EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WELLINGTON

CIV-2016-085-000441
[2017] NZDC 2259

	BETWEEN	ACE BODY CORPORATE & PROPERTY MANAGEMENT LIMITED Appellant
	AND	KELSEY GARRATT AND SCOTT DAVID GARRATT Respondents

Hearing: 10 November 2016

Appearances: P Walsh for the Appellant
The Respondents represented themselves

Judgment: 8 February 2017

DECISION OF JUDGE W K HASTINGS

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[1] This is an appeal from a decision of the Tenancy Tribunal dated 26 May 2016. The Tenancy Tribunal made four orders:

(a) that the respondents pay the appellant $35 to reimburse the landlord for a credit check it carried out on a potential replacement tenant;

(b) that the appellant pay the respondents $200 in exemplary damages for unlawful entry;

(c) dismissing the appellant's application for the respondents to pay rent up to and including 9 June 2016; and

(d) that the respondents were liable for rent up to and including 26 May 2016, and that after that date no further rent or other costs other than what is specified above shall be paid in relation to the tenancy.

[2] The respondent tenants entered into a tenancy with the appellant landlord on 29 January 2016 for a fixed term ending 19 February 2017. The adjudicator found that the landlord agreed to release the tenants from the fixed term when the tenants found suitable applicants who wished to take up the tenancy for the remainder of the fixed term. The tenants provided written evidence of this agreement in the form of a letter from the landlord to the tenants dated 29 March 2016. That letter refers to the landlord completing "checks" on a "suitable" applicant. There was no other definition of what "suitable" meant. Relying on this assurance, the tenants advertised and arranged viewings of the property. The tenants found a number of applicants they felt were suitable because they were able to show that they could afford to pay the rent, had a good credit history and had positive references. One of the applicants was able to move into the property on 6 May 2016.

[3] After the tenants submitted this applicant to the landlord on 18 April 2016, the landlord advised that it deemed this applicant not "suitable" on 20 April 2016. The landlord said the applicant, who had a partner and a child, were unsuitable because of an absence of previous tenancy history and the presence of a child. The adjudicator found that the tenants had not been advised of these specific "suitability" conditions prior to finding these applicants. The adjudicator said the issue for the Tribunal was whether it was unreasonable of the landlord to refuse to accept these applicants as unsuitable for reasons it had not earlier conveyed to the tenants. The adjudicator found that "it was unreasonable of the landlord to provide such reasons only after the tenants advertised and found potential tenants" and said that the average tenant would have considered "suitability" to be determined by credit and reference checks.

[4] The landlord found replacement tenants whose tenancy commenced 10 June 2016. The respondents left the property around 2 May 2016 and paid rent up to 26 May 2016. In light of her finding that the landlord acted unreasonably following its agreement to terminate the lease with the respondents, the adjudicator decided that the tenant was only liable for rent paid up to 26 May 2016. Having paid rent to 26 May 2016, the adjudicator found that the landlord's entry onto the premises on 2 May 2016 without the tenants' knowledge or permission, and its removal of property belonging to the tenants, was unlawful. The adjudicator did not accept the landlord's

defence that because the tenants had moved out it thought it could enter without consent, "especially as the Landlord's application to the Tribunal asserts that the tenancy does not end until 8 June 2016". The adjudicator awarded $200 in exemplary damages as a result.

[5] The appellant now seeks:

(a) $900 rent for the period from 27 May 2016 to 8 June 2016;

(b) "an order that the landlord's discretion in agreeing to a new tenancy was not limited by a test of reasonableness";

(c) "if such a test applied, an order that the landlord did not unreasonably withhold consent or act unreasonably";

(d) "an order that the landlord is not limited in its reasons for withholding consent to those notified to a tenant in advance of an application";

(e) "an order that the tenant unlawfully terminated the tenancy and the landlord is entitled to rent to the date when the landlord accepted termination, 9 June 2016";

(f) "an order that the landlord should not have been fined $200 for entering the premises when the landlord believed the tenant had abandoned the premises";

(g) "an order that the landlord is entitled to bring claims for compensation in the future (including the bond)"; and

(h) "an order that the bond be held with Tenancy services until costs from the end of the tenancy have been dealt with".

