which Mr Haggar's rent payments have been consistent.

10. On 10 September 2019 the landlord served Mr Haggar with a notice to remedy rent arrears of $8,500.00 by 24 September 2019.

11. The landlord states the notice was however incorrect as the amount of rent arrears was in fact significantly less than that stated in the notice.

12. The landlord states however that Mr Haggar has in subsequent dealings acknowledged rent arrears of $4,700.00. This is denied by Mr Haggar. The landlord nevertheless claims that under section 56(1) of the Residential Tenancies Act 1986 (The "Act") Mr Haggar has failed to remedy the breach notice issued and that it would be inequitable to refuse to terminate the tenancy. The notice for rent arrears was the first issued during this tenancy.

13. The landlord has produced rent summaries from the start of the tenancy to 03 October 2019.

14. The landlord states on 06 August 2019 that he served Mr Haggar notice to increase the rent from $440.00 to $520.00 effective from 11 October 2019.

15. The landlord states that Mr Haggar has failed to meet the increased payments. Mr Haggar has produced an email in which he claims the landlord has retracted the notice of rent increase, although I note the email is dated 03 August 2019.

16. I am satisfied that the landlord has served notice of a rent increase from $440 to $520 effective from 11 October 2019.

17. Based on the rent summaries produced I have determined Mr Haggar's rent liability from the start of the tenancy on 23 July 2017 to 12 December 2019 to be $48,240.00 of which he has paid $43,960.00 leaving a shortfall for the period of $4,280.00.

Offset - services in lieu of rent

18. Mr Haggar claims that he has provided services to the landlord which the parties agreed would be in lieu of rent, and that the landlord has failed to credit him for these services to at least the value of the shortfall, if not more.

19. The landlord denies that there was any agreement that Mr Hagger provide services in lieu of rent. The landlord states that while Mr Haggar provided some services to the landlord they were minimal and not connected to the rental agreement.

20. Mr Haggar has produced an invoice dated 21 August 2019 made out to Mr Wood and the landlord for consultancy services. The invoice does not contain any reference to the services having been provided in lieu of rent and in fact states that payment is due on invoice.

21. There are no other documents such as emails, notes, or any other material to corroborate Mr Haggar's claim. During the hearing Mr Haggar stated that his record keeping in this regard was slack and conceded that there was insufficient evidence to support a finding that more likely than not the parties had reached an agreement that he provide services in lieu of rent.

22. In addition to a claim that he provided services in lieu of rent Mr Haggar claims that he should be compensated for the landlord's use of half of the garage as storage. The parties have told me that the oral tenancy agreement reached in July 2013 included an agreement that Mr Haggar enjoy exclusive possession of the property apart from half of the garage which would continue to be used as storage by the landlord. There is no evidence that at the time of the original agreement the parties envisaged that the continued use of the space by the landlord would involve any charge.

The law

23. The Tribunal may terminate a tenancy under section 56 of the Act where due to the nature and extent of the breach it would be inequitable to refuse to terminate. Where the breach is capable of remedy the landlord must, pursuant to section 56(1)(a) of the Act serve a notice specifying the nature of the breach and requiring the other party to remedy the breach within a reasonable period.

24. Where a landlord applies to terminate for a breach under section 56(1) of the Act, and the rent is at least 21 days in arrears on the hearing date, the tribunal shall determine the matter as if the landlord had made an application under section 55(1)(a) of the Act.

25. Before determining the matter under section 56(2) and 55 the tribunal must be satisfied that the requirements of section 56(1) have been met, in particular that the 14 day notice issued by the landlord was valid.

26. Section 55(2) of the Act states that the tribunal has the discretion to refuse to terminate under subsection (1) if, and only if, it is satisfied that the breach has been remedied (where capable), the landlord has been compensated for any loss arising from the breach, and it is unlikely that the tenant will commit any further breach of a kind to which section 55(1)(a) applies.

27. Rent is defined in the Act as meaning any money, goods or services, or other valuable consideration in the nature of rent to be paid or supplied under a tenancy agreement by the tenant, but does not include any sum of money payable or paid by way of bond.

