EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WELLINGTON

CIV-2016-085-000244
[2016] NZDC 10582

BETWEEN	JENNIFER ANNE FRANICEVIC Appellant
AND	KGH TRUST Respondent

Hearing: 8 June 2016

Appearances: Appellant appears in Person
P Kennedy and A Green for the Respondent

Judgment: 8 June 2016

ORAL DECISION OF JUDGE B DAVIDSON:
[Tenancy Tribunal Appeal]

Appeal

[1] This is an appeal by the tenant under s 117 Residential Tenancies Act 1986 ("Act") against a decision of the Tenancy Tribunal on 5 April 2016 granting the landlord possession of the tenanted premises from 5.00 pm 19 April 2016.

[2] The order has been stayed pending this hearing. I am told that the appellant remains in occupation and that her rental obligation is up to date.

Background

[3] The possession order stemmed from the tenant's failure to vacate the premises by 26 February 2016 following the service on her on 26 November 2015 of a 90 day quit notice.

[4] The adjudicator heard evidence from the tenant and her friend Mr Williams and from Messrs Kennedy and Green. As well, a copy of the lease, the notice in question and an affidavit from Mr Williams were before the adjudicator.

Issues at the tribunal hearing

[5] Three issues arose:

(a) whether the landlord had proved, on the balance or probabilities, service of the s 51 termination notice;

(b) whether service was valid;

(c) whether the Tribunal could, under s 54 Act declare the notice retaliatory and of no effect.

Proof of service

[6] As to the first, the adjudicator had disputed evidence. On the one hand Mr Green said that around 2.00 pm, 26 November 2015, he served the notice by placing it under the door to the tenant's apartment. He said that he did so in the presence of a cleaner, Mr Cameron. On the other hand, the tenant said she was unaware of the notice until 24 February 2016, 2 days before the notice period expired.

[7] As I have mentioned the adjudicator also had before him an affidavit from her friend Mr Williams. Mr Williams also gave evidence at the hearing. In his affidavit Mr Williams said that between October and December 2015 he was staying at the appellant's apartment. The impression from his affidavit, dated 29 March 2016, is of him staying on occasions.

[8] At the Tribunal hearing the adjudicator asked Mr Williams to comment on Mr Green's evidence about the particulars of service of the notice:

> Q: You heard Mr Green say about 2 o'clock in the afternoon he delivered the notice. You're saying you weren't there at that time?

A: I can't attest that I wasn't, was not, you know, I can't.

[9] In dealing with this issue, the adjudicator accepted the evidence as to service of the landlord. This was a finding of fact available on the evidence to the adjudicator.

[10] In giving reasons he said as follows:

> The tenant could not explain why she failed to see the notice other than suggested it had been removed by someone else.

[11] In her notice of appeal the appellant suggests that the evidence given on behalf of the landlord on the issue of service of the notice amounted to perjury.

[12] To support that, she filed a further affidavit from Mr Williams dated 13 April. This affidavit was sworn 8 days after the Tribunal hearing. In it Mr Williams said that he was, in fact, at the tenanted premises on 26 November 2015; that he had stayed home for the day because he had a migraine headache. He says the appellant herself was out for most of the day returning in time for dinner. He says that he is absolutely certain that no 90 day notice was placed under the apartment door that day, nor that anyone knocked on the door. He contended that Mr Kennedy and Mr Green had both lied on oath at the Tribunal hearing.

[13] Putting aside issues as to whether I should even receive this affidavit at the appeal hearing it has to be said that Mr Williams' sudden and very specific memory recall is highly questionable. In his initial affidavit he was vague about his association with the tenanted premises. When asked by the adjudicator about the specific occasion of service he was unable to categorically assert he was there; yet for reasons which, in my view, must be very suspicious only 8 days later he was able to provide some deep categoric detail.

[14] Even if I accepted his affidavit at face value it has to be said that it was evidence reasonably available at the time of the Tribunal hearing in any event.

[15] As to this point, in my view, the adjudicator's finding on the facts that service was affected on 26 November 2015 is unimpeachable.

Was service valid?

[16] As to the second ground, there are no mandatory requirements as to service other than that set out in s 13AB(2) of the Act which reads as follows:

> Whenever a party is required to give an address for service, the party
>
> (a) must given an address of a physical place in New Zealand and
>
> (b) may in addition specify a post office box number, email address or facsimile number as one of the party's addresses for service.

[17] Here the evidence is that the notice was brought to the tenant's attention by placing it under the door to her apartment. As the adjudicator noted s 136 Act provides a number of permissive forms for service but none are mandatory. The adjudicator found that service was sufficient; in my view, a finding entirely open to him on the evidence placed before him. That it did not comply with s 136 is immaterial. As I have said, s 136 provides for permissive not mandatory methods of service.

[18] I find, therefore, that service was sufficient.

Notice set aside as retaliatory

[19] As to the third, the setting aside of the notice as retaliatory, again, the adjudicator's conclusion is unimpeachable.

[20] Section 54 provides that a person may, after 14 days of a receipt of a notice terminating the tenancy, apply to the Tribunal for a declaration that the notice is retaliatory and of no effect.

[21] Today the appellant has essentially repeated the contentions that she made before the Tribunal. She had given no notice that she intended to raise this issue but the adjudicator in fairness gave her leave to do so. The adjudicator heard the evidence and concluded that the notice to quit was not retaliatory.

[22] At the hearing, Mr Kennedy gave evidence as follows:

> We are fully entitled to give a 90 day notice which we thought was the easiest course of action here. Jennifer's been a very, very troublesome tenant and causes a lot of trouble in the building and outside the building. We have got four formal written complaints to us and two to the police which I can go into at great detail if required. I have got all the evidence here in relation to, I've asked all the tenants to put their full complaints in writing and if necessary involve the police.

He went on:

> So we just weighed it all up and thought the easiest way around all of this was to give a validly served 90 day notice and not get involved in who said what to whom and which we're endeavouring to do.

[23] The adjudicator then asked Mr Kennedy about the allegation of a retaliatory nature of the notice. Mr Kennedy refuted that.

[24] On this point, as I have said, again the adjudicator's acceptance of Mr Kennedy's explanation was finding a fact entirely open to him. I find therefore, the adjudicator's conclusion on this point also unimpeachable.

Outcome

[25] It follows, therefore, that the appeal must be dismissed.

[26] The respondent is granted possession of the tenanted premises as from 5.00 pm on 29 June 2016.

B Davidson
District Court Judge