EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2016-009-001773
[2016] NZDC 22603

BETWEEN	GREAT WALL PROPERTY MANAGEMENT LIMITED Appellants
AND	LORIEN ARELLANO MARK ARELLANO Respondents

Hearing: 9 November 2016

Appearances: A McLeod and N McLeod for the Appellants
Respondent L Arellano appears in Person
Respondent M Arellano appears in Person

Judgment: 9 November 2016

ORAL JUDGMENT OF JUDGE T J GILBERT

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[1] This is an appeal against a Tenancy Tribunal decision dated 14 July 2016. That decision followed a hearing on 11 July 2016.

[2] The appellant, Great Wall Property Management Limited, is represented by its agent, Anna McLeod, who was also its representative at the Tribunal hearing. The respondents are Mr and Mrs Arellano who were tenants at a property managed by the appellant on behalf of a Chinese based landlord. The underlying tenancy agreement was dated 15 May 2016 and was for a one year fixed term, expiring on 15 May 2017.

[3] In its decision the Tribunal made the following orders:

(a) The appellant was to pay the respondents $900 being compensation for failure to provide and maintain the premises in a reasonable state

of repair, and to comply with statutory requirements in respect of buildings.

(b) The fixed term tenancy was able to be terminated immediately by the respondents by giving the appellant written notice.

(c) The appellant was to pay the $20.44 filing fee to the respondents.

[4] Immediately when the Tenancy Tribunal decision was received the respondents, Mr and Mrs Arellano, gave notice and moved out of the flat which was the subject to the tenancy. Since then approximately five months has passed and they have been residing happily in another place ever since.

[5] After the Tenancy Tribunal decision the appellant, Ms McLeod, filed a notice of appeal setting out the following three grounds of appeal, and I quote:

(a) "Inappropriate procedure.

(b) The Adjudicator changed my evidence.

(c) Adjudicator misleading the fact".

[6] In considering this appeal I have had access to the Tribunal decision, a transcript of the evidence taken at the Tribunal and the documentary material submitted at that hearing. I have considered all that material carefully.

[7] During the appeal I have also heard quite extensively from Ms McLeod who at times got quite excitable in the presentation of her case. And I also heard briefly from Mrs Arellano on behalf of her and her husband.

[8] I will deal with each of the grounds of appeal in turn, although I note that at the hearing Ms McLeod said that she specifically did not want to revisit all of the evidence which was heard in the Tenancy Tribunal. Her main contention was that the Tribunal had no legal power to allow the fixed term tenancy to be terminated early.

[9] The first ground of appeal was, "Inappropriate procedure." In the notice of appeal Ms McLeod maintained that the procedure followed at the hearing was inappropriate. This was not really pursued orally today at all, but I will deal with it nonetheless.

[10] The manner in which the Tribunal conducts hearings is reasonably loosely regulated. Section 85(1) Residential Tenancies Act 1986 provides that:

> Subject to any legislative provisions the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes.

[11] Section 85(2) goes on to say:

> 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.

[12] That is quite important here because I discern in the Adjudicator's decision a firm guiding light for him was what might be termed the substantial merits and justice of the case.

[13] There are various basic procedural requirements contained within the Act such as a right of the parties to be heard, but apart from those matters which are explicitly stated, by virtue of s 96(4) the Tribunal is authorised to regulate its own procedure in a manner it sees fit. The Tribunal is also authorised to receive whatever material it thinks will help it efficiently dispose of the matter, irrespective of whether that material would be admissible in a Court of law. That provision is s 97(4).

[14] Having considered the transcript it is apparent that both parties were given the opportunity to present their cases, as indeed they have been here before me. Bearing in mind the flexibility in procedure which is envisaged by the Act, in my view there is no substance to the assertion that an inappropriate procedure was followed. As I said a moment ago, Ms McLeod, in fairness to her, did not really pursue this as a ground of appeal. In any event that ground of appeal is dismissed.

[15] The second and third grounds of appeal were, respectively, "Adjudicator changed my evidence," and, "Adjudicator misleading the fact." Ms McLeod asserts in her notice of appeal that the adjudicator changed her evidence, and allied to that was misleading in his characterisation of the facts. They seem to me to be related grounds, so I deal with them together.

[16] Again I note that, to some extent Ms McLeod backed off these assertions and said she did not wish to re-litigate all of the evidence. Her primary point was that the Adjudicator lacked the jurisdiction to terminate the fixed term tenancy early.

[17] The Adjudicator in his decision specifically noted that where there was a conflict between the evidence given by Ms Arellano, who spoke for she and her husband at the Tribunal hearing, and Ms McLeod. He preferred the Arellano's evidence, commenting that her evidence was consistent with the written material and Ms McLeod's evidence was not.

