EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WAITAKERE

CIV-2015-090-001215
[2016] NZDC 9068

UNDER	SECTION 117 OF THE RESIDENTIAL TENANCIES ACT 1986
IN THE MATTER OF	AN APPEAL FROM THE TENANCY TRIBUNAL
BETWEEN	PRITESH PATEL Appellant
AND	WAYNE SUNIL SINGH Respondent

Hearing: 24 May 2016

Appearances: P J Broad for the Appellant
Respondent in Person

Judgment: 27 May 2016

DECISION OF JUDGE J BERGSENG

Background

[1] The appellant was named as the landlord in proceedings issued by Mr Singh in the Tenancy Tribunal ("the Tribunal"). The appellant failed to attend at the hearing although he wrote to the Tribunal advising that he was not the landlord and asking for the proceedings to be dismissed.[1]

[2] The adjudicator was in receipt of the appellant's letter. The adjudicator proceeded with the hearing, giving no weight to the letter as evidence.[2]

[1] Mr Patel works as an insolvency practitioner and he has explained that he was involved in a creditors meeting that day which had been publicly advertised. He acknowledges he should have requested an adjournment of the hearing but explains he was unrepresented at the time.
[2] Transcript of Proceedings, at page 1.

[3] Following the hearing the adjudicator made orders in favour of Mr Singh requiring the appellant to pay the sum of $10,970.44[3] and to undertake certain repair works within a specified timeframe, failing which monetary penalties were to apply.[4]

[4] On 29 September 2015 the appellant applied for a rehearing pursuant to s 105 of the Residential Tenancies Act 1986 ("the Act"). He also applied for a stay of proceedings.

[5] The adjudicator refused both applications in his decision of 8 December 2015.[5] The appellant now appeals that decision.

Right of Appeal

[6] Section 117 of the Act provides:

> (1) Subject to subsection (2), any party to any proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in the proceedings may appeal to a District Court against that decision.
>
> (1A) A decision referred to in subsection (1) includes the decision to grant, or refuse to grant, an application under section 105 for a rehearing.
>
> …

[7] The appeal proceeds by way of a rehearing. The powers of a District Court Judge on appeal are set out at s 118(1) which provides that a Judge may:

> (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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[3] Order of Tenancy Tribunal, dated 23 September 2015, application No: 15/01429/HE.
[4] The repairs were not undertaken and accordingly the appellant is liable for an additional payment of $7,500; See Order, above n 3, at [4] and [5].
[5] An interim stay was granted on 13 April 2016.

The rehearing application to the Tribunal

[8] Section 105(1) of the Act enables the Tribunal 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.

[9] An application for rehearing is one to which the provisions of s 91 apply. Section 91 of the Act provides:

> (1) Where any application is referred to, or directed to be reconsidered and determined by, the Tribunal under section 87 or section 88, the Tribunal shall cause to be given to each party to the dispute reasonable notice of the time, place, and purpose of the hearing to be held in respect of the application.
>
> (2) The notice of the hearing shall be in writing, and shall include the following:
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> (a) a statement of such particulars as will fairly inform the party to whom it is given of the substance of the matters to be dealt with at the hearing:
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> (b) a reference to the relevant provision of the Act or regulations under the authority of which the hearing will be held:
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> (c) a statement of where information on the procedure of the Tribunal may be obtained:
>
> (d) a statement warning each party to whom the notice is given that if that party does not attend the hearing, the Tribunal may proceed to determine, dismiss, or adjourn the matter in that party's absence.

[10] Section 87 provides that any application filed in accordance with section 86 of the Act is generally to be referred to the registrar. Section 86 requires that proceedings before the Tribunal are commenced by filing an application in the approved form with any prescribed fee.

Grounds of Appeal

[11] The basis of the appeal is that the appellant was not given notice of the time, date and place of the hearing of his application as is required by s 91, nor was he informed that it was going to proceed on the papers. Accordingly, the appellant submits that the decision of the adjudicator was made without the benefit of his submissions and evidence.

Was notice of the hearing given?