28. In *O'Shea v Brown* HC Auckland AP 110 – PL01, 14 December 2001 the Court stated that when considering an application for termination under section 55(1)(a) of the Act the Tribunal should in fairness involve a determination of claims which would lead to an equitable set off before assessing whether an order under section 55 should be made.

29. The onus of proving a claim rests with the applicant.

30. The standard required is on the balance of probabilities.

31. The tribunal must be satisfied that more likely than not, the fact asserted is supported by the evidence and that the act of breach or omission complained of actually occurred.

Decision

32. The notice issued by the landlord on 10 September 2019 was invalid as it did not accurately specify the nature of the breach, the quantum of the rent arrears to be remedied. While on the face of it the tenant is in rent arrears of at least 21 days, the provisions in section 56(2) enabling the tribunal to treat the application under section 55 do not apply.

33. I am not satisfied to the required standard that the parties have entered into an agreement under which the tenant was to provide services in lieu of rent.

34. I am not satisfied to the required standard that the landlord is liable to compensate the tenant for use of half of the garage.

35. On the evidence produced I am satisfied that the tenant is labile for rent arrears to 12 December 2019 of $4,280.00.

36. The tenant has served notice to vacate to end the tenancy and vacate the property by 31 December 2019.

Unlawful subletting

37. The landlord claims the tenant has assigned [or sublet or parted with possession of] the premises when it is expressly prohibited by the tenancy agreement.

38. In July 2019 the parties entered into an oral tenancy agreement. In December 2018 the landlord gave Mr Haggar oral permission to conduct Air BnB at the property.

39. Around August 2019 the landlord decided to withdraw that oral permission.

40. On 06 August 2019 the parties signed a written tenancy agreement back dated to 14 March 2017.

41. Clause 3 of the written tenancy agreement states "the *tenant shall not assign or sublet the tenancy without the landlords written consent*".

42. The agreement was signed and returned by Mr Haggar.

43. The landlord then amended the agreement by adding to clause 3 the words, "*Applicable as regards Air BnB*". The landlord states that he did so clarifying that the prohibition on assignment or subletting without the landlord's prior written consent applied to Air BnB only and did not affect Mr Haggar's taking on flatmates.

44. The amended clause was then countersigned by the landlord but not by Mr Haggar who states that in his view it does not form part of the agreement that he initially signed.

45. The landlord states that prior to the parties signing the tenancy agreement in August he had told Mr Haggar that he no longer wished the property to be offered as Air BnB. Mr Haggar denies that there was any such conversation

46. The written agreement did not make any mention of any agreement to Mr Haggar providing services in lieu of rent.

47. The landlord states that the agreement signed on 06 August 2019 was not a new agreement but recorded the terms of the original oral agreement and in his opinion withdrew the oral permission to use the property for Air BnB.

48. The primary reason for the landlord seeking that the oral tenancy agreement be fixed in writing was not revocation of the oral consent to subletting but a desire to fix in writing the start date of the tenancy with a view to then serving Mr Haggar with a rent increase.

49. In the landlord's opinion the written agreement served to fix the terms of the original oral agreement and vary the subsequent oral agreement granting Mr Haggar permission to offer Air BnB.

50. The landlord states that on 07 September 2019 he discovered that Mr Haggar was continuing to operate Air BnB and on 08 September 2019 issued Mr Haggar with a 14 day notice to cease doing so by 24 September 2019.

51. The landlord claims that Mr Haggar did not comply with the notice and has continued to offer the property for Air BnB. The landlord has produced a screen shot of Mr Haggar's Air BnB profile from October 2019 which contains a review of a stay in that month, and advises the property's availability up to January 2020.

52. The landlord is seeking that the tribunal terminate the tenancy, that Mr Haggar account for profits made from the Air BnB, and that the tribunal award exemplary damages.

53. Mr Haggar states that on receiving the landlord's notice on 09 September 2019 he delisted the property from Air BnB as he was concerned about threats made by the landlord to disclose information of a personal nature. Having considered Mr Haggar's evidence I am unsure as to whether he necessarily considered himself bound by the clause 3 of the written agreement

54. Mr Haggar states that at the time he delisted the property he still had bookings in the pipeline which he was contractually obliged to meet, and states that after the booking and review in October, produced by the landlord, he has not accepted any new bookings.