[6] The respondents addressed the matters raised by the appellant. They submitted that the letter sent by the landlord on 29 March 2016 set out an agreement. They said they relied on the terms of this agreement, and that they were

disadvantaged by the landlord changing the terms and adding further restrictions to what was agreed. They submitted that they incurred advertising and other costs to find replacement tenants. They submitted that the order that no "other costs other than what is specified above shall be paid in relation to the tenancy" reflected and balanced the costs the respondents paid to advertise the property and the time involved in showing the property. The respondents also submitted that they were advised by email on 1 June 2016 that the appellant had conducted a final inspection and, apart from some minor dusting and weeding, that the appellant was happy. The respondents seek:

(a) damages for the prolonged time and stress this appeal has caused;

(b) an order that Tenancy Services release the bond; and

(c) an order that concludes the legal relationship between the respondents and the appellant "to prevent further action".

[7] Section 118 of the Residential Tenancies Act 1986 sets out the powers of the District Court hearing an appeal:

> **118 Powers of District Court Judge on appeal**
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> (1) On the hearing of an appeal under section 117 of this Act, a District Court Judge may—
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> (a) Quash the order of the Tribunal and order a rehearing of the claim by the Tribunal on such terms as the Judge thinks fit; or
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> (b) Quash the order, and substitute for it any other order or orders that the Tribunal could have made in respect of the original proceedings; or
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> (c) Dismiss the appeal.
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> (2) In ordering a rehearing under subsection (1)(a) of this section, the District Court Judge may give to the Tribunal such directions as the Judge thinks fit as to the conduct of the rehearing.
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> (3) The procedure at an appeal under this section shall be such as the Judge may determine.

[8] It is now fairly settled that the Act's objective of "expeditious determination" is an indicator of Parliament's intention that appeal hearings are not hearings *de novo* (*Housing New Zealand Corporation v Salt* [2008] DCR 697). It is also fairly settled following Jeffries J's decision in *A R Cabarets Ltd v Hawkes Bay Development Co Ltd* (1985) 5 NZAR 477 that appellate courts should "not look with a spider's eye at the decision of an experienced expert body" such as the Tenancy Tribunal. His Honour said there would have to be "clear and convincing reasons" to disturb such a decision.

[9] In this case, the appellant is undoubtedly correct to say that a fixed term tenancy cannot, except in very limited circumstances that do not exist here, be terminated by notice. The landlord's appeal grounds (a) to (e) seem to be based on the assumption that the adjudicator was "wrong in fact and law" to hold that the test of reasonableness applies to restrict the landlord's discretion to withhold consent, either to terminate the term, or to approve new tenants.

[10] I do not read the adjudicator's reasons to say, however, that once notice has been given by the tenants, that the landlord is bound not to withhold consent to termination unreasonably. Section 85(2) requires the Tribunal to 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 it is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities. In this case, the adjudicator appears to have found that the landlord and the tenants had agreed to terminate the fixed term tenancy. Essentially, the adjudicator found that a new agreement had been formed, and her comments with respect to the "reasonableness" or otherwise of the landlord's actions related to the new agreement, not to the fixed term tenancy agreement. This finding on the facts was open to the adjudicator to make. Part of the execution of that agreement was that the tenants would find "suitable" replacement tenants who would be subject to "checks". The adjudicator applied a "reasonableness" test, not to the fixed term tenancy agreement, but to the replacement agreement to terminate the fixed term tenancy. Applied to that agreement, the adjudicator's finding that it was unreasonable of the landlord to change the meaning of "suitable" after the tenants advertised and found potential

replacement tenants was open to her, because the tenants detrimentally relied on the ordinary meaning of "suitable" in the context of the agreement.