[12] I have had an opportunity to review the Tribunal's file. The appellant's rehearing application states:

> Please see the attached application (3 pages). Please advise me if this hearing is to be heard "on the papers" in order that I may provide written submissions and documentary evidence.

[13] On 3 November 2015 a Tribunal registrar emailed the appellant requesting further information in respect of his application. Specifically the registrar wanted details of his claim that there had been a "substantial wrong or miscarriage of justice". The application did no more than repeat the wording of s 105 of the Act.

[14] The appellant responded by memorandum.[6] The appellant challenged the authority of the registrar to seek the further information and noted:[7]

> While it is not appropriate that you be made aware of, or weight, submission and/or evidence, that is for the tribunal to do so. In order that you have a greater knowledge of the matter, I mention that part of the evidence that will be adduced will be to establish that I am not the landlord. I am not the landlord now and have not been the landlord at any time.

[15] The appellant concluded his memorandum by requesting the registrar to advise him of the hearing date and whether it would be heard on the papers.[8] He indicated that he was hoping that the matter would be heard before 30 November as he was going to be out of New Zealand from early December 2015.[9]

[16] The registrar responded to the appellant, advising that in his view he had given the appellant the opportunity to make written submissions and that he was now forwarding the rehearing application and supporting documents to the adjudicator for directions and/or orders.[10]

[17] The adjudicator's decision declining the rehearing application was made without a hearing. The appellant was not advised of a hearing date or that a decision was going to be made without a hearing.

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[6] Appellant's memorandum dated 4 November 2015.
[7] Appellant's memorandum, above n 7, at [14].
[8] At [15].
[9] At [16].
[10] Email of the registrar dated 5 November 2015.

[18] The appellant had made it clear in his rehearing application and in his memorandum that he intended to make submissions and wanted to present further evidence before a decision was made regarding his application. The actions of the registrar and adjudicator had the effect of depriving him of being able to make submissions and request to present further evidence. This amounts to a procedural error on the part of the Tribunal.

[19] I am satisfied that a miscarriage of justice has arisen in that the appellant has effectively been denied the right to present his submissions and evidence at the rehearing application. Accordingly the appeal against the adjudicator's decision to decline the application for a rehearing is allowed.

The rehearing

[20] In this case the appellant requests that the Court consider the rehearing application. Such an order would fall within the provisions of s 118(1)(b) of the Act. Additionally, the appellant seeks leave pursuant to r 18.17(2) of the District Courts Rules 2014 ("the Rules") to adduce further evidence in support of the rehearing.

[21] Leave is granted to the appellant pursuant to r 18.17(2) of the Rules to adduce further evidence comprising an affidavit from the appellant and from Sabulite's property manager, Mr Patrick Darby.

[22] Mr Singh has in his submissions today indicated that in his view the landlord is not the appellant but a company Sabulite Property Investments Ltd ("Sabulite"). He provided documentation which supported this. Additionally Mr Singh indicated he was not opposed to the rehearing being granted and he would not be prejudiced if it was granted.

[23] The adjudicator's decision after hearing Mr Singh found that the appellant was personally liable. This was despite him writing and advising the Tribunal that he was not the landlord. Documents produced by Mr Singh at the hearing also indicated that it was Sabulite that was the entity Mr Singh was dealing with. These included a letter to WINZ on Sabulite letterhead confirming it was renting a property to Mr Singh, confirmation from WINZ that the bond payment was made to Sabulite, emails

from the appellant to Mr Singh sent with the heading "On behalf of Sabulite" and notice of eviction for non payment of the bond on Sabulite letterhead.

[24] Section 97(4) of the Act gives the Tribunal wide powers in terms of what it accepts as evidence. In this case the applicants own evidence tended to support Sabulite as being the landlord.

[25] The adjudicator's decision to find the appellant was the landlord was partly on the basis of enquiries undertaken by the registrar which suggest the appellant has other tenancy bonds lodged in his own name.[11]

[26] Exactly what enquiries were undertaken is not clear from either the file or the decision. Evidence tendered by the appellant as part of his appeal includes confirmation from MBIE that they have no record of any bonds lodged in the appellant's name.[12] This is contrary to the finding of the adjudicator.