Law

55. Section 13B(1) of the Act states that every variation of a tenancy agreement, and every renewal of a tenancy agreement, shall be in writing and signed by both the landlord and the tenant.

56. As with the formation of the initial agreement regarding any variation there must be certainty, a meeting of the minds, as to the terms of any variation and an intention to be bound by them.

57. Conduct and context are relevant in determining the parties' intentions and in determining whether any agreement was concluded.

58. A tenancy agreement may provide that a tenant is unconditionally prohibited from assigning, subletting or parting with possession of the premises. See section 44(1) of the Act.

59. In the absence of a specific condition in the tenancy agreement prohibiting assigning or subletting the tenancy a tenant may do so only with the prior written consent of the landlord. See section 44(2) of the Act.

60. Breaching this obligation is an unlawful act for which exemplary damages may be awarded up to a maximum of $1,000.00. See section 44(2A) (a) and Schedule 1A Residential Tenancies Act 1986.

61. Where a party has committed an unlawful act intentionally, the Tribunal may award exemplary damages where it is satisfied it would be just to do so, having regard to the party's intent, the effect of the unlawful act, the interests of the other party, and the public interest. See section 109(3) of the Act.

Decision

62. The original tenancy agreement was oral and not in writing.

63. The landlord's consent to sublet the property given in December 2018 should have been given in writing, it was not.

64. There is a disagreement as to whether the revocation of consent was raised prior to the signing of the variation agreement in August.

65. The parties signed the variation which was then unilaterally amended by the landlord.

66. The tenant disputes the validity of the amendment made by the landlord.

67. On balance I am not satisfied that there was a meeting of the minds as to the terms of the variation dated 06 August 2019 concerning the prohibition on subletting and assignment.

68. Having previously been given oral consent to conduct Air BnB at the property I am not satisfied that in signing the agreement on 06 August 2019 Mr Haggar necessarily agreed to the revocation of that permission.

Breach of quiet enjoyment

69. By way of counterclaim Mr Haggar claims the landlord has breached his right to quiet enjoyment and to an extent that the landlord's conduct has amounted to harassment for which Mr Haggar is seeking compensation and exemplary damages.

70. The parties have known each other since 2005. While they have not been in business together it appears that they share a common interest in entrepreneurial endeavours. The parties agree that their relationship became strained before breaking down totally in early August 2019.

71. Mr Haggar has outlined a number of incidents which he claims amount to a breach of his right to quiet enjoyment.

72. Firstly he states that the landlord's children came to the property in 2018 and told another occupant that they had Mr Haggar's permission to pick fruit. Mr Haggar was not at the property at the time and the incident was recounted to him by a flatmate. Mr Wood has no knowledge of this and denies that it was his children.

73. Mr Haggar states that during the tenancy, and while he was not home, Mr Wood would visit the property unannounced and speak with his flatmates. During the tenancy, one of Mr Haggar's flatmates was also an associate of the landlord. It appears that prior to the falling out Mr Wood did visit the property with either express consent or in circumstances that would suggest an honest belief as to implied consent.

74. Mr Haggar states that on one occasion Mr Wood visited the address looking for his flatmate to offer him employment. Mr Haggar states that shortly afterward the flatmate concerned gave him notice. Mr Haggar claims that during the notice period the flatmate acted as the landlord's agent provocateur spying on Mr Haggar and taking photographs of the inside of the property without his permission. This allegation is denied by the landlord.

75. Mr Haggar states that while he was not at the property Mr Wood would visit and speak with his flatmate Mr Zhe, who is Chinese and speaks limited English, and discuss Mr Haggar's personal affairs. This is denied by Mr Wood. There is no corroborating evidence from Mr Zhe before the tribunal.

76. Mr Haggar states that on one occasion Mr Wood visited the property to serve on him a trespass notice. Once again it appears that Mr Haggar was not home at the

time and that the notice was served on one of his flatmates. Mr Haggar states that Mr Wood could have emailed him the notice and that personal service was unnecessary.

