IN THE DISTRICT COURT
AT WELLINGTON

CIV-2015-085-000535
[2016] NZDC 4138

BETWEEN	CHALLENGE RENTALS PROPERTY MANAGEMENT LIMITED, AGENT FOR VISHNU TRUST Appellant
AND	THOMAS SIMON PATTULLO DOMINIC COWIE JACOB PEYTON GABRIEL PAPAUNI MITCHELL MCCURRACH TIM WALKER Respondents

Hearing: 9 March 2016

Appearances: Mr G Manktelow for Appellant
Respondents in person (oral submissions by T S Pattulo and J Peyton

Judgment: 14 March 2016

RESERVED JUDGMENT OF JUDGE B DAVIDSON
[Tenancy Tribunal Appeal]

Appeal

[1] This is an appeal by a landlord under s 117 Residential Tenancies Act 1986 (Act) against 2 components of the Tenancy Tribunal order on 21 July 2015 requiring it to pay the tenants $579.30. At the appeal hearing I was told that the sum had been paid by the landlord by rental adjustment.

[2] The 2 components under appeal are:

1. a finding by the adjudicator that the tenancy agreement binding between the parties was that of 12 or 13 February 2015 (the first

agreement) under which the rent payable was $1,017 per week; rather than the second agreement, signed a week later on 19 February 2015, with a higher rental of $1,075 per week. As a result the adjudicator found the respondents, who had paid at the higher rate, were entitled to a refund of $1,421.30 for the overpayment. This was then offset by the adjudicator against admitted rental arrears by the respondents of $1,017;

2. an award of $100 for a breach of s 19 of the Act by late bond lodgement.

[3] The landlord essentially says:

1. the adjudicator was wrong to conclude that the first agreement was legally binding;

2. the adjudicator's conclusion that it would be unjust to the respondents to bind them to the second agreement, purportedly in reliance of s 85 of the Act, was wrong as it ignored the fact the second agreement legally superseded the first;

3. there was no claim by the tenant for exemplary damages, the issue was not gone into at the hearing and so it was wrong of the adjudicator to make any such order.

[4] The tenants made brief submissions supporting the adjudicator's findings. Their case is that they understood the first agreement to be legally binding, but felt pressured, by virtue of urgency and circumstance, into the second agreement with the higher rent.

Background

[5] I take the following factual outline from material presented, both in writing and orally at the Tenancy Tribunal hearing.

[6] In early February 2015 the respondents, a group of university students, were seeking accommodation for the 2015 university year.

[7] On 5 February 2015, they completed a tenancy application in respect of the landlord's property at [address deleted], Newtown. They withdrew the application the following day.

[8] They resurrected the application a few days later on 10 February 2015. This was based on a rental of $995 per week plus an additional payment in respect of whiteware.

[9] On 10 February 2015, the tenants emailed the landlord as follows:

> I would like to confirm our application for [address deleted], the rent listed on TradeMe was $995 per week. We would like to opt out of the additional whiteware … we're filling out the application forms and I'll forward those to you as soon as they are completed likely sometime tomorrow.

[10] This was followed by a further email from the tenant the following day, 11 February 2015, in the following terms:

> We accept the offer of $995 per week plus $22.50 for whiteware at [address deleted]. For a lease of one year. I'm just waiting on our last member to complete his application and then I will send them through in one email.

[11] The landlord replied by an email in the early hours of 12 February 2015 as follows:

> Thank you accepted your acceptance of the lease at [address deleted] for one year.

[12] This was followed a few hours later by a further email from the landlord as follows:

> Enclosed is an agreement for [address deleted]. Please look over. Please make sure all tenants have submitted guarantee forms, applications forms and copies of photo ID.

[13] A few hours later the tenant replied as follows:

> Will do and will get everyone to sign and send back after work tonight.

[14] The tenancy agreement was signed by the tenants on 13 February 2015. The agreement set out weekly rental of $1,017 (including $22 for whiteware), a bond amount, tenancy commencement and termination date. The associated property inspection report was not completed.

[15] It is clear enough that the accompanying documents were incomplete, including guarantees, references and proof of identification and the like. This is of significance because the essence of the landlord's position at the Tribunal hearing was that no agreement had been concluded until these various documents were signed and returned; and until this has been done it justified the landlord continuing to advertise the property. At the Tribunal hearing Mr Reeves, an employee of appellant's agent, put it this way[1]:

> The landlord was therefore justified in maintaining the advertising the property requiring completed documentation of payments to be made before signing the agreement. Now an inspection of the property was carried out on 19 February 2015 and a number of people were present … if the tenant accepted that agreement they were not only accepting the specific rent and bond there were other elements to the agreement including the submitting of documents and the paying of certain amounts. These requirements were put in writing and included deadlines. … So there was no meeting of minds in regards to the 12th of February tenancy. Yes it is signed by the tenants but there was no meeting of minds regarding when letting fees were going to be paid, when bond was going to be paid, when rent was going to be paid because our expectations were not met. … The meeting of minds was eventually accomplished on the 19th of February when we physically sat down with the tenants … The first tenancy agreement dated 12 February is signed only by the tenants. It does not include an inspection report. It is not accompanied by any of the required payments.

[16] This was reflected in an email sent by the landlord on 17 February 2015 as follows:

> As discussed we have another group who is interested and need to make a decision.

[17] There was a meeting at the property on 19 February 2015. On the same day the tenants were given a letter which read as follows:

> Your contract is for the term 16 February 2015 to 19 February 2016.