[27] The additional evidence of the appellant is to show that he has never been the owner of the property subject to the tenancy, nor has he had any legal right to act as the landlord and has not acted as the landlord. In support a historical search of the relevant certificate of title has been annexed which shows that the property was purchased by Sabulite on 8 August 2013.[13] Mr Singh's tenancy commenced 1 March 2014.

[28] The relevant company extract for Sabulite has also been annexed.[14] The appellant is a director and 25 per cent shareholder in Sabulite.

[29] The appellant has deposed to the fact that Sabulite contracts directly with the tenants of the premises. Further Sabulite does not license, lease or otherwise permit the appellant to use the premises so that in turn he could sublet or otherwise permit tenants to occupy the premises.[15]

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[11] n 3 at paragraph 9.
[12] Affidavit of PK Patel dated 19 May 2016 at exhibit D.
[13] As above, at exhibit C.
[14] At exhibit B.
[15] At [11].

[30] Contrary to the evidence given by Mr Singh at the original hearing, that there was no written tenancy agreement, the appellant has filed evidence that prima facie supports that there is a tenancy agreement between Mr Singh and Sabulite. Mr Darby who now manages the property deposes that there is no copy of the written tenancy agreement in Sabulite's possession. However, he has undertaken enquires with Work and Income New Zealand ("WINZ") who appear to be involved in providing some form of accommodation grant to Mr Singh. While not disclosing any details, an employee of WINZ has confirmed that they hold a copy of Mr Singh's tenancy agreement on file, but are not able to release it for privacy reasons.[16]

[31] In addition, evidence has been provided which suggests that Mr Singh was significantly in arrears on his rent at the date of the hearing. This is not disputed by Mr Singh.

[32] Mr Singh's statement of account with Sabulite is annexed to Mr Darby's affidavit.[17] This confirms that the last rental payment was made 9 September 2015. As at that date the statement appears to show that Mr Singh was in arrears of rent to the extent of $7,170.68. Rent arrears as at the date of this hearing were said to be $8,077.43.[18]

[33] The order of the Tribunal includes compensation for rainwater leaks over a period of 81 weeks. Thirty five weeks of compensation were ordered at the rate of $150 per week and 46 weeks of compensation was ordered at the rate of $100 per week. Accordingly, it appears compensation has been ordered to be paid on the basis that Mr Singh's rental was not in arrears. Evidence now presented appears to contradict this position.

Decision

[34] Given the stance adopted by Mr Singh in not opposing the rehearing application and the additional evidence produced I am satisfied that in the circumstances of these proceedings a substantial wrong and/or a miscarriage of

[16] Affidavit of PA Darby dated 19 May 2016 at exhibit B.
[17] Affidavit of PA Darby, above n 15, at exhibit 1.
[18] At exhibit 1.

justice may have occurred. Accordingly I grant the appellant's application for a rehearing.

[35] Mr Singh has advised that he and the appellant/Sabulite are involved in further proceedings in the Tribunal. Mr Singh also provided a copy of an order from Auckland Council declaring this building to be a dangerous building pursuant to s 121 of the Building Act 2004. It would appear that these proceedings have a significant history before the Tribunal.

[36] I direct that the registrar of the Tribunal allocate a new hearing date as soon as possible in accordance with my powers under s 118(1)(a) of the Act. It may be that Mr Singh's claim should be consolidated with the other proceedings before the Tribunal. That however is a matter best left for the Tribunal.

[37] The hearing of 23 September 2015 was in effect a formal proof hearing, given Mr Patel's non attendance. When Mr Singh gave evidence he did so without being asked to promise to tell the truth. Whether there is a promise to tell the truth is a discretion to be exercised by the adjudicator pursuant to s 97(1) of the Act. As a matter of practice in such circumstances best practice would be to require a promise to tell the truth as per s 97(2).

Costs

[38] In the circumstances of this appeal and the rehearing and given that the appellant failed to attend at the Tribunal hearing on 23 September 2015 there will be no award of costs.

J Bergseng
District Court Judge