[18] Again, I have read through the transcript from the hearing. I have also considered the documentary material that was filed with the Tribunal. I have also considered very carefully what Ms McLeod has said today.

[19] Noting that the Adjudicator had the benefit of seeing the witnesses in person give their substantive evidence, as it were, I certainly do not see any basis for intervening with his assessment. Indeed, in general terms I agree with the Adjudicator's assessment.

[20] Perhaps the most critical part of the evidence was the fact that the Arellanos had signed up for a home to house themselves and their three children who were shortly to arrive from the Philippines. This was explicitly included in the tenancy agreement which stated, "Maximum two adults and three children may reside in this premises (including the tenant)."

[21] However, within about three weeks of the tenancy commencing Ms McLeod, on behalf of the landlord, had sent both a text message and a letter on 2 June 2016 stating, "The maximum residence for that house are two adults and one child of

under 16 years old, or otherwise the house will always become damp. If the house has any mould and/or damage due to condensation you are liable for compensation."

[22] During the hearing Ms McLeod asserted that the Tribunal Adjudicator, and indeed I, had somewhat misrepresented her words. For that reason I have been very careful to quote word for word what was contained in both the text message and the letter of 2 June. The evidence was there in black and white in both the text and the letter, that, "The house was only suitable for two adults and one small child or else it will always become damp." The evidence is also there in black and white that on 2 June Ms McLeod said, in writing, as the landlord's agent, that, "The maximum residents for the house are three," that being two adults and one child under 16.

[23] That is directly contrary to what was set out in the tenancy agreement. This was, of course, fundamental to the Arellanos who would never have taken the tenancy if they were not permitted by the landlord to house their three children, or alternatively were unable to accommodate them, "without the house always becoming damp," to quote Ms McLeod's correspondence.

[24] Sitting alongside this evidence were more generalised complaints from the Arellanos about the state of the house and the difficulties they had dealing with Ms McLeod. For example there was exposed copper wiring, a leak in the roof contributing to dampness issues, inadequate heating, a lack of smoke alarms, and so forth.

[25] As the Adjudicator commented during the hearing those types of complaints could well have been dealt with by way of a work order and compensation rather than cancellation of the fixed term tenancy.

[26] However, the requirement to have a house which could adequately and comfortably house the Arellanos three children was absolutely fundamental and the material written by Ms McLeod makes it clear that was either not permitted, and even if it was permitted, was not possible due to dampness issues, in respect of which the Arellanos would be taxed for compensation arising out of any damage relating to those issues.

[27] Accordingly, it appears to me that the Adjudicator's decision was firmly grounded in the evidence, both oral and documentary, and there is no reason for me to interfere on appeal with his findings.

[28] Specifically, I do not agree that the Adjudicator changed Ms McLeod's evidence or was misleading as to the facts; he simply weighed the evidence alongside the competing cases and made factual findings which were open to him and which, in my view, were clearly, to quote the Act, "In accordance with the substantial merits and justice of the case."

[29] I do not agree that a Tenancy Adjudicator, on application by someone in the Arellanos' position, cannot cancel a fixed term tenancy. Indeed, in my view, as the Adjudicator found, such a tenancy could be cancelled under the Contractual Remedies Act, but moreover, s 66 of the Residential Tenancies Act gives the Adjudicator that power in certain circumstances. One such circumstance is where the Adjudicator is satisfied that because of an unforeseen change in the applicant's circumstances severe hardship would be suffered.

[30] To my mind, being told by the landlord's agent that the house was such that the maximum number of residents could only accommodate one of the three children, or even if three were squeezed in, it would result in it being hopelessly damp for which compensation would be payable, constitutes an unforeseen change in circumstances, and clearly in my view the Tribunal Adjudicator must have the capacity to cancel or reduce the term of the fixed term tenancy.

[31] In my view the Adjudicator was entitled to make the orders effectively cancelling the fixed term tenancy and granting compensation at $100 per week, which totalled $900. In respect of that compensation figure it was clear from the documentary material, and also the evidence at the hearing, and also what I heard today, that the Arellanos were significantly impacted at an emotional level by how matters unfolded. It is also clear that they were required to live in substandard conditions. Accordingly $100 per week by way of compensation seems entirely justifiable.

[32] I note that Ms McLeod has yet to sign the form relinquishing the bond back to the Arellanos. She has said to me today that she will do that, and she will be required to do that forthwith.

[33] And so for all of those reasons the appeal is dismissed and the orders made by the Tenancy Adjudicator will stand.

[34] Just for clarity, I make an order that the bond, now that the tenancy has been terminated, is to be refunded forthwith to Mr and Mrs Arellano.

T J Gilbert
District Court Judge