EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT MANUKAU

CIV-2015-092-002997
[2016] NZDC 9356

BETWEEN	QI ZANG Appellant
AND	PING YIP Respondent

Hearing: 16 May 2016

Appearances: Plaintiff appeared in Person
Defendant appeared in Person
(Interpreters for both parties present)

Judgment: 30 May 2016

RESERVED DECISION OF JUDGE P A CUNNINGHAM

Introduction

[1] This is an appeal against a decision of the Residential Tenancy Tribunal not to grant a rehearing. The hearing application was decided by the same Adjudicator in original decision which is dated 20 August 2015. Both the landlord (Ms Zang) and the tenant (Ms Yip) had filed claims. There were 12 claims by the landlord and 7 by the tenant.

[2] The Adjudicator allowed some of the landlord's claims and some of the tenant's claims. The result was that the tenant was required to pay the landlord $1748.05.

[3] The reasons given for the decision is six pages in length. The Adjudicator set out each part of each party's claims and gave reasons for why it was allowed or disallowed. In some of the claims evidence given by various parties was referred to in some detail.

Application for rehearing in the Tribunal

[4] The basis on which the landlord sought a rehearing was set out in the decision dated 9 November 2015 and the Adjudicator then referred to s 105 of the Residential Tenancies Act which deals with the power to order a rehearing noting that the legal test is where "a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur." The Adjudicator went on to say that in order to be granted a rehearing the party applying must show that something went wrong, giving examples such as:

(i) one party did not receive notice of the hearing;

(ii) a party was not able to present their case clearly;

(iii) that there was new evidence that was not reasonable available at the first hearing.

[5] The Adjudicator said that it is not enough to establish a miscarriage of justice if the Tribunal was wrong in its findings of fact or its application of the law. Further that a rehearing will not be granted just because a party is unhappy with the decision, to give that party a second opportunity to present their case or as an alternative to an appeal.

[6] The Adjudicator then went through each of the grounds set out in the application for a rehearing and gave reasons why each of them was not sufficient to grant a rehearing.

Approach on appeal

[7] There are two conflicting decisions about the approach the District Court should take when sitting on an appeal from the Tenancy Tribunal. On the one hand there is the approach set out in *Nelson Education Board v Williamson*[1] where it was

[1] [1990] DCR 337.

held that an appeal was one "de novo". This means the Court was able to rehear the matter and reach its own independent findings.

[8] In *Housing New Zealand Corporation v Salt*[2] Judge Joyce QC noted that one of the powers of the District Court Judge on appeal is to direct the matter back to the Tenancy Tribunal to rehear the matter. This sat uncomfortably with the concept that the hearing of an appeal in the District Court was de novo or hearing afresh.

[9] Judge Joyce QC found that Parliament intended that the hearing on appeal did not require a de novo hearing but only an appeal by way of a rehearing. That was the form of the appeal described in an issues paper of the Law Commission, Paper No. 6, Entitled Tribunals in New Zealand. That includes that the rehearing of the appeal is heard on the record of evidence given in the Tribunal below subject to the discretionary power to rehear the whole or any part of the evidence or to receive further evidence.

[10] This appeal proceeded in the manner contended for in *Housing New Zealand v Salt*.

Rehearing applications s 105 Residential Tenancies Act 1986

[11] Section 105 says:

> **105 Rehearings**
>
> (1) The Tribunal shall in all proceedings have the power to order a rehearing of the whole or any part of the proceedings on the ground that a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur.
>
> (2) An application for a rehearing shall be lodged with the appropriate Registrar of the Tribunal within 5 working days after the date of the decision, or within such further time as the Tribunal may allow.
>
> (3) A copy of an application for a rehearing under this section shall be sent by the Tribunal to the other party to the proceedings as soon as practicable after it has been lodged with the Tribunal.
>
> (4) An application for a rehearing under this section shall not operate as a stay of proceedings unless the Tribunal so orders.

[2] [2008] DCR 697.

> (5) The Tribunal may grant an application for a rehearing under this section on such terms as it thinks fit, and may in the meantime stay proceedings.
>
> (6) Nothing in this section shall apply to proceedings under section 25 of this Act.

