EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT NORTH SHORE

CIV 2015-044-001574
[2016] NZDC 12625

BETWEEN	RYAN AMBLER Appellant
AND	GLEN BRIGHT Respondent

Hearing: 4 July 2016

Appearances: Both parties attended in person by telephone

Decision:: 18 July 2016

DECISION OF JUDGE G M HARRISON

History

[1] There have been a number of hearings involving these parties in the Tenancy Tribunal. The first was in January 2015 when the Tribunal held that a notice to quit served on Mr Ambler was retaliatory and of no effect. Other claims by him were adjourned.

[2] There was a further hearing in March 2015 and in a decision of 9 April 2015 the Adjudicator found in favour of Mr Ambler on a number of matters and ordered Mr Bright, as landlord, to pay $2,020.44.

[3] The parties were again before the Adjudicator in July 2015 to determine a claim by Mr Ambler for overpayment of gas charges, and a claim by Mr Bright for further rent.

[4] The Adjudicator directed Mr Bright to pay $5,609.91 as reimbursement for excessive gas charges paid by Mr Ambler from December 2008 to March 2015. He then found the claim for rent arrears from June 2009 to be proved for an amount of

$8,237.94 which, after deducting the gas reimbursement figure, produced an amount owing by Mr Ambler to Mr Bright of $2,628.03.

[5] A further application by Mr Bright was adjourned. It is not clear what that further application related to and as far as I am aware it has never been determined.

The appeal

[6] The appeal before me relates to the decision of 17 August 2015. Mr Ambler's concern was that the gas being supplied to the rental property was fed through one meter that served not only his premises but also other premises on the property, and he claimed that since 2005 he had been paying for gas supplied to the other tenancy.

[7] The Adjudicator held that Mr Ambler was only entitled to claim for excessive gas payments for a period of six years prior to the date on which the claim was brought. That means that claims for payments made before 1 December 2008 were time barred.

[8] Mr Ambler argues that the limitation period does not apply because of fraud on the part of Mr Bright and that he is entitled to receipt of gas overpayments from 2005.

[9] The Limitation Act 2010 provides in s 61 that for any right of action based on an act or omission before 1 January 2011 the Limitation Act 1950 continues to apply.

[10] The act or omission by Mr Bright that Mr Ambler complains of must have occurred in or around 2005 when Mr Ambler took occupation of the subject premises, and therefore the Limitation Act 1950 applies.

[11] Section 28 of that Act is relevant. It provides:

> Where in the case of any action for which a period of limitation is prescribed by this Act, either-
>
> (b) The right of action is concealed by the fraud of any such person as aforesaid; or …

> The period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake as the case may be or could with reasonable diligence have discovered it.

[12] There is some doubt that Mr Bright was aware that the gas was being supplied to two premises. There was also in the evidence before the Adjudicator the possibility that in 2009 this issue was resolved between the parties.

[13] I am not able to resolve those matters but it seems to me that Mr Ambler has not been able to demonstrate that there was any fraud on the part of Mr Bright.

[14] "Fraud" as used in the 1950 Act is not "deceit" as such. The proper interpretation of the section was explained by Mahon J in *Inca Limited v Autoscript (NZ) Limited* [1979] 2 NZLR 700. At p 710 he said:

> Therefore the cases make it clear, in my opinion, that the obligation to disclose the existence of the cause of action arose in only two factual settings. The first was where there existed between plaintiff and defendant a fiduciary relationship. The second was where by virtue of a contract or other legal relation subsisting between the parties, a duty to disclose the facts comprising the cause of action was expressly or impliedly created. Whether either of those two situations existed, the concealment of the existence of the cause of action, whether actively or passively effected, although irrelevant in terms of the Statute of Limitations, was held in equity to be so unconscionable as to justify avoidance of the statutory bar.

[15] He went on to say that where there was dishonest concealment of the cause of action, whether equivalent to common law fraud or where there was non-disclosure in circumstances amounting to equitable fraud, in either case the concealment must be wilful. "The defendant must know all the facts which together constitute the cause of action".

[16] I am far from satisfied that the evidence before the Adjudicator established the requisite degree of knowledge, if any, on the part of Mr Bright that would justify the non-application of the statutory limitation.

[17] The Adjudicator was therefore correct to find that Mr Ambler could claim only so much of his cause of action as occurred in the six year period prior to commencement of the claim, and there is no suggestion that the amount calculated was in error.

[18] That part of the appeal is therefore dismissed.

[19] The second ground of appeal related to the arrears of rent.

[20] There was no challenge to the findings of the Adjudicator.

[21] Mr Ambler, however, purported to produce further evidence not before the Adjudicator to support his claim. Not unexpectedly, this was opposed by Mr Bright who advised that his complete financial records had been before the Adjudicator when the calculation was made.

[22] The simple point is that Mr Ambler, as appellant, must demonstrate that the Adjudicator erred in reaching the conclusion he did. He did not endeavour to do so, but sought to advance a completely different case on appeal which is impermissible. That aspect of the appeal is also dismissed.

Was the appeal filed in time?

[23] Section 117(6) of the Residential Tenancies Act 1986 provides that any appeal must be filed within 10 working days after the date of the decision appealed against. In this case the decision was dated 17 August 2015 and 10 working days from that date expired on 1 September 2015. The appeal was not brought until 10 October 2015. Mr Ambler acknowledges it was brought out of time but claimed that notice of the Tribunal's decision was not received by him in sufficient time for the appeal to be brought within the 10 day working period.

[24] I indicated that I would check the Court file, but there is no reference on it to any misnotification. Even if there had been, it is clear from the decision in *Brown v Nixon* [1989] DCR 97 that the 10 day working period cannot be extended and that any appeal filed beyond that time is a nullity.

[25] In response to the appeal Mr Bright filed what was initially described as "a statement of defence and counter claim" which later was repeated in a document termed "notice of cross appeal".

[26] Again, I note that while r 18.11 District Court Rules 2014 acknowledges the right to file cross appeals, they must be filed two working days before the appeal conference. That conference was held on 22 April 2016 and, as for the notice of appeal, the cross appeal is also out of time.

[27] Notwithstanding the timing issues, I have in any event dealt with the substantive issues on appeal. Mr Bright purported to claim further rental alleged to be owing in his cross appeal, but of course such a claim can only be brought in the Tribunal and not on an appeal against different issues decided by the Tribunal.

[28] For the foregoing reasons, the appeal is dismissed.

G M Harrison
District Court Judge