EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT DUNEDIN

CIV-2016-012-000067
[2016] NZDC 16021

BETWEEN	GORDON HENRY HOLMES Appellant
AND	HOUSING CORPORATION OF NEW ZEALAND Respondent

Hearing: 2 July 2016 (by AVL)

Appearances: Appellant in person
F J Cuncannon for the Respondent

Judgment: 31 August 2016

JUDGMENT OF JUDGE R E NEAVE

Introduction

[1] This is an appeal against a decision of the Tenancy Tribunal terminating the appellant's tenancy with the respondent corporation on the grounds that the appellant threatened to kill the respondent's Senior Tenancy Manager, Mr Zampach upon a visit to the appellant's property in November of 2015. The Tribunal determined that there had been such a threat and that the breach of the Tenancy Agreement occasioned by that threat was incapable of remedy, thus justifying termination of the appellant's tenancy.

The appellant's argument

[2] The appellant appeared for himself at the hearing. It was difficult to isolate the exact nature of his complaints and to a large extent the appeal simply proceeded on the grounds that the Tribunal got the decision wrong. The appellant's grounds did at times appear a little contradictory and it was not always easy to follow the exact nature of his complaint.

[3] The key points contained in his written submissions relate to various procedural matters, none of which directly affected the hearing or the decision under appeal. Essentially, the complaints were :

(a) The decision was wrong and that the threats never occurred.

(b) He seemed to be complaining that the police had not provided information which might have assisted in his defence of the respondent's application.

(c) He alleged that there were numerous inconsistencies in statements recorded as having been made by Mr Zampach and that given the inconsistencies between what he had said on other occasions and what he had said in evidence that, in effect, his evidence should not have been accepted.

(d) He noted that his tenancy had subsisted for 15½ years.

(e) He also complained about the lack of paperwork supplied to him, although I think in part that related to other proceedings he had on foot before the Human Rights Tribunal which form some of the background to the dispute in this case. His other numerous complaints essentially amount to different aspects of the same issues.

However, it seemed to me that the case did give rise to a number of issues which I endeavoured to explore with the Respondent's counsel.

[4] Although the appellant denied making the threat that is the subject of the complaint, it is difficult to establish from the evidence whether Mr Holmes was accepting that he was present and didn't make the threats, or that he couldn't have made the threats because he wasn't at home at the time that the complainant arrived.

[5] I think there may have been some misunderstanding as to the exact dates or times on which the threats are said to have been made, which perhaps explains Mr Holmes' confusion. In essence, his argument I think boiled down to a suggestion

that if the events occurred on one particular occasion, he wasn't at home and if they occurred on another, then he didn't make the threats. It was suggested at times that what Mr Zampach may have heard was Mr Holmes' television.

Evidence

[6] The crucial parts of the evidence are relatively brief, although there was some written material before the Tribunal I think it important, as the Tribunal seems to have done, to focus on what the actual testimony was. At page 9, Mr Zampach described the events in question. Earlier in his evidence he said he was positive that Mr Holmes was present at the time he heard the threats, and he noted the defendant's English accent, although he didn't seem to provide any reasons as to why he thought the defendant was behind the door. He said :

> **Mr Zampach**
>
> Right. Well as I was walking up to the property I could hear him talking about something and he sounded odd, I couldn't make out what it was. It sounded like he was agitated and then when I went up to the door that's when I could hear it quite clearly. Yeah I mean something along the lines of, it's in here but, you know, "I told you to stop coming here, I told you to stop harassing me, I'll kill you and your father where you stand" and let out a, like a [makes a noise to demonstrate]. Like it was bizarre that's why I pretty much left. I didn't want to keep knocking or anything like because I didn't want to upset him any further and I just felt that I, you know, I didn't deserve that. I haven't done anything to offend him in the past and I was just trying to deliver some documents that I was under the understanding that he was wanting documents delivered to him, just so he could do what he needed to do and I think that now that he's aware that I made the complaint, it's only made things worse, yeah."

[7] Shortly afterwards, the adjudicator questioned him about the possibility he may have overheard the television in the following exchange :

> **Adjudicator**
>
> Any chance it could've been a TV you were hearing?
>
> **Mr Zampach**
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> No because it was an English accent and I know his voice, like I've spoken to him at the property on at least half a dozen occasions and also he's come into the office and I've spoken to him face to face. It was definitely his voice.