[12] As s 105(1) says there must be "a substantial wrong or miscarriage of justice" before the Tribunal will grant a rehearing. In *Wellington City Council v McMillan*[3] Judge Tuohy made it clear that the words do not cover a complaint that the Tribunal was merely mistaken or wrong in its findings or application of the law. In *Mason v May*[4] the Tribunal held that before a rehearing is granted on the basis of new evidence, there must be an explanation about why that evidence was not available at the original hearing. This would include that an additional quotation obtained after the Tribunal hearing is not enough.

The appellant's points on appeal

Cracked tiles in the kitchen

[13] In the decision of 20 August 2015 the Adjudicator reviewed the evidence of the landlord and the tenant and noted that she had viewed photographs which were on the file when I heard this appeal. The decision referred to two small cracks on two of the tiles and described these as fair wear and tear in a room that was a high traffic area of the house over the period of a seven year tenancy. The claim was dismissed.

[14] In the decision dated 9 November 2015 this was one of those aspects of the original decision that the Adjudicator found was a decision of the Tribunal with which the landlord did not agree.

[15] In the hearing before me Ms Zang said that there must have been something heavy dropped onto the tiles to cause the damage. I viewed the photographs and I agree that the cracks were minor and in my view the conclusion reached by the Adjudicator was available on the evidence.

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[3] [2003] DCR 50.
[4] Christchurch TT 1328/95.

Damage to the bamboo floor

[16] There were photographs of this area which showed the area concerned which was adjacent to a ranch slider door. There was fading and loss of the finish coat adjacent to the ranch slider door and a small bubble under the surface in another photograph.

[17] In the original decision dated 20 August 2015 the Adjudicator found this was fair wear and tear and not a matter for which the tenant was liable. This was another aspect of the claim that the Adjudicator said was a decision that the appellant does not agree with and for that reason declined to grant a rehearing on this aspect of the application.

[18] At the hearing before me the appellant referred to the difficulties replacing the flooring because the existing pattern is not available in the same thickness which means that the repair costs is going to be $960.00 plus GST. That evidence that was before the Tribunal which is the first difficulty the appellant faces.

[19] In my view the finding that the "damage" was fair wear and tear was available to the Adjudicator on the evidence. This point on appeal is rejected.

Cleaning costs

The cost was based on Ms Zang herself doing the cleaning to be charged at a rate of $35.00 plus GST which she said took some 8 ½ hours. In the 20 August 2015 decision the Adjudicator mentioned that the quotation dated 19 April 2015 was two months after the tenancy ended. At the hearing before me Ms Zang explained that the quote was dated for the hearing but the cleaning was carried out beforehand.

[20] In response to this Ms Yip submitted that nothing was said about the state of cleanliness of the house at the time that she and her family moved out on 18 February 2015.

[21] In the decision dated 9 November 2015 the Adjudicator found that the landlord did not incur the costs as she cleaned the premises herself. The result was

that no evidence was provided at the hearing of 20 August with regard to the time involved for the landlord.

[22] In order for the landlord to succeed on this claim there had to be evidence of the state of the premises after the tenant moved out and before the cleaning took place. That showed the state of cleanliness was well below standard.

[23] Even if that were the case there are always difficulties when the landlord his or herself carried out the cleaning and there is no independent verification that it took place or the difference it made.

[24] On the state of the evidence before the Adjudicator I am not able to find anything wrong with this aspect of the original decision or the decision to decline a rehearing.

The garden

[25] The landlord contended that the original rent to be charged was reduced by $20.00 a week on account of the tenant agreeing to mow the lawns and keep the garden tidy. There was a claim for the failure to do the gardening works. There was a new quotation with the appeal documents that cleaning up the garden and replacing two dead roses would cost $2753.83.

[26] In response Ms Yip said that she was not aware of any agreement that the rent was reduced because the tenant said that they would tend to the garden. She noted that the invoice for the gardening was dated 19 November 2015 nine months after the tenancy ended. She said that the landlord came to collect the mail every week during which the landlord would have seen the garden. No complaint about the state of the garden had been made during the tenancy. She agreed that one rose was missing but said that she watered the garden regularly. In other words, she denied that any actions by her or her family had caused any roses to die.

