

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV-2015-004-001773
[2016] NZDC 15768**

BETWEEN STEVEN JOSEPH CHOU
Appellant

AND VICTOR CHOU
Respondent

Hearing: 27 July 2016

Appearances: S W M Piggin for the Appellant
The Respondent in Person

Judgment: 30 September 2016

JUDGMENT OF JUDGE B A GIBSON

[1] This is an appeal pursuant to s 117 of the Residential Tenancies Act 1986 from a decision of a Tenancy Adjudicator given on 14 December 2015.

[2] The matter concerns the occupation of residential premises at 40 Panapa Drive, St Johns, Auckland, by the respondent. That property was, for a number of years, owned by the respondent's mother, the late Tsai Sang Sung and her husband, the appellant, ownership being as joint tenants. Mrs Sung died on 21 April 2014 and her interest in the property transmitted by survivorship to her husband, Mr Steven Chou. Prior to her death Mrs Sung and her husband resided abroad and had done so since 1995. She returned to live in the property a few months prior to her death. The respondent also lived in the property and has done so for the majority of the last 14 years. He did not pay rent to his mother and stepfather but was responsible for the management and upkeep of the property for the majority of that time.

[3] The respondent's position is that he was assured by his mother that he could continue to live in the property for the rest of his life, and was reassured by his

stepfather that he would abide by his wife's wishes. Indeed the respondent asserted in his submissions that his mother intended to transfer the property to him, and also make a will providing for him, if the transfer had not been effected before she died. She came to live in New Zealand in February 2014 after finding she was terminally ill, but had not transferred the property or executed a will at the date of her death. Mrs Sung would not, of course, have been able to transfer the property to her son unless her husband, Mr Steven Chou, was also prepared to sign a transfer.

[4] The appellant alleges that he has his own chattels and books stored at the property but has been denied access to them, and to the property, by his stepson and, in any event, the appellant now requires his stepson to leave the property so that he can obtain possession of it himself.

[5] Proceedings were initially commenced in the High Court for recovery of the property following the issuing of a trespass notice from the appellant to the respondent. When those proceedings were met by a claim by the respondent that he was a tenant of the property they were abandoned, and proceedings were commenced before the Tenancy Tribunal. However, at the hearing before the Tenancy Tribunal Mr Victor Chou abandoned his assertion of a tenancy and claimed to be entitled to reside, for life, in the property pursuant to a promise made to him by his mother before her death. That, of course, ignores the interest the appellant has in the property.

[6] A transmission by survivorship was registered on 10 November 2014 so the appellant is now the sole proprietor of the property. It seems steps have been taken by the Public Trustee as administrator of Ms Sung's estate to apply to the High Court to sever the joint tenancy so as to enable a claim to be brought by the respondent against what, in the event the claim is successful, will be his late mother's share of the relationship property she had with the appellant. There is nothing to indicate what the quantum of the relationship property is likely to be in the event the application to the High Court is successful.

[7] By the time the matter reached the Tenancy Tribunal the respondent's position as to the nature of his occupation of the premises had shifted. They

were plainly residential premises as defined by s 2(1) of the Residential Tenancies Act 1986 ('the Act'). Both parties now agreed no tenancy existed.

[8] The appellant's position was that the respondent, prior to his mother's death, had resided in the premises under a licence to occupy granted to him by his mother. The adjudicator found as a fact that the appellant had agreed to the respondent residing in the property during his then wife's lifetime.

[9] Once the appellant became the sole proprietor of the property he, the appellant argued, had revoked what was no more than a bare licence, so that he was entitled to possession of the premises. The respondent, by continuing in occupation, was no more than a squatter so that s 65 of the Act applied, the provision concerning the eviction of squatters, and an order was sought from the Tribunal granting possession of the premises to the appellant.

[10] The Tribunal declined to make the order being satisfied that the respondent intended to prosecute a claim against the estate of his late mother if the High Court proceeding commenced by the Public Trustee, as administrator of her estate, for severance of the joint tenancy was successful.

[11] The respondent, Mr Victor Chou, accepted he was not a tenant of the property. His right to occupy the property was under a bare licence given to him by his late mother, apparently with the agreement of the appellant, but which being a bare licence was capable of being revoked. The appellant revoked the licence. That was the position correctly stated by the Adjudicator in his decision of 14 December 2015. He noted the evidence supported the appellant's submission that he wished to revoke the licence to occupy the property following his late wife's death, stating *"that the evidence of this is overwhelming"*.

[12] The respondent, not being a tenant and with his licence to occupy the property being revoked by the registered proprietor, the appellant, meant that his possession of the premises was that as a squatter or trespasser. Section 65 of the Act, the provision dealing with the eviction of squatters, therefore applied. The section provides:

- (1) Where on the application of any person entitled to possession of any residential premises the Tribunal is satisfied that any other person is in possession of the premises as a squatter or trespasser, or otherwise than pursuant to any right of occupation granted to that person by any person having lawful authority to grant that right to that other person, the Tribunal shall make a possession order granting possession of the premises to the applicant.

