IN THE DISTRICT COURT
AT WHANGAREI

CIV-2016-088-000041
[2016] NZDC 3632

BETWEEN	KATHARINE LINDBERG & ORS AS TRUSTEES OF THE KATHARINE LINDBERG FAMILY TRUST Appellant
AND	MARY-ANN CLUEARD Respondent

Hearing: 1 March 2016

Appearances: Ms Lindberg in person for the Appellant
Ms Clueard in Person

Judgment: 8 March 2016

DECISION ON APPEAL AGAINST THE TENANCY TRIBUNAL OF JUDGE D J McDONALD

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[1] On 3 August 2015 Ms Lindberg on behalf of her Trust filed an application with the Tenancy Tribunal seeking $4,785 in rent arrears and $2,454.54 for new carpets in the downstairs bedroom and passage, cleaning of carpets, general cleaning and removal of rubbish to the tip.

[2] The tenant, Ms Clueard subsequently filed an application seeking compensation from the landlord for $296.41 as reimbursements for fixing the pump that had broken down and which the landlord had not fixed in an expeditious way.

Hearing before the Tenancy Tribunal

[3] Mr N Blake, the Tenancy Adjudicator, heard evidence on 17 September 2015 from Mrs Lindberg and Ms Clueard. A number of documents, including photographs, were produced at the hearing.

Order of the Tribunal

[4] Mr Blake found that the relevant tenancy was a periodic one as argued by Ms Clueard. Ms Lindberg had argued that it was a fixed term tenancy. He found that Ms Clueard owed $310.71 in rent arrears. He found against Ms Lindberg's claim for the cost of replacing the carpet in full. He found proven that Ms Clueard should pay 10% of the value of that being $167. He also found that the tenant, Ms Clueard, should pay $250 for carpet cleaning, $50 for general cleaning, and $11.50 for window cleaning. In a subsequent hearing he found that Ms Clueard should also pay $31 for rubbish removals.

[5] He found in favour of Ms Clueard, the tenant, in relation to reimbursement of parts for the cost of the pump repair of $108.10 and exemplary damages for bond and rent in advance of $150.

Appeal to this Court

[6] I heard the appeal on 1 March 2016.

[7] I consider that an appeal to this Court from the Tenancy Tribunal is by way of rehearing. The appeal is heard on the record of the oral evidence given before the Tenancy Tribunal, subject to a discretionary power to rehear the whole or any part of the evidence or even receive further evidence. *Shotover Gorge Jetboats Limited v Jamieson*[1].

[8] On an appeal by way of rehearing I am not restricted by any findings which the adjudicator has made, but I acknowledge the advantage enjoyed by the decision maker at the first instance where he saw and heard the witnesses. I also acknowledge the wealth of experience built up by Mr Blake sitting as an adjudicator. As was said in the *Housing New Zealand Corporation v Salt*[2]:

> "[14] There is something akin to a presumption that the decision appealed from is correct and it is also customary for the Appellant body to exercise restraint in interfering with discretionary decisions.

[1] [1987] 1 NZLR 437 and 439
[2] CIV-2007-004-002875

> [15] Thus, ordinarily, the Appellant body will only differ from the factual findings of the decision maker at first instance if:
>
> - the conclusions reached was not open on the evidence, that is, where there is no evidence to support it; or
>
> - the lower body is plainly wrong in the conclusion it reached[3]".

The Act

[9] Section 118 of the Residential Tenancies Act 1980 allows the District Court Judge on appeal to quash the order of the Tribunal and order a rehearing by the Tribunal; or substitute any orders that the Tribunal could have made; or dismiss the appeal. When the District Court is considering appeals from the Tribunal regard needs to be had to s 85. That section provides the manner in which the jurisdiction of the Tribunal is to `be exercised. 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". Further "the Tribunal shall determine each dispute according to the general principles of law relating to the matter in a 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".

Ms Lindberg's position

[10] Ms Lindberg argued that Mr Blake was wrong, on the evidence and at law, in finding that from 1 September 2014 the tenancy was a periodic tenancy. Ms Lindberg repeated the arguments that she had advanced in front of Mr Blake. She said that for the preceding three years, 2011, 2012 and 2013, the tenancy was a fixed one. The written tenancy agreements which she prepared for 1 September 2014 were left by her on two occasions in Ms Clueard's letterbox. Ms Lindberg had signed it. She said the adjudicator should have found that Ms Clueard received the documents, but refused or failed to return them. She said that a tenancy agreement need not be in writing despite s 13 of the Residential Tenancies Act 1986. Here the evidence of a fixed tenancy was both oral and by conduct. The history of the tenancy. The emails between her and Ms Clueard which clearly show that Ms Clueard was wanting to enter in to a fixed term contract. The lack of objection relied upon by the adjudicator

[3] *Rei v International Insurance Brokers (Nelson Marlborough) Limited* [1998] 3 NZLR 190 at 197

did not change the nature of a tenancy as agreed between her and Ms Clueard. That the adjudicator should have ruled that it was a fixed tenancy and as such that the balance of the rent up to 1 September 2015 should have been ordered to be paid.

