IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2020-085-000294
[2020] NZDC 16359

BETWEEN	TRUST PROPERTY MANAGEMENT LIMITED Appellant
AND	ROBERT MANFIELD and LAUREN RICHARDSON Respondents

Hearing:	31 July 2020
Appearances:	Mr Buck (Director) and Adam McCallum (Property Manager) for the Appellant No appearance for or by Respondents
Judgment:	18 August 2020

RESERVED JUDGMENT OF JUDGE C N TUOHY

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[1] This is an appeal against a decision of the Tenancy Tribunal. The Tribunal made two decisions in relation to the application before it. The first was a decision dated 23 March 2020 on the substantive application by the tenants for termination of the tenancy for breach of the landlord's obligations, compensation and exemplary damages. The second was a decision dated 4 June 2020 dismissing the landlord's application for a rehearing. The Notice of Appeal refers to the former decision, but in substance the appeal relates to the refusal to grant a rehearing. The substantial merits and justice of the case[1] are best served by treating the appeal as one against the decision of 4 June 2020 refusing a rehearing.

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1 See s 85 Residential Tenancies Act 1986.

[2] There is an unfortunate procedural history which is pivotal to the appeal. The tenant's application was set down for hearing on 23 March 2020 just when the Covid-19 emergency was breaking out. The landlord's property manager, Adam McCallum, who was to represent it at the hearing, was required to go into self-isolation on medical advice. The landlord made a telephone call to the Tribunal (or possibly to Tenancy Services) on the morning of 23 March to advise of this. The landlord was apparently advised that the Tribunal would be advised of the situation and that there was no need for anyone to appear.

[3] It seems that this was not conveyed to the Tribunal which proceeded to hear the application in the unexplained absence of the landlord. The decision given was adverse to the landlord. It included an award of $3,000 exemplary damages accompanied by a comment that this was *"one of the most egregious cases which (the Adjudicator) had encountered in 7 years on the Tribunal"*.

[4] When the landlord learnt what had happened, it applied for a rehearing. Because of the Covid-19 emergency, the Adjudicator ordered that application would be heard on the papers based on written submissions to be provided by 5.00 pm on Friday 8 May 2020.

[5] This order was not conveyed to the landlord until Wednesday 13 May 2020, five days after the time limit for filing writing submissions had expired. The landlord sought and was granted a written extension until 5.00 pm on Friday 22 May 2020.

[6] On Friday 22 May at 11.08 am, the landlord emailed its written submissions to the Tribunal accompanied by supporting photos and documentation. These were never given to the Adjudicator who proceeded to give his 4 June 2020 decision on the landlord's application for rehearing which was again adverse to the landlord. He recorded in his decision that *"by order dated 4 May 2020, the Tribunal gave the landlord the opportunity to provide written submissions, by 8 May 2020. It has not done so, then or since"*.

[7] The landlord subsequently filed this appeal. As if to prove Murphy's Law, when the appeal was set down for an appeal conference on 31 July, the notice given to

the tenant was sent to their old address, even though they had notified the Court of their current address. Unsurprisingly, they did not attend the hearing.

[8] I had read the file beforehand and was aware of the course of events set out above. The landlord's representatives attended, and I assumed that the tenants had been notified of the hearing but had chosen not to attend. I heard the landlord's case which, of course, was based upon the breach of its right to be heard. I indicated a favourable result for the landlord with a written decision to follow.

[9] In preparing that decision, I noted that the notice of hearing given to the tenant was for an appeal conference which raised the possibility that they thought there would be some later hearing which they could attend. For that reason, I issued a Minute dated 5 August 2020 explaining what had happened and giving the tenants an opportunity of making written submissions on the appeal.

[10] They have taken that opportunity and have filed extensive written submissions. They also explained why they had not appeared at the 31 July hearing, viz. because they never received the notice sent to their former address. Finally, the Court is in the position of being able to make a decision after both parties have been given the opportunity to be heard.

[11] I am entirely satisfied that the appropriate outcome is to allow the appeal and grant the landlord's application for a rehearing of the tenant's original application. The reason for that is simple. The landlord, through no fault of its own, has had no opportunity to present its case to the Tribunal, either at the original hearing or at the hearing of the application for a rehearing. It is a basic principle of natural justice, generally applicable to all Courts and Tribunals, that both parties must be given the opportunity to be heard before a decision is made.

[12] It matters not that the case for the party which has been heard seems overwhelmingly strong. Sometimes, when the other side is heard, that case does not seem so strong. But more importantly, procedural justice demands that that opportunity be given. A party who has not been given any opportunity to be heard

will rightly consider that his or her case has not been justly dealt with regardless of the merits.

[13] The tenants' submissions focussed upon the merits of the substantive decision of 23 March 2020. The Adjudicator's decision of 4 June also focussed upon the strength of the tenants' substantive case, but without any consideration of the submissions and evidence provided by the landlord but not brought to his attention.

[14] I have not attempted to assess the merits of the substantive application. In my view, the proceeding has gone so far off track procedurally that it should go back to the start – not quite the start because both parties have now prepared and articulated their respective cases fully. However, that substantive application should be decided by the specialist tribunal set up for that purpose.

[15] I therefore allow the landlord's appeal and direct a rehearing in the Tribunal of the original application. In view of the strongly expressed view taken by the Adjudicator in the two decisions he has made, I direct that the rehearing take place before a different Adjudicator so that there can be no perception of pre-judgement.

C N Tuohy
District Court Judge