[27] In the rehearing decision of 9 November 2015 the Adjudicator noted that the landlord was now seeking to produce additional evidence to support her claim well after the tenancy had ended. The decision stated that:

> …the Tribunal finds that she had sufficient time in which to gather the evidence to support her claim but failed to do so. A rehearing will not be granted to give the party a second opportunity to present their case.
>
> (She refers to the landlord).

[28] I agree that this is not a case where additional evidence can be brought so many months after a hearing. Moreover the state of the evidence does not in my view reach the threshold the appellant needed to reach. The decision of Adjudicator both in the original hearing of the case and the application for rehearing is entirely reasonable.

Drain unblocking

[29] A drain apparently blocked twice during the tenancy of seven years. The tenant had paid $200 towards cost of clearing a sewer drain as the landlord had maintained that the tenant caused or contributed to the blockage. In the original decision the Adjudicator made reference to the invoice which noted that a root cutter was used to clear the blockage and that there were no reference to any domestic items blocking the drain. On this basis the Adjudicator found that the $200 paid by the tenant should be refunded.

[30] In the rehearing application the Adjudicator noted that the landlord was seeking to produce a new invoice in the context of a rehearing. The Adjudicator found that there had been ample opportunity to request a new invoice from the plumber before the hearing and that a rehearing would not be granted to give that party an opportunity to present new evidence that was reasonably available at the hearing.

[31] At the hearing before me Ms Zang maintained that there was an agreement that the tenant would pay $200 and that the first time the drain unblocked was because of a problem caused by the tenant.

[32] Ms Yip said that there was no agreement about paying the $200 in relation to the first unblocking. She also said that it had been alleged that women's hygiene products had been alleged to be the cause of the blocking of the drain but nobody who lived in the house disposed of such material into the toilet.

[33] Again I agree with the Adjudicator's decisions both in the original decision and in the rehearing decision dated 9 November 2015. Further material cannot be placed before any Tribunal or Court at this late stage and in any event having heard from Ms Yip I am confident that it would change the original decision.

Clearing of rubbish

[34] This is dealt with at paragraph [17] of the Adjudicator's decision. On the basis that the amount of rubbish was small and could easily have been put out in the Council bin at no cost. Ms Yip said that no rubbish was left when she and her family left the tenancy on 18 February 2015 and there was no mention of it until many months later.

[35] In my view the substantive decision of the Adjudicator in the decision dated 20 August 2015 is pragmatic and should be upheld. The way this was dealt with in the rehearing application was that this is another matter where the landlord does not agree with the Tribunal which is not a ground to grant a rehearing.

Laundry floor repair

[36] The Adjudicator had allowed a claim by the landlord to repair the laundry floor. The landlord obtained $172.50 to remove rubbish from the laundry repair. The appellant said that a second quote which included a $172.50 for the removal rubbish that was not included in the first quote. The Adjudicator said that the compensation was based on a second quotation which did not specifically mention the removal of rubbish.

[37] Ms Yip responded that the decision of the Tribunal had been based on a quote the landlord had presented.

[38] In the rehearing application the Adjudicator noted that Ms Zang was wishing to produce a further quotation. In the application for a rehearing Ms Zang advised her that she and her husband would carry out the repair. No evidence was produced with regard to that cost.

[39] I can see no basis on which to disturb either the original decision or the decision dated 9 November 2015 declining to order a rehearing. The Adjudicator's original decision was based on a quotation presented by the landlord and in the circumstances referred to at the rehearing application.

Power usage

[40] The tenant had claimed for excess power usage said to be due to a leaking hot water pipe. The Adjudicator allowed this claim in part by reducing the accounts for May and June 2013 by 50%. The Adjudicator found that there was an increase in electricity usage due to hot water leaking from a pipe.

[41] In the hearing before me Ms Zang alleged that there was no evidence the leaking pipe contained hot water.

[42] In the original decision dated 20 August 2015 the Adjudicator said that the plumber gave evidence that he had fixed a pipe supplying the hot water cylinder but could not remember if it was a hot or cold water pipe.