[8] The adjudicator summarised the evidence to that point at page 27 in the following terms :

> So the purpose for the legislation is to ensure that landlords and their agents can perform their duties in terms of the regulations that they have under the Residential Tenancies Act without fear of danger to themselves or the threat of danger to themselves. So for me the claim by Housing New Zealand Corporation will be about whether they've established that threats to kill were made. If a threat to kill has been made, then unless there can be some guarantee that it won't be repeated and the Corporation can be compensated for the fact of the threat, then I don't have any discretion but to terminate. So this is a situation where Mr Holmes denies absolutely the threat occurred in any shape or form on the day or to the person or any knowledge of it. He says that it never happened and it's rubbish. So that's at one end and at the other end of the scale Mr Zampach says that he was there for Housing New Zealand, he says he was delivering documents in terms of the Human Rights Review Tribunal proceedings, that he parked his vehicle and approached the house and that after knocking – sorry that as he approached the house he could hear something odd and agitated noises and that as he walked up to the door he knocked and he was told to stop, that he'd been told to stop coming around and to stop harassing him and that he would kill – the voice he heard said that he will kill you and your father or something to that effect.
>
> Mr Zampach says that he then heard a, I think Mr Holmes described it as a grimace or a grunt or a scream or a grimace or some other noise and he left fearing for his safety.

[9] At p.28 Mr Holmes observes: "No the issue is did I make a threat without knowing who was there whatsoever. Did I make a threat when I can't see a car and I can't see a person." This is a point I think of some significance.

[10] Mr Zampach also gave some reply evidence. In particular, at pages 25-26 :

> I'd just like to say something if I can, just to reply to some of the things that he said. I just need to confirm that he's reading off two different statements. So there's a statement that someone in the police call centre, who is under pressure because they have to answer calls all day, they've just written down notes off the top of their head while they're under pressure. So I haven't signed anything to say that I actually said those words. So some of the things that are mentioned by someone in the contact centre are not necessarily correct.
>
> I didn't question his mental health, that's obviously something that the person that's written the information in there, the contact centre person's written. The only thing I said in my statement about Mr Holmes is that I believe he's becoming more and more anti Housing New Zealand, more anti government as of late. I didn't say anything about his mental health. Nowhere in my statement have I mentioned anything about his mental health, apart from what I witnessed and what I heard and what I felt, you

know, what I thought it to be. So you have to make sure that what he's trying to say that I stated, that I didn't actually necessarily state some of the words he's talking about and he also talked about he wasn't expecting them on Friday, they were due by Friday. I actually visited twice on the Friday to drop the documents off because we were rushing to get them to him in a hurry. So as soon as I got the documents emailed to me, I went to his property on the Friday. He said he was expecting them. He wasn't home then. On two occasions he wasn't home. So that is why on Monday morning I turned up early on the Monday morning to try and catch him at home so I could deliver them, that's when the incident occurred. So when he says that he wasn't expecting them on the Monday, he was. They were supposed to be there on the Friday. So the first – if I couldn't get them to him on the Friday, of course I'm going to go there straightaway on Monday to try and drop them off.

He also said that he wasn't home, he said he was away on the Monday afternoon but then he turned around and admitted that he was there on Monday morning doing washing, that he was home on Monday morning. So he's said that he was at home. There's also my statement that I've written here. I've seen him on about four different occasions. At that time, I had a look back on my notes but I've probably spoken to him directly on about four different occasions when I've been face to face. I've been there on other occasions when there's been other people present talking to him but when he came directly into the office I was present but I wasn't talking directly to him most of the time, it was someone else. So while that's not quite accurate, it is in a way because I've probably spoken to him about four times directly. When he was reading out the statement he was just picking words and he was missing out bits which, you know, it's just, yeah, I just think he's avoiding the fact that he did say that. Why would I go to the police? I mean I've got no reason to go to the police about – I would never make something up about someone. Obviously I was concerned at the time for myself and for him because I don't know what was happening, yeah. I'm just seeing if I've got anything else written down here.

