

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CIV-2019-085-000715
[2020] NZDC 3198**

BETWEEN

RICHARD WRIGHT
Plaintiff

AND

HELENA GOKCEN
Defendant

Hearing: 19 February 2020

Appearances: Plaintiff appears in Person
Defendant appears in Person

Judgment: 19 February 2020

ORAL JUDGMENT OF JUDGE C N TUOHY

[1] This is an appeal against the decision of the Tenancy Tribunal that Richard Wright, whom I will call the tenant, must pay \$1,429.01 to Helena Gokcen.

[2] Essentially, Mr Wright signed a tenancy agreement in relation to Ms Gokcen's rental property, at 53 Sheridan Terrace, Johnsonville. He signed it in the first few days of October 2018. The tenancy was to commence on 14 October 2018.

[3] After the agreement was signed, but before the tenancy commenced, Mr Wright changed his mind - the reason is not important in legal terms - and advised that he would not be taking up the tenancy. Ms Gokcen accepted that on the basis that she would try to find a new tenant and Mr Wright, in an email, said to her that he would pay the rent until a new tenant was found.

[4] Fortunately, for both parties, a new tenant was found very quickly, who was able to go into the property and start paying rent from 1 November. So, the amount of \$1,429 was the rental for the period 14 October to 1 November.

[5] Ms Gokcen took a claim to the Tenancy Tribunal when that was not paid. The Adjudicator made a decision, as long ago as 6 March 2019, setting out those facts, or some of them. Mr Wright opposed the claim, said that he did not pay the required bond, he did not pay the letting fee, and he was not given the keys, therefore, in his view, he should not be liable for rent.

[6] The Adjudicator reserved his decision to consider whether, in the circumstances outlined, there was a binding agreement. His conclusion was that there was. In law there is no cooling off period in an arrangement like this. The landlord had made a commitment and suffered loss by reason of the tenant withdrawing. She is entitled to recover that loss.

[7] He also looked at the question of whether this was an application to terminate the agreement on the grounds of hardship, under s 66 Residential Tenancies Amendment Act 2010, which had not been argued, but considered that the outcome would not be different.

[8] I should mention one other relevant fact. This was a fixed term tenancy of more than a year, just over one year. In other words, it is one where the tenant becomes liable to pay rent for the whole of the fixed term, whether he occupies it or not. So, that probably does not have any legal significance, but it simply emphasises the fortunate circumstance that a new tenant was found very quickly, otherwise this claim might have been for a much larger sum.

[9] The Tenancy Tribunal Adjudicator did not have before him some email exchanges between the tenant and the letting agent, Campbell Cowan, of Guardian Rentals. These were located by the tenant only after the Tenancy Tribunal had made its decision, and indeed, I think, after the appeal itself was filed. A Judge at the appeal conference effectively allowed this additional evidence to come in before this hearing and it is part of the evidence before me.

[10] The series of events is as I have already described, but the exchange with the agent took place between the tenant's application for 53 Sheridan Terrace being successful and his later communications, directly with the landlord, so it starts off on 3 October. The agent wrote:

Hi Richard, your tenancy application for 53 Sheridan Terrace is successful. To accept the tenancy would you please pay the let fee of \$667 to our trust account. It is our company policy to continue to advertise the property until the let fee has been paid and the tenancy agreement has been signed. Once completed we remove the advertising and no longer show the property. Please note if you change your mind the let fee is non-refundable. The bond and the first week's rent to be paid to the same account, prior to the tenancy commencing.

[11] After that letter the tenancy agreement was signed. The letting fee was not paid. The bond was not paid, and no key was ever given to the tenant. What happened then is what I have already mentioned. The tenant decided he did not want to continue with the tenancy and then there was another email exchange between himself and the landlord at that time. It starts on Friday October 12, when the tenant wrote:

Hi Helena, I'm sorry to have to let you know, due to personal reasons that have changed, I cannot accept your place on a long-term lease. I'm willing to mutually work out a payment from the 15th until you are able to find a new tenant.

[12] There was a further email from him, on Sunday October 14, which was the day when the tenancy was due to start, saying:

Hi Helena, my worst fear came true and my work contract has been cancelled. I'm so sorry, I really won't be able to rent the place and will probably need to look for other opportunities outside of Wellington. Once again, I'd be happy to pay you until you find another tenant.

[13] So, the question is was there a binding contract in place? If there was, then the tenant was bound to pay rental for the entire term of the lease. If he sought to cancel and the landlady accepted the cancellation, then it would depend on the terms of the acceptance.

[14] Under the law of contract, the law assumes that the communications of the parties must be judged by a reasonable observer seeing what is going on from both points of view. That notional person sometimes ends up being a Judge, as in this case.

What I consider happened here is that the appellant, the tenant was bound from when he signed the tenancy agreement, not from when he paid the letting fee.

[15] The agent's statement does not indicate that he is not bound. What it indicates is that if he does not pay the letting fee then the property may be let to someone else. That does not mean he is not bound. If he did not pay the bond, or the first week's rent, or the letting fee, then that would give a right to the landlord to cancel the tenancy agreement and re-let the property to someone else. It does not mean that the tenant is never under any obligation until the tenant pays the fee. The tenant is under obligation once they sign the agreement.

[16] The landlord is also under an obligation to keep the place available for the tenant from the time that the tenancy agreement is signed. However, tenancy agreements generally have provisions that the first week's rent and a bond is to be paid, and a letting fee and so on, as this one did. If those conditions are not complied with then a landlord would have the right to cancel and let to someone else.

[17] The agent conveying that they are continuing to advertise the property does no more than make that position clear to the tenant, that he could lose the property if he does not make the payments required under the tenancy agreement, not that he is not bound by the provisions of the tenancy agreement.

[18] I have to also agree with the landlord's argument that the tenant's actions, in writing the emails of October 12 and October 14, indicate that that was his understanding of the position as well, because he knew about the agent's letter saying that the place is going to continue to be advertised until you pay the letting fee when he wrote those letters. And those letters are an agreement to pay until another tenant is found, which would be his legal obligation in any event.

[19] I am sure that if he had believed he was under no obligation to the landlord, who I do not think is any particular friend of his, that he would not be offering to pay for a new tenant out of the goodness of his heart, only because he believed that he was contractually bound, despite the letter from the agent.

[20] Indeed, I think he was right about that belief. As a matter of law, he was, so the appeal must be dismissed.

C N Tuohy
District Court Judge