[43] I was not taken to this evidence or given any reason why the Adjudicator got this wrong.

[44] Ms Yip said that there was a delay between the problem arising and the water pipe being fixed. In relation to the estimate of the electricity use the Adjudicator's decision for not granting a rehearing on this aspect of the matter is that it is not enough for the party not to agree with the decision of the Tribunal.

[45] The state of the evidence around this matter is a little unusual. One would not expect a hot water pipe to be feeding into a hot water cylinder. However I was

not the judicial officer that heard and saw the parties and I am not prepared over rule the Adjudicator on this aspect of the claim.

Repair of laundry flooring

[46] The next aspect of the landlord's claim is the amount to repair the laundry flooring. This is a claim where the Adjudicator found that the damage was either the result of the tenant's careless actions in allowing the washing machine or fridge to leak onto the laundry floor or knowing about the damage, failed to notify the landlord as required to do so. The amount ordered was that in the lower of two quotations in the sum of $2056.00.

[47] In the rehearing decision the Adjudicator noted that Ms Zang wished to produce two further quotations. She noted that Ms Zang told her that she and her husband would carry out the repair. The Adjudicator noted that no evidence was produced with regard to what this would cost.

[48] Ms Yip responded that it is up to the landlord to provide the correct information to the Tribunal. I agree. In addition given that the work has been carried out by the landlord and no evidence of that actual cost has been provided, there is no possible basis on which the original decision could be overturned.

Number of tenants

[49] The final matter is the fact that the landlord says that there was an agreement that there would only be three people living in the house. During the tenancy Ms Yip became a grandmother. It appears that she looked after that child for some or all of the week days. Ms Zang produced a letter from a neighbour who said that the grandchild was present at the house during the week days inferentially excluding the weekends. It was silent as to whether the child stayed overnight. In those circumstances it cannot be said the child was "living" at the address.

[50] Ms Yip did not accept that there was an agreement about the number of people living at the property. The landlord's claim for this additional person living in the property was for $4680.00 for extra rent.

[51] In the rehearing decision the Adjudicator said that she would not have granted a rehearing to allow a party to produce another witness. This is the neighbour whose evidence does not support the landlord's claim that an additional person was living at the premises.

[52] Further the Adjudicator noticed that breaching the agreed number of tenants living at the premises can create an unlawful act under s 40(3A) of the Residential Tenancies Act 1986 that might be subject to an award of exemplary damages but not a claim for extra rent.

[53] Section 40(3) of the RTA requires a tenant to abide by any agreement as to the maximum number of persons who reside in the premises.

[54] The Tribunal may order a party to pay the other party compensation for the breach of any express or implied provision in a tenancy agreement. In *McKay v Moore* DC Napier, 24 October 1990, Judge Hole, set out a number of principles a Tribunal should apply in deciding whether to grant damages under s 77(2)(n):

> (a) So far as money can do it, the injured party shall be put in the same position as he would have been in but for the breach of the tenancy agreement.
>
> (b) Liability exists for reasonably foreseeable losses flowing from the breach.
>
> (c) Damage may be foreseeable; either
>
> > (1) Because the damage is such as may fairly and reasonably be regarded as arising naturally, that is to say according to the usual course of things from the breach, or
> >
> > (2) Because of special knowledge…at the time of making the contact. For the purpose of (2), actual knowledge needs to be proved.

[55] In order for the Tribunal to grant compensation the landlord must show loss. No loss has been demonstrated.

[56] Exemplary damages are also available for an unlawful act under s 109. These are limited to $1000 (Schedule 1A of the Act).

[57] The state of the evidence establishes that Ms Yip was minding a grandchild from 2011 onwards during the week. The evidence falls short a small child was living in the house permanently.

[58] Even if a grandchild was living in the house permanently and that was a breach of the tenancy agreement, it is difficult if not impossible to see how that could possibly found a claim for damages for loss or for an award of exemplary damages.

[59] For the above reasons the appeal is dismissed.

Dated at Auckland this 30th day of May 2016 at am/pm

P A Cunningham
District Court Judge