Appeals under the Residential Tenancies Act

[11] Section 117 (1) of the Residential Tenancies Act ("RTA") provides that any party to any proceedings before the Tribunal who is dissatisfied with the decision, may appeal to the District Court against that decision. The procedure on an appeal was definitively considered by His Honour Judge Joyce QC in *Housing Corporation v Salt* [2008] DCR 697. He determined that an appeal under this legislation was to be an appeal by way of a re-hearing, and at paragraph 71 he said that he discussed the nature of the appeal in the following terms :

> [71] It is, of course, in the nature of such an appeal that –
>
> - It is to be heard on the record of the oral evidence given below; subject to there being

- A discretionary power to rehear the whole or any part of the evidence, or even to receive further evidence; and that
- The Court in question is not limited to correction of errors in the judgment or decision below, but may take into account developments since;
- But this does not mean that that Court will hear evidence again as though were a new trial.[1]

[12] In her submissions for the respondent Ms Cuncannon also referred to the Supreme Court's decision in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, where Elias CJ indicated that in such case the appellant bears an onus of satisfying an appeal court that it should differ from the decision under appeal, and only if the Appellate Court considered the appeal decision is wrong is it justified in interfering with it.[2]

[13] The Chief Justice continued at paragraph 5:

> The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong.[3] It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it pays little explicit attention to the reasons for the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case.

[14] The position of the respondent is that the right of appeal under the RTA is to a conventional "rehearing" on the record of the oral evidence given below, subject (as is later rehearsed in more detail) to usual discretionary powers to rehear the whole or any part of the evidence, or even to receive further evidence.

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[1] Though, if circumstances so enjoined, this Court could remit to the tribunal for rehearing – s 118.
[2] Paragraph 4.
[3] The authorities are numerous. They include *Shotover Gorge Jet Boats Ltd v Jamieson* and *Rangatira Ltd v Commissioner of Inland Revenue* [1997] 1 NZLR 129 (PC).

[15] Ms Cuncannon further submitted that the Tribunal had traversed the evidence in detail accurately summarising the evidence given by the respondent's witnesses and the appellant. She referred to the Tribunal's noting the strained relationship between the parties and that the Tribunal had preferred the witness evidence of, in particular Mr Zampach, over Mr Holmes' evidence and that accordingly, there were no grounds for interfering with the decision. She submits that Mr Holmes has not established the Tribunal was wrong to terminate his tenancy, nor has he demonstrated that the Tribunal reached conclusions that were not open on the evidence, nor has the Tribunal been plainly wrong in the conclusion it reached. She also submitted at paragraph 6.2 :

> On the basis of the evidence of Mr Flett and Mr Zampach referred to above, it was open to the Tribunal to prefer Mr Zampach's evidence that Mr Holmes had threatened to kill him over Mr Holmes' evidence, and to find that it was more likely than not that Mr Holmes had done so, having had the benefit of seeing and hearing their evidence at the hearing. It is immaterial that Mr Holmes may not have known who was standing at his door. All that is required is a threat to assault an agent of a landlord.

[16] I will return to this issue later.

Assessment of the evidence

[17] The Tribunal's decision clearly considered the arguments of both parties.

[18] The Tribunal noted that Mr Zampach was 100% sure it was the tenant who made the threat. The Tribunal noted that previous dealings with the tenant and Mr Holmes' distinct English accent. He noted that the witness was confident it was not the television he was hearing.

[19] The Tribunal also noted the parties strained relationship and indicated that he preferred the evidence of Mr Zampach to that of the defendant. She said at paragraph 10 :

> I prefer the landlord's evidence over that of the tenant. The tenant had previously told the landlord not to come to his address and he had specifically told Mr Zampach to stay away. The threats made on 16 November are consistent with the tenant's previous warnings. His voice is distinctive as is the guttural noise, of the kind described by Mr Zampach in his statements, the tenant makes when clearing his throat and nose.

> Mr Zampach is sure it was the tenant and I am satisfied that is more likely than not.

[20] The Tribunal also noted at paragraph 9 :

> 9. The standard of proof that may lead the police to a successful prosecution for threatening to kill is much higher, beyond a reasonable doubt, than the standard of proof in the Tribunal. To make a determination in this matter I need only be satisfied on the balance of probabilities that a threat of assault was made.