[11] Further, the respondents having found replacement tenants, having been advised by Tenancy Services to pay rent up to the date of the Tribunal hearing, and the adjudicator having terminated the tenancy under s 50(f), I do not think the adjudicator can be faulted for finding the tenant liable for rent only until 26 May 2016. This is not, as the landlord submitted, a case of the adjudicator effectively awarding the tenant damages equivalent to rent from 27 May 2016 to 8 June 2016. Nor does what the tenant did amount to, as the landlord also submitted, abandonment or the premises. The issue of whether or not the respondents were liable for rent until 8 June 2016 when the landlord relet the premises was squarely before the adjudicator and her finding was open to her. I therefore decline to make the orders requested by the appellant at para [5] (a) to (e) above.

[12] Turning to the issue of the award of exemplary damages, having paid rent to 26 May 2016, it was open to the adjudicator to find that the landlord's entry to the property without the tenants' consent occurred during the currency of the tenancy agreement, and was as a result unlawful. I note here, as did the adjudicator, that the landlord submitted that the tenancy agreement was alive until 9 June 2016 when the premises were relet, so even on the landlord's view of the facts, the entry was during the currency of the tenancy agreement. I therefore decline to make the orders requested by the appellant at para [5] (f) above.

[13] I turn now to the landlord's claim for an order that the landlord "is entitled to bring claims for compensation in the future (including the bond)" and for an order that the bond be held by Tenancy Services "until costs from the end of the tenancy have been dealt with". The adjudicator made an order that "no further rent or other costs" other than the $35 reimbursement for a credit check and $200 exemplary damages she awarded, "shall be paid in relation to the tenancy". When the landlord sought clarification of what was meant by "other costs", the Tribunal advised,

> "Other costs" means exactly that – no other costs in relation to the tenancy payable – that includes no further break fee, no photo costs and no damages. They have already done a final inspection after the tenants left and before the date of the tribunal hearing – they brought no costs to the hearing and said that the tenants had left the place reasonably clean and tidy.

[14] The landlord submitted that this is "wrong in fact and law". It submitted that it had not carried out a final inspection at the time of the Tribunal's order and could not have done so without first knowing when the tenancy ended. Until the outcome of the hearing was known, the landlord did not know when the tenancy ended. The landlord submitted that it is entitled to "advertising costs, costs of entry photos and credit checks and an administration fee of $600". At this hearing, the landlord submitted that it had spent 12.7 hours on these matters. The respondents submitted that they were advised by email on 1 June 2016, after the date of the Tribunal order, that the landlord had conducted its final inspection, and that it was happy apart from minor dusting inside and weeding outside. The respondents offered to remedy the issue of weeding on 2 June 2016 but did not hear back from the landlord.

[15] I accept that at the time of the Tribunal hearing the landlord could not have done a final inspection because it did not know the date from which the adjudicator would terminate the tenancy, but a largely satisfactory final inspection was completed shortly afterwards. Further, undoubtedly acting in the spirit of s 85(1) which requires the Tribunal to exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants, the adjudicator in her order and in her further explanation specifically anticipated and addressed the further costs claimed by the landlord. It seems to me that by ordering that no further rent or other costs were be paid in relation to the tenancy, the adjudicator was drawing a line under this dispute in a manner that ensured a fair and expeditious resolution of it. To permit further claims for compensation including claims against the bond would considerably undermine both the adjudicator's intention and the purpose of the Act. For these reasons, and given the time that has passed since the termination of the tenancy, I uphold the adjudicator's order that "no further rent or other costs" shall be paid in relation to the tenancy", decline to make the orders requested by the appellant at para [5] (g) and (h) above, and order that the bond is to be returned to the tenants pursuant to s 22B(5).

[16] For these reasons, the appeal is dismissed.

W K Hastings
District Court Judge