77. Mr Haggar states that Mr Wood arranged for the driveway to be dug up without notice and that he was unable to use the driveway for an hour and a half. The landlord states that an opportunity presented itself whereby they could avail themselves of a digger which was used to undertake remedial work on the driveway, which Mr Haggar had complained was affected by potholes. Mr Wood acknowledges that he did not serve notice on Mr Haggar as it was, in the circumstances not practicable to do so.

78. Apart from the inconvenience caused to Mr Haggar when the landlord repaired the driveway, which is accepted by Mr Wood, there is no clear evidence as to the dates or times of the other incidents and an absence of corroborating evidence.

79. On 08 September 2019, soon after receiving the breach notice to cease Air BnB, Mr Haggar states that the landlord sent him a link to a website purporting to contain personal information about Mr Haggar. Shortly after receiving the link Mr Haggar states he then received a text message from one of his former female flatmates.

80. The text message contained a message that had been sent to the former female flatmate by another former flatmate stating that they had just become aware of some personal information about Mr Haggar.

81. Mr Haggar states that this personal information referred to by the former male flatmate in the text must have been disclosed by Mr Wood, and that this is a breach of his privacy and his right to quiet enjoyment.

82. Mr Wood acknowledges that he sent the link to Mr Haggar (which is relevant to his standing as an Air BnB host) but denies that he disclosed personal information to Mr Haggar's former male flatmate.

83. The text message concerned has been produced. While the author of the forwarded text alludes to being privy to certain information about Mr Haggar the message does not set out in any detail the nature of the information.

84. Finally Mr Haggar states that instead of sending him one email Mr Wood sends multiple emails texts, phone calls and hangout messages.

The law

85. A landlord must not interfere with the reasonable peace, comfort or privacy of the tenant in their use of the premises. See section 38(2) of the Act.

86. In *Smith v Floris* Auckland TT 1404/93, 9 March 1994 at [6] the Tribunal stated:

> "Quiet enjoyment means effectively the right not to have the quality of the tenancy significantly impaired by actions of the landlord and/or the landlord's agents. Balanced against that, however, one must bear in mind that landlord/tenant relationships tend to

be between individuals and that will inevitably involve some interaction between them on a personal level. It is important not to allow a simple clash of personality to become the basis for a claim for a breach of this type"

87. Breaching this obligation in circumstances that amount to harassment is an unlawful act for which exemplary damages may be awarded up to a maximum of $2,000.00. See section 38(3) and Schedule 1A of the Act.

88. Harassment means "to trouble, worry or distress" or "to wear out, tire, or exhaust" and "indicates a particular pattern of behaviour directed towards another person". *MacDonald v Dodds,* CIV-2009-019-001524, DC Hamilton, 26 February 2010.

89. Where a party has committed an unlawful act intentionally, the Tribunal may award exemplary damages where it is satisfied that it would be just to do so, having regard to the party's intent, the effect of the unlawful act, the interests of the other party, and the public interest. See section 109(3) of the Act.

Decision

90. This landlord/tenant relationship was born out of a personal relationship between the parties. After entering into the oral tenancy agreement in July 2017 both relationships continued, that is a landlord/tenant relationship and the personal relationship which involved a common interest in entrepreneurial activities.

91. Although not an unusual phenomenon this can often lead to a blurring of the lines between a formal tenant/landlord relationship and a personal relationship.

92. For example in this case I understand that until the relationship soured, Mr Wood would from time to time pop around to the property to have a chat with Mr Haggar about entrepreneurial matters, Mr Wood and his wife provided financial and moral support to Mr Haggar, Mr Wood supported Mr Haggar after he had had a significant operation, Mr Haggar mentored and provided assistance to Mr Woods stepdaughter, and Mr Haggar provided services to the landlord.

93. When, for example a personal relationship sours, as it has in this case, the more formal tenant/landlord relationship will also be affected.

94. What may have been seen as acceptable conduct prior to the breakdown may following a breakdown, be viewed as conduct which amounts to a breach of the tenant's or landlord's rights.