[21] Clearly, this matter was a civil proceeding. It follows from that that the standard of proof required was the balance of probabilities. However, the allegations were of behaviour which amounted to a criminal offence. Considerable amounts of ink have been spilt on this particular topic. Essentially the position is that whilst the standard of proof remains the same, namely the balance of probabilities, it is recognised that where an allegation is particularly serious, and in particular involving criminal offending, any Tribunal will need to be anxious to ensure that the level of evidence relied upon is of a sufficiently high standard to meet the burden.

[22] In *re H & Others* [minors] (sexual abuse : standard of proof) [1996] 1 All ER 1, 16 Lord Nicholls explains how this concept operates:

> "the balance of probabilities standard means that a Court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probabilities. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."

[23] In a New Zealand context, Tipping J in *Managh v Wallington* [1998] 3 NZLR 546 said for the Court of Appeal:

> "the concept of a standard of proof is concerned with the establishment of facts, either by direct evidence or by inference. The facts themselves and their consequences – whether potentially more or less serious – are what in the civil context, will influence where on the scale inherent in a flexible

> standard of probabilities test the particular case should fall. If the nature of the case i.e. whether it is an employer trying to justify a dismissal, or an employee planning constructive dismissal or an employee claiming compensation on account of sexual harassment, is of no present moment. It is the seriousness or otherwise of the act or conduct upon which the Court should focus, together with the potential consequences to those concerned of that act or conduct. It is these matters which are capable of influencing the level of proof required, rather than the procedural or legal setting in which the act or conduct falls to be assessed."

[24] For the respondent, Ms Cuncannon accepted that such considerations applied in this case. It was however, her submission that the referee had sufficient regard to these issues in reaching her determination. I am not so certain of that. There is no express reference in the judgment to the need to recognise this principle.

[25] Furthermore, the decision fails to give appropriate consideration to the actual evidence given by Mr Zampach. I refer in particular to his evidence at page 9 when on the evidence it is clear that the words complained of were heard as Mr Zampach was walking up towards the house. On the evidence, it seems the words at the very least may have been uttered before there was a knock on the door. There is no evidence, and certainly no finding that Mr Holmes was aware or ought to have been aware of Mr Zampach's presence prior to the knock on the door.

[26] I am perfectly prepared to accept that Mr Zampach heard these words uttered, and I am also prepared to accept, at least for the purposes of argument, that it was established that Mr Holmes uttered the words. However, no consideration has been given to whether or not the words were deliberately aimed at somebody on the outside of the property, as opposed to Mr Holmes simply airing his grievances or musing aloud.

[27] The Tribunal seems to have proceeded on the assumption (as has the corporation), that if the words were spoken they could only have been intended to be heard by Mr Zampach. Such an inference is not inevitable and this prospect has not been even considered by the adjudicator contrary to Lord Nicholls' injunction. Further, the evidence is clear that Mr Holmes was agitated even before Mr Zampach's presence was made known to him. There had to be at least a possibility that Mr Holmes was not directing a threat at anyone on those facts.

Termination of tenancies under the Residential Tenancies Act

> **55 Termination on non-payment of rent, damage, or assault**
>
> (1) Subject to subsection (2) of this section, on any application made to it under this section by the landlord, the Tribunal shall make an order terminating the tenancy if the Tribunal is satisfied that –
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> …
>
> [(c) the tenant has assaulted, or has threatened to assault, or has caused or permitted any person to assault, or to threaten to assault, any of the following persons:
>
> (i) the landlord or any member of the landlord's family:
>
> …
>
> (ii) any agent of the landlord:
>
> …

[28] In considering this provision it is necessary to give consideration as to what is meant by "assault" or "threaten to assault" in s 55 of the Residential Tenancies Act.

[29] The Tribunal did not directly address the elements of a threat in the decision. In her submissions, Ms Cuncannon correctly states the definition of threat in a criminal law context. She describes it, as "an expression of intent to do harm to another person by the use of force." She also points out that a prosecutor in a criminal case must prove that the person making the threat intended for it to be taken seriously by the person to whom the threat was directed, but that there is no need to intend to act on the threat, or to have the capability to do so, or that the threat be passed on to whomever it relates.

[30] However, there is one other element which is not addressed in the submissions, nor do I consider it addressed in the decision. A prosecution must also prove that the threat was deliberate. That is to say, it must be established that the defendant intended the threat to be heard. For example, someone muttering to themselves without any intention to convey the threat to anybody overhearing it would not be issuing a threat. While the context of the investigation is different,

subject to the questions of burden of proof I have discussed above, that enquiry still needs to be made in this case.