[13] The use by the legislature of the word “shall” means a possession order is mandatory once the preconditions referred to in the section are established. There is no element of discretion.

[14] The Tribunal decided that as it was satisfied the respondent intended to make a claim for ownership of a portion of or all of the property to either the Family or High Court, and had begun the process by encouraging the Public Trustee to take action on his behalf, it was not unreasonable that the appellant not gain exclusive possession of the property pending determination of the foreshadowed claim against the late Ms Sung’s estate, if that estate could be resuscitated by the revocation of the transmission of the property by survivorship to the appellant, thereby enabling the claim to be prosecuted. The Adjudicator noted that if the respondent’s claims were unsuccessful including, presumably, the attempt by the Public Trustee to set aside the transmission by survivorship then the appellant could return to the Tribunal to obtain the possession order. The Adjudicator in his decision referred to s 85(2) of the Act, stating:

The Tribunal must apply an approach that reflects a broad intuitive sense of propriety in the circumstances of each case and recognises the overall impression and sense of fairness and equity.

[15] Section 85(2) of the Act deals with the manner in which the Tribunal’s jurisdiction is to be exercised and provides that:

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.

[16] The section has been the subject of analysis in the higher Courts with Asher J stating in *Ziki Investments (Properties) Limited v McDonald*¹ that the provision:

¹ *Ziki Investments (Properties) Limited v McDonald* [2008] 3 NZLR 417, 431

... simply means that technical requirements, such as matters of form or time, may not be strictly applied. In this the subsection indicates that general principles of law should be interpreted or applied consistently with the merits and justice of the case where possible.

and further:

Section 85(2) does not therefore give the Tribunal a carte blanche to decide the case on its perception of merits and justice.

[17] In support of the latter proposition Asher J referred to the earlier decision of *Welsh v Housing New Zealand Limited*² in which, at para [30] it was stated:

If a remedy is justified by the principles of law applicable to the matter, the Tenancy Tribunal will have to consider the merits and justice of the case and whether the strict application of the law gives rise to a fair result, but, if there is no remedy provided for by the law, it is not open to the Tenancy Tribunal to invent one.

[18] The Adjudicator's analysis of s 85 and its relevance to the application was as follows:

The words of s 85 are conjunctive, not disjunctive. However if there is a cause of action according to general principles of law, the remainder of s 85(2) may give the Tribunal jurisdiction to relieve or mitigate the consequences of those proposals in the particular case. The Tribunal must apply an approach that reflects a broad intuitive sense of propriety in the circumstances of each case and recognizes the overall impression and sense of fairness and equity.

[19] Section 85(1), which refers to the manner in which the jurisdiction is to be exercised, states that it is to be done in a manner "*most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises*". The premises were clearly residential premises but the respondent was not a tenant. Although he claimed he was for the purpose of the High Court proceedings, thereby causing the appellant to abandon those proceedings, for the purpose of the hearing before the Tribunal he accepted he was not a tenant. A squatter cannot be a tenant. Neither can a trespasser. Hence the directory nature of s 65 requiring an order for possession once the preconditions in the section had been met.

² *Welsh v Housing New Zealand Limited* (High Court, Wellington, AP 35/2000, 9 March 2001, Doogue & Goddard JJ)

[20] The respondent did not fall within the definition of ‘tenant’ contained in s 2 of the Act. There was no tenancy agreement. He was not a former tenant. He had a mere licence to occupy which had been revoked.

[21] Consequently I accept the appellant’s submission that the threshold requirement for the application of s 85 of the Act was not met. The fact that there might potentially be claims against the estate of the respondent’s late mother, should the Public Trustee in its action, funded by the respondent, succeed in the setting aside of the transmission by survivorship, was no more than speculative. The strength of those potential claims was not evaluated. Even if the transmission by survivorship is set aside then the appellant’s interest in the property would still remain as he would be a tenant in common and no claim against his interest could be made by the respondent.

[22] Overall, therefore, I am satisfied that the appeal should be allowed and the order of the Tenancy Tribunal annulled. The respondent is not a tenant of the premises. The appellant is entitled to possession of the premises, having revoked the respondent’s licence to occupy, and so the appellant is entitled to a possession order granting possession of the premises to him, and I make one accordingly.

[23] The appellant is entitled to costs. Unless the appellant wishes to contend otherwise by memorandum filed and served within the next 14 days costs are to be determined on scale 2B of the District Courts Rules 2014 together with disbursements as fixed by the registrar.

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Gibson DCJ