95. Timing is therefore important. Regarding the visits to the property subject to complaint, there is an absence of details concerning the dates and times of those visits. Mr Haggar was not himself present during some of the visits and they have been recounted to him. Accuracy and reliability of that evidence is an issue. The landlord appears to have had previous dealings with some of Mr Haggar's flatmates and legitimately visited the address before the relationship breakdown in August. There is no corroborating evidence from Mr Haggar's Chinese flatmate Mr Zhe. The emails produced suggest that the parties corresponded with each other in equal measure. The incident involving the driveway appears to have been

a one-off incident and there is no evidence that it was the subject of complaint by Mr Haggar at the time.

96. Mr Wood denies disclosing personal information about Mr Haggar to others and there is insufficient evidence for me to conclude that Mr Wood has, or that he has breached his obligations under the Act.

97. In determining these matters, I must be satisfied that more likely than not the alleged conduct complained of occurred, and if it did so that it necessarily amounted to a breach of Mr Haggar's right to quiet enjoyment. The onus is on Mr Haggar to prove his counterclaim. He must produce evidence and satisfy me to the required standard. If I reach the conclusion that it is likely that there has been a breach, then I have not been satisfied to the required standard and I must dismiss the claim.

98. Taking into account the nature and breadth of the relationship between the parties, the evidence that has been produced, and which is relevant and reliable, I am not satisfied to the required standard that following the breakdown of the personal relationship between the parties there has necessarily been a course of conduct by the landlord that amounts to a breach of the tenant's right to quiet enjoyment, or that has amounted to harassment.

99. The counterclaim for breach of quiet enjoyment and harassment is dismissed.

100. Because COCORA LIMITED has partially succeeded with the claim I have reimbursed the filing fee.

G Barnett
06 January 2020

Please read carefully:

Visit justice.govt.nz/tribunals/tenancy/rehearing's-appeals for more information on rehearing's and appeals.

Rehearings

You can apply for a rehearing if you believe that a substantial wrong or miscarriage of justice has happened. For example:

- you did not get the letter telling you the date of the hearing, **or**
- the adjudicator improperly admitted or rejected evidence, **or**
- new evidence, relating to the original application, has become available.

You must give reasons and evidence to support your application for a rehearing.
A rehearing will not be granted just because you disagree with the decision.
You must apply within five working days of the decision using the Application for Rehearing form: justice.govt.nz/assets/Documents/Forms/TT-Application-for-rehearing.pdf

Right of Appeal

Both the landlord and the tenant can file an appeal. You should file your appeal at the District Court where the original hearing took place. The cost for an appeal is $200. You must apply within 10 working days after the decision is issued using this Appeal to the District Court form: justice.govt.nz/tribunals/tenancy/rehearings-appeals

Grounds for an appeal

You can appeal if you think the decision was wrong, but not because you don't like the decision. For some cases, there'll be no right to appeal. For example, you can't appeal:

- against an interim order
- a final order for the payment of less than $1000
- a final order to undertake work worth less than $1000.

Enforcement

Where the Tribunal made an order about money or property this is called a **civil debt**. The Ministry of Justice Collections Team can assist with enforcing civil debt. You can contact the collections team on **0800 233 222** or go to justice.govt.nz/fines/civil-debt for forms and information.

Notice to a party ordered to pay money or vacate premises, etc.

Failure to comply with any order may result in substantial additional costs for enforcement. It may also involve being ordered to appear in the District Court for an examination of your means or seizure of your property.

If you require further help or information regarding this matter, visit tenancy.govt.nz/disputes/enforcing-decisions or phone Tenancy Services on 0800 836 262.

Mēna ka hiahia koe ki ētahi atu awhina, kōrero ranei mo tēnei take, haere ki tenei ipurangi tenancy.govt.nz/disputes/enforcing-decisions, waea atu ki Ratonga Takirua ma runga 0800 836 262 ranei.

A manaomia nisi faamatalaga poo se fesoasoani, e uiga i lau mataupu, asiasi ifo le matou aupega tafailagi: tenancy.govt.nz/disputes/enforcing-decisions, pe fesootai mai le Tenancy Services i le numera 0800 836 262.