[31] Given the evidence that the Tribunal heard, there was a real question as to whether or not any such threatening comments were made before the defendant was, or ought to have been, aware of the presence of somebody outside the door. Even assuming the Tribunal finds that the making of the statements to have been established, it needed to consider whether or not it was intended that they be heard. That enquiry simply never seems to have taken place. The issue was clearly raised on the evidence the Tribunal heard, and was not addressed. To that extent, it is important to remind oneself of Lord Nicholls' observations to the effect in the general run of circumstances, non-criminal behaviour is more likely than criminal behaviour. It might be said the point is subtle, but it is nonetheless real, and it was not addressed by the Tribunal.

[32] Further to that, this case involved an issue of voice identification. This is of course a civil proceeding :

> **46 Admissibility of voice identification evidence**
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> Voice identification evidence offered by the prosecution in a criminal proceeding is inadmissible unless the prosecution proves on the balance of probabilities that the circumstances in which the identification was made have produced a reliable identification.
>
> **46A Caution regarding reliance on identification evidence**
>
> If evidence of identity is given against the defendant and the defendant disputes that evidence, the court must bear in mind the need for caution before convicting the defendant in reliance on the correctness of any such identification and, in particular, the possibility that the witness may be mistaken.

[33] Section 46 is of course expressly limited to criminal proceedings. Section 46A by implication with its reference to conviction also would seem similarly limited.

[34] Notwithstanding the limitation of the whole of Part 2 sub-part 6 of the Evidence Act 2006 to criminal proceedings the reason behind the need for the caution required remains the same regardless of whether the proceeding is civil or

criminal. The possibility of honest mistake remains the same, it is simply that the consequence may be less onerous in civil proceedings.

[35] Given the discussion above about the assessment of allegations in civil proceedings of essentially criminal conduct, and also bearing in mind the prospect that someone in Mr Holmes' position might lose their home, these issues ought to have been at least recognised in the decision. Just as juries need to be cautioned against the honest mistake, any judicial officer would be wise to at least advert to the issue particularly when that issue is voice identification.

[36] The evidence suggested Mr Holmes' door was closed at the relevant time, so any identification is limited by that fact. Further, Mr Zampach never saw the person speaking nor is there any evidence that the person speaking saw Mr Zampach.

[37] The Tribunal's decision does not expressly refer to any of these considerations. However, to be fair, the Tribunal clearly analysed the evidence and came to the view that in effect there was some support for the identification of the voice by Mr Zampach. There was the reference to the accent, there was the noise that Mr Holmes was in the habit of making, there is fact that the voice came from Mr Holmes' address (although that might be arguably a two edged sword in that it might pre-suppose one to be expecting any voices heard to be Mr Holmes). There is the fact that Mr Zampach seems to have been familiar with Mr Holmes' voice, having heard it on previous occasions, although his actual opportunity to hear it does appear to have been limited.

[38] It is necessary to remember that this is a Tribunal rather than a Court, and perhaps a lesser degree of precision might reasonably be expected than might be the case if a Court were dealing with the issue. That being said, evicting someone from their home is a very serious issue. Although not a right specifically protected under the New Zealand Bill of Rights Act 1990, there is a general right, or at least expectation, of the ability to have accommodation.

[39] Notwithstanding my concerns in this matter, had the point stood alone, it may not have been sufficient to justify an interference with the Tribunal's decision.

However, in combination with the other issues in the case it increases the risk of an unsatisfactory hearing having occurred.

The discretion under s 55

[40] If we assume that the Tribunal is correct in deciding that Mr Holmes had deliberately uttered words of a threatening nature, it is probably not necessary in terms of s 55 (1) (c) for the Tribunal to be satisfied that Mr Holmes knew he was threatening an officer of the landlord. Providing a threat is consciously uttered at an individual, to some extent the tenant runs the risks if the person so threatened turns out to be an agent of the landlord. It is not necessary to establish some form of mens rea element in this regard. To that extent, I accept Ms Cuncannon's submissions in relation to this point.

