EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2019-004-000054
[2019] NZDC 6726

BETWEEN	NAUSCHAD AZAM AND SADIYA SALEEM Appellants
AND	RODERICK SEWELL AND ALISON SEWELL Respondents

Hearing: 10 April 2019

Appearances: Appellants in Person
Mr Sewell and his mother in Person

Judgment: 11 April 2019

DECISION OF JUDGE G M HARRISON

The appeal

[1] The appellants are husband and wife. At all material times they were the tenants of a property at [residential address deleted], Epsom, Auckland, owned as I understand it by Mr Sewell and his mother.

[2] Mr Azam and Ms Saleem appeal against a decision of the Tenancy Tribunal. The substantive decision of the Tribunal was delivered on 4 July 2018. Section 117(6) of the Residential Tenancies Act 1986 (the Act) provides that any appeal to this Court shall be filed within 10 working days after the date of the decision to which the appeal relates. Any appeal against the decision of 4 July 2018 should therefore have been filed on or about 16 July 2018. No appeal was filed.

[3] The appellants applied for a rehearing. By decision of 3 September 2018 that application was dismissed. The notice of appeal is dated 14 September 2018 and appeals specifically against the decision of the Tenancy Tribunal of 3 September 2018.

[4] Section 117(1A) of the Act provides a right of appeal against a decision to refuse to grant an application for a rehearing under s 105 of the Act. However, it was quite apparent that the appeal related to the decision of 4 July 2018, but there was no appeal against that decision and this Court has no power to extend the time within which an appeal must be brought.

[5] This is a trap for litigants without knowledge of the provisions of the Act.

[6] No submissions were addressed with regard to the decision of the Tribunal to decline a rehearing. The essential point of that was that the appellants wish to submit new evidence to the Tribunal. The Adjudicator pointed out that in an earlier decision of 28 February 2018 the Adjudicator stated:

> 11. The tenants also have an obligation to satisfy me that the damage has not been caused by them, or is not substantial, and to provide a plausible explanation and evidence to support this; see s 40(4) RTA.

[7] The Adjudicator then went on to conclude that the three-month period between the first and second hearings was sufficient for the appellants as tenants to obtain such evidence as they wished to produce to the Tribunal and that their failure to do so did not justify the grant of a rehearing. Furthermore, the Adjudicator noted that even if the new report had been admitted, which was a thermography report assessing dampness of one of the units in the complex, it did not conclusively explain the cause of the damage to the unit in question and may not as a consequence have assisted the appellants' case.

[8] I can discern no error in the Adjudicator's reasoning and the appeal against the refusal to grant the rehearing must accordingly be dismissed.

The substantive issue

[9] Despite my obligation to dismiss the appeal, it is appropriate that I address the

concerns of the appellants.

[10] The landlords, through Unlimited Potential Limited, their managing agents, applied to the Tribunal on 22 December 2017 for termination of the tenancy on the grounds that the appellants, as tenants, had breached the tenancy agreement by causing substantial damage to the premises for which compensation of $5,575.57 was sought.

[11] The damage that the building owners complained of were holes and cracks to gib board and plaster in a number of rooms throughout the premises. It was unclear to the Adjudicator exactly how many separate areas of damage there were and the size of each ranged from the size of a nail head up to the largest of approximately 8 cm x 5 cm.

[12] The issue was whether the tenants had caused the damage.

[13] Section 40(2) of the Act provides:

> The tenant shall not –
>
> (a) intentionally or carelessly damage or permit any other person to damage, the premises.

[14] Section 40(4) then provides:

> Where any damage (other than fair wear and tear) to the premises is proved to have occurred during any tenancy to which this Act applies, it shall be for the tenant to prove that the damage did not occur in circumstances constituting a breach of subs (2)(a).

[15] The Adjudicator was quite correct, therefore, in stating at paragraph 14 of the decision:

> In any claim for compensation for damage to a tenancy premises, the landlord must first prove that the damage occurred during the tenancy and is more than fair wear and tear. If they succeed in doing this, then the onus of proof shifts to the tenant who must then show that the damage was not caused by them, or anyone at the premises with their consent, either accidentally or intentionally; see s 40(4) RTA.

[16] The Adjudicator then referred to the Court of Appeal decision in *Holler and Rouse v Osaki* [2016] NZCA 130, which held essentially that a landlord must be

insured to repair any damage caused by a tenant, even if that damage has been caused through carelessness, as long as the damage was not caused intentionally.

[17] As the Adjudicator noted, the tenants did not dispute that the damage occurred during their tenancy. It was the cause of the damage that they disputed.

[18] The managing agents called as a witness an expert of 40 years, Mr O'Hagan. His report concluded that the damage was not caused by water leaking into the premises. There had been a leak in a ceiling which had promptly been repaired. Otherwise there was no cogent evidence of leakage that might have caused the problem. In particular the Adjudicator noted that some of the damage was to interior walls which could not have been caused by leakage affecting walls with an exterior surface.

[19] It is clear that the appellants are bewildered as to the cause of the damage. Mr O'Hagan's view was that it could only have been caused by a penetrating instrument such as a screwdriver or keys. The appellants denied causing the damage themselves and would not accept that their teenage daughters were responsible for it either.

[20] They had produced a report to the Tribunal from a builder who had conducted some of the repair work. His conclusions were brief and unsupported by analysis, one of his conclusions being that he was 70 percent sure a plasterer had added something to the plaster, causing it to break down.

[21] In the decision declining the application for rehearing, at paragraph 7f, the Adjudicator said:

> I refer to the QSV evidence (para 22 of the order dated 4 July 2018). I gave the QSV evidence less weight than the evidence of Mr O'Hagan and his report because there was no evidence of the builder's expertise in regard to gib board, he was not available as a witness so could not be questioned, and his opinion was given in a shorthand note form which made it difficult to draw clear conclusions from.

[22] The Adjudicator's conclusion was that the tenants had not discharged the burden of proof cast upon them by s 40(4). At [28] of the decision the Adjudicator said:

> The evidence provided by the tenants is not enough to satisfy me of this. The moisture report of a neighbouring house is not evidence in regard to the tenancy premises. The request by the owners to reclad the premises does not help explain the damage to internal walls and may have been for purely aesthetic reasons. The tenants themselves acknowledged at the hearing that they had not had problems with mould or dampness at the premises, apart from one leak in the ceiling in the lounge, which was promptly repaired.

[23] It was because the tenants had been unable to discharge the burden of proof that the Adjudicator found that it was more probable than not that they had breached their obligation under s 40(2)(a) not to intentionally or carelessly damage the premises. The implication from the finding was that the damage had been caused intentionally because the Adjudicator did not address that issue further and consider whether or not the damage might be insured.

[24] For those reasons, therefore, I cannot find fault with the reasoning of the Adjudicator, and were the appeal to have been properly brought against the decision of 4 July 2018, I would in any event have dismissed it.

[25] The appeal is dismissed accordingly.

G M Harrison
District Court Judge