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[1] Pages 33 – 34 transcript Tribunal hearing

[18] The evidence from the tenants about this meeting was as follows:

> He (landlord) came back to us I think on the 17th requesting saying that he has got some new people interested and due our inability to return all the forms, which we actually have confirmed, we needed to match the rent or he is going to give the property to the other person. And so from there we didn't really know what was going on. It was first week of university and we needed a place so we accepted it[2].

[19] Thereafter the tenants began rental payments at the higher rate, but within a relatively short period of time became concerned about what had happened. As a result the mother of one of the tenants wrote to the landlord on 28 April 2015.

[20] The bond was lodged based on the first agreement.

First issue - which agreement was binding

[21] In my view the adjudicator was correct to conclude that the first agreement constituted a legally binding agreement between the parties. There are several reasons for this:

1. the email exchange on 11 and 12 February 2015 demonstrate a clear and unambiguous offer and acceptance;

2. the landlord forwarded them an agreement based on the agreed terms; this was signed by all 6 tenants;

3. other documents such as guarantees, references, identification, property inspection report and the like were ancillary and at no stage did the landlord make it clear that completion of the agreement was wholly dependent on completion of these as well;

4. the agreement in itself carried all the requisite terms including rent payable, period of tenancy, its commencement and its termination.

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[2] Page 15 transcript Tribunal hearing

[22] At the hearing before me, the landlord's stance changed somewhat from that at the Tribunal where it had argued that the first agreement was invalid. Mr Manktelow rather argued that the second agreement superseded the first and that the adjudicator was wrong in the way she applied s 85 of the Act to reject the second agreement as legally binding.

[23] Section 85 of the Act is in the following terms:

> **85 Manner in which jurisdiction is to be exercised**
>
> (1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises to which this Act applies.
>
> (2) The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

[24] It is clear enough that s 85 provides no licence for an adjudicator to ignore general and accepted principles of contract law[3].

[25] However, the adjudicator did not simply find that the second agreement was not binding because it would be unjust to do so. She went on to say, in her decision, as follows:

> 5. The landlord's argument that there was no binding agreement in place until all required documents were in place does not stand as the landlord themselves admitted it is often the case that a tenancy commences before all required documents are completed. Given the large number of tenants in the tenancy (6) it's alleged expectation and requirement of getting all documentation back within 2 days was not realistic and even if it were no evidence was provided by the landlord that it specifically advised the tenant that it would seek to terminate agreement 1 and/or it would not be of effect if the remainder of documentation was not provided within a certain timeframe[4].

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[3] *Welsh v Housing New Zealand Limited* (High Court Wellington Registry AP 35./2000, 9 March 2001 paragraph [29])

[4] Paragraph 5 Tribunal decision

[26] More than that there was evidence before her about the circumstances under which the tenants were asked to sign a second agreement with an increased rent. It was at a time of considerable urgency to secure accommodation and when they were told, without any documentary proof, that other prospective tenants had offered a higher rent. More than that, the adjudicator would have been entitled, in my view, to call in aid, in spirit at least, s 24 of the Act which prescribes a process for rent increases.

[27] I have to say that the whole course of events demonstrated by the emails and the oral evidence reeks of an unjustified rent increase by the landlord.

The second issue - exemplary damages $100

[28] It is common ground that the landlord lodged the bond late. It is equally clear that the only reference to this at the tribunal hearing related to mixed, and somewhat confusing evidence, about when the bond was actually paid and received. That, however, is immaterial as it is common ground that it was lodged late.

[29] Equally, it is clear that there was no claim for exemplary damages because of late bond lodgement in the tenant's application before the tribunal. It was obliquely mentioned in the letter of 28 April 2015 on behalf of the tenants.

[30] It is clear enough that late bond lodgement constitutes an unlawful act under s 19(2) of the Act. But there are other requirements, as prescribed by s 109 which need to be considered by the adjudicator to justify an award of exemplary damages. The adjudicator would need to have considered s 109(3) which reads as follows:

> **109 Unlawful acts**
>
> …
>
> (3) If, on such an application, the Tribunal is satisfied that the person against whom the order is sought committed the unlawful act intentionally, and that, having regard to—
>
> (a) the intent of that person in committing the unlawful act; and
>
> (b) the effect of the unlawful act; and

(c) the interests of the landlord or the tenant against whom the unlawful act was committed; and

(d) the public interest,—

it would be just to require the person against whom the order is sought to pay a sum in the nature of exemplary damages, the Tribunal may make an order accordingly.

[31] So the adjudicator would have needed to consider whether the unlawful act was intentional and then have regard to the other matters set out in s 109(3), and then to consider the overall justice of the situation. In doing so the adjudicator would need to give notice to the landlord and the opportunity for it to address the matter in evidence or submissions before any award was made. She simply failed to do so.

[32] So in summary an award of exemplary damages was not sought; and although an unlawful act was clearly demonstrated the other requirements of s 109(3) were not addressed at the hearing.

[33] Accordingly I set aside the award of exemplary damages.

Outcome

[34] Accordingly the appeal in respect of the overpayment, based on the adjudicator's conclusion that the first agreement was the binding agreement between the parties is dismissed.

[35] The appeal against the exemplary damages order against the appellant is granted.

[36] Given that both parties have been successful at this hearing there will be no order for costs.

B Davidson
District Court Judge