[41] Once the existence of a threat is established, it is not entirely clear what follows. One reading of s 55 would suggest that the making of a threat is a breach which can never be cured. This point was discussed by Keane J in *Collins v Housing New Zealand Ltd* CIV-2004-409-717. At paragraphs 35-40 His Honour said :

> [35] Subsection (2) begins with a condition, expressed elliptically, requiring that the Court be satisfied 'that the breach has been remedied (where it is capable of remedy)'. This could mean one of two things. It could mean that unless the breach is capable of remedy and has been remedied, the condition will be unsatisfied. Or it could mean that where the breach is not of a kind that can be remedied, it becomes irrelevant.
>
> [36] On the former view, for which HNZ contends, an assault or the threat to assault must always result in an order terminating the tenancy, because in contrast to a breach of a positive covenant, an assault or threat, can never be remedied. HNZ relies by analogy on *Hoffman v Fineberg and Ors* [1948] All ER 592, Harman J and *Expert Clothing Ltd v Hillgate House Ltd* [1986] Ch. 340, 350 (CA), which concern the opportunity to remedy a breach before re-entry or forfeiture under s 146(1) of the Law of Property Act 1925 (UK); the equivalent to s 118 of the Property Law Act 1952.
>
> [37] I accept HNZ's analysis to this extent. A threat once made, or an assault once committed, cannot be remedied. But I am loathe to conclude that, once the Tribunal finds as a fact a threat or an assault, the discretion becomes spent. That could mean that a technical assault, or words in haste, could pre-empt the Tribunal from

considering the two remaining issues s 55(2) presents, which are of equal significance.

[38] I prefer the interpretation that, if the breach cannot be remedied, that issue is to be set to one side and the Tribunal is to consider the two remaining issues. There may well be cases where the Tribunal concludes, despite the fact of breach, the landlord can be compensated for any loss, and there is unlikely to be any further breach. The Tribunal might then well be justified in deciding to refuse to make the otherwise mandatory order.

[39] Of those two conditions, only the third is of significance I this case. There is no question of compensation for loss. But, to be satisfied as to that, the Tribunal did have to assess Mr Collins and whether he was likely to be threatening again. To that inquiry, I think, in contrast to the Judge, whether he was incapacitated could well be relevant and ought not to have been ruled out a priori. But how relevant that was, if at all, could only be assessed on expert medical opinion and with that specific focus.

[40] The material before the adjudicator and the Judge was historical and unrelated to this case. Two psychiatrists who had assessed Mr Collins in the past had concluded that he does not suffer from a clear psychiatric disorder and both considered that he might suffer a personality disorder. Whether he might be violent was put in issue in one of the reports at least. But his capacity to utter further threats is another issue.

[42] Left to my own devices, I am not sure that I would have concluded that a threat could never be remedied. For example, a fulsome and appropriate apology, and/or something approaching restorative justice may well remedy the threat and satisfy the person who has been the subject of it. Keane J clearly took the view that it is more appropriate to regard such matters as falling within one of the other limbs of s 55 in particular whether it is unlikely that the tenant will commit any further breach. Other factors such as the deterrent effect of the threat of eviction or in appropriate cases, counselling or treatment or mediation (this list is not exhaustive) all of which may well satisfy the Tribunal that there is unlikely to be any repetition will need to be considered.

[43] In the Tribunal's view the only relevant factor in assessing this matter, was the fact that there had been blanket denials by the defendant. I do not think it follows that that determines the likelihood of further breaches. Even if I am wrong as to the possibility that Mr Holmes may well not have been aware of anyone's

presence needed to be considered in determining whether a threat was made, it is still a relevant consideration for the exercise of the discretion under s 55 (2).

[44] I accept it is appropriate to take into account the somewhat fractious (putting it mildly) relationship between Mr Holmes and the corporation. However, as none of the other issues to which I have referred seemed to have been considered, I am not satisfied that the Tribunal turned its mind to all the relevant issues before reaching its conclusion.

[45] On any appeal by way of re-hearing where it is established that the fact finder has failed to take into account relevant considerations, the decision will always be vulnerable on appeal. In this case, a number of highly relevant issues have not been addressed by the decision maker.

[46] For the reasons given above, I am satisfied that the decision was in error, and that the appeal must be allowed. In the circumstances, I consider a fresh hearing should occur before a different adjudicator, with proper consideration being given to the issues which arise.

R E Neave
District Court Judge

Signed this …….. day of August 2016 at ……. am/pm