[11] So far as the downstairs carpet damage was concerned Ms Lindberg again disagreed with Mr Blake's findings. She re-argued what had been before Mr Blake, it was the tenant's cat who had damaged the carpet to such an extent that it needed to be replaced. Without the cats, the carpet would have been perfectly fine.

[12] Ms Lindberg decided not to re-let her property but did it up and sold it.

Ms Clueard's position

[13] Ms Clueard said this was the third time that the dispute had been before the Court. She considered this was a vindictive attack on her that was causing her distress and disharmony. She took particular umbrage as Ms Lindberg's assertion that she left the property "filthy and dirty" and by extension that she was the same. The tenancy agreements were not received by her. She presumed it was a periodic tenancy. If Ms Lindberg was so concerned then why didn't she, Ms Lindberg, come to the door with the written agreement to discuss it and if it was in order have it signed. Ms Lindberg did not do that.

Discussion

[14] I will deal with each of the issues in turn.

Rent

[15] Section 13 of the Act states that:

> "Every tenancy agreement shall be in writing and signed by both the landlord and the tenant."

Further

> "The landlord shall, before the tenancy commences, provide the tenant with a copy of the tenancy agreement."

[16] Section 13B provides 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."

[17] Again it is the landlord's obligation to provide a copy of the variation or renewal to the tenant.

[18] Section 13C states:

> "Notwithstanding anything to the contrary and any other enactment, no tenancy agreement, or variation or renewal of a tenancy agreement, shall be unenforceable on the grounds that it is not in writing."

[19] For the sake of completeness, Section 60A of the Act states:

> "On the expiry of a fixed-term tenancy of more than 90 days, the tenancy continues as a periodic tenancy with the same terms as the terms contained in the expired tenancy so far as those terms are consistent with a periodic tenancy."

[20] That sub-section does not apply if the parties enter in to a new tenancy agreement or agree to extend the existing tenancy agreement (that should be in writing); or within the affected period, either party gives the other written notice of the party's intentions not to continue with the tenancy (that did not occur on this occasion).

[21] There is therefore a strong direction from the Act that tenancy agreements should be in writing, duly signed by both the tenant and the landlord. It is the landlord's obligation to provide a signed copy of the agreement to the tenant. Here there was no agreement in writing for the 2014/2015 tenancy period. Ms Lindberg relies on an oral agreement and by Ms Clueard's conduct. Mr Blake was fully aware as adjudicator of Ms Lindberg's arguments. He was also fully aware of the law. He found "if there is no clear agreement, then the tenancy is periodic". He accepted that an offer of a fixed term was made by Ms Lindberg but that offer was not accepted by Ms Clueard.

[22] The adjudicator saw and heard the witnesses. He was fully aware of what he must decide. There is evidence from which the adjudicator could have come to the decision he did. He found Ms Clueard did not accept the fixed term contract; either by way of her emails or by her conduct. That being so in terms of s 60A the tenancy became a periodic one. What Ms Lindberg has attempted to do before me is to reargue what she argued before the adjudicator. I am not prepared to substitute any view I might have of the facts for that of Mr Blake. He is a very experienced tenancy adjudicator. There was no basis, even though this is an appeal by way of hearing, for me doing so.

The carpets

[23] Ms Lindberg is again asking me on appeal, to find that the adjudicator got the facts "wrong" as regards to the damage to the carpet and what amount Ms Clueard should pay for that damage. The adjudicator found that there was some damage to the carpet that was beyond fair wear and tear. He assessed that and Ms Clueard's liability at 10% of the replacement cost. Ms Lindberg does not agree with that. She wants 100%.

[24] Having regard to the transcript of evidence given before the adjudicator, and having looked at the documents produced, it is quite clear that the factual findings made by Mr Blake were open to him. This is not a case where there is no evidence.

Conclusion

[25] The grounds advanced in the appeal fail. The appeal is dismissed.

D J McDonald
District Court Judge