IN THE DISTRICT COURT
AT AUCKLAND

CIV-2017-004-000483
[2017] NZDC 21608

UNDER	The Residential Tenancies Act 1986
IN THE MATTER	of an appeal and cross-appeal from the Tenancy Tribunal
BETWEEN	GERALD DAVIES AND GARETH DAVIES Appellants
AND	KIP CLARKE AND SAMUEL SNEAD Respondents

Hearing:	21 September 2017
Appearances:	W Edendean for Appellants D Cooney for Respondents
Judgment:	25 September 2017

RESERVED JUDGMENT OF JUDGE D J CARRUTHERS

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[1] This matter comes before the Court as both an appeal and cross-appeal against the order of the Tenancy Tribunal dated 30 September 2016.

[2] The original appellant was Mr Gerald Davies, acting for the owner of the premises, his son Gareth Davies. The appeal is in their joint names, but nothing hangs on that since their interests coincide. In fact Mr Gerald Davies acted as the Manager of this rental property for his son.

[3] The appeal itself, as later refined, seeks that the decision of the Tribunal be set aside and the respondents be ordered to pay to the appellants, loss of rent from 19

August 2016 to 30 November 2016 less the sum of $3,600 already paid to the appellants. Costs are also sought.

[4] The cross-appeal seeks to set aside the decision of the Tenancy Tribunal and award damages against the appellants for breaches of the Residential Tenancies Act 1986 (the Act), under various headings, together with costs.

[5] For the purposes of convenience I will refer to both appellants as *"the appellant"* given their coinciding interests.

Background

[6] A fixed term tenancy agreement was entered into by the parties in respect of premises at 18a Hawera Road, Kohimaramara, Auckland. The term of the tenancy was from 23 April 2016 to 30 November 2016 with a rental agreed at $1,200 per week. A bond of $3,600 was paid.

[7] The respondents served notice on the appellant purporting to terminate the fixed term tenancy. They vacated the premises on 19 August 2016.

[8] The respondents applied to the Tribunal for a reduction of the period of the fixed term tenancy for damages and for a refund of the bond.

[9] A full hearing took place before an Adjudicator on 9 September 2016. Present at that hearing were Mr L Cooney, who appeared for the respondents and Mr Gerald Davies for the appellant with his daughter.

[10] Some original grounds of appeal are no longer relevant in my view, but I mention them for the sake of completion. One ground related to the breach of rules of natural justice in that the appellant had not received a copy of the cross-application until part way through the case; and another that the appellant was not given notice of the respondent being represented by counsel thereby preventing him from having the opportunity of being represented by counsel himself; and another alleged bias and unfairness because of the way in which the Tribunal promoted settlement discussions at certain stages throughout the hearing.

[11] None of those matters is now, in my view, relevant. They may have had relevance in other circumstances. However, a later opportunity was given to the appellant to reply to the cross-applications; both parties were represented very ably by counsel at this hearing; and the attempt by the Tribunal to promote settlement was sensible and appropriate and could not possibly amount to actions involving bias and unfairness. I propose to deal with those issues no further.

Tribunal Decision

[12] In the event the Tribunal ordered that the term of the fixed term tenancy be reduced to 9 September 2016, that the respondents pay the appellant the amount of the bond, which would then cover rent from 20 August 2016 (expiry of the date when the respondents left the premises) to 9 September 2016 and the bond was directed to be paid to the appellant accordingly.

[13] Reasons were given for those decisions which I will refer to in the course of this judgment.

Factual Background

[14] From the beginning, matters relating to this tenancy did not go well.

[15] There were some minor matters of irritation more than substance which set the tone for that. The previous tenants had not taken all of their items and retrieved them later when the respondents were not present; there was no walk-through to identify the condition of the property in the usual way; and there were other more minor irritating matters which would not normally be expected in a property being rented for this amount and in this comfortable area of Auckland.

[16] However, the major points which emerged quickly and which distressed the respondents, were the following –

- A cat urine smell in the carpet.
- A faulty kitchen range hood.

- A broken showerhead.
- A malfunctioning, or broken spa pool.

[17] There was from the beginning, and continues to be dispute between the parties, about these items.

[18] The appellants' evidence is that they could not themselves detect the cat urine smell, others invited by them to test could also not detect it, and that a previous tenant had not been troubled by it. The suggestion was finally made by the appellant that the respondents might professionally clean the carpet themselves; since they had an obligation to do that at the end of the tenancy this could be taken as satisfaction of that requirement. That was not an unreasonable suggestion, but it was soundly rejected by the respondents as *"insulting"*.

[19] The issue is significant to the respondents, because they attempted to have tenants in the spare room, but the information before the Tribunal and the Court is that two people who tried moved out because of the cold of that room; one said he moved out because of the urine smell.

[20] The kitchen range hood issues was eventually resolved, as was the broken shower head, although in an unsatisfactory way. Initially the appellant suggested taping the broken shower head and later provided the part which was necessary for it to work well.

[21] Major issues about the spa pool remain unresolved. The appellant was adamant that the spa pool was working with a minor leaking problem, whereas the respondents assert that it was not functional and that it was a significant attraction of the tenancy to them. Eventually the spa pool was completely replaced, but at a much later date.

[22] I mention these complaints because they rank high for the respondents, together with what they have continued to assert was a cavalier and casual attitude towards those issues by the appellant; whom they say constantly also broke the *"quiet enjoyment"* requirement by constant contact and communication to the point of harassment.

[23] The appellants' view is that a working spa was there and in position with a minor leaking problem which could have been attended to in other ways, and that proper efforts were gone to to ensure that it was both working and eventually replaced.

[24] The cat urine smell issue remains unresolved. The Tribunal did not attempt to resolve it.

[25] I think that the smell as a complaint must be regarded as unproved; the evidence about it is balanced and there is nothing which can be regarded as swinging the issue as between the parties.

[26] For what it is worth, I think that the respondents' complaints about the urine smell on balance are likely to have had substance, but the significance of that I will discuss later.

[27] Other complaints at the outset related to the removal of items by the previous tenants, the late provision of a key for the lock, a broken alarm which was constantly beeping, a faulty fountain, the gas fire working irregularly, no proper response to any of the issues and, later to be considered again further by me, constant harassment by Mr Gerald Davies, being present at the premises without permission and conduct amounting to a nuisance.

[28] The Tribunal concluded, having canvassed some of these complaints and the overall complaint that there was never any satisfactory response to the issues of maintenance which were raised, said as follows:

> However, it was apparent that there was some maintenance issues with the property virtually from the beginning. It should have been addressed before the tenants occupied. Although each in isolation *"was just a maintenance issue"*, relationship differences arose around their resolution or even acceptance and as a consequence relationships deteriorated and a kind of stand-off developed. I am not sufficiently certain to describe any other motivation to the tenants vacating other than the maintenance issues and the deteriorating relationship.

[29] With respect, I consider that to be a perceptive summary of the situation as a whole and I will return to it.

[30] So far as the allegation of harassment and breach of quiet enjoyment are concerned, I have come to the view that the respondent's description of those activities is overstated. I can understand that Mr Gerald Davies' well meaning efforts to attend to the complaints must have become irritating and seemed ineffectual. He was not a professional property manager – he was clearly a practical man seeking practical solutions when he could. If he had been a professional manager he would have had a stable of tradespeople to call on for assistance. There was, perhaps, a failure to appreciate that this property, placed as it was in an upper market area of Auckland, required something more by way of solution than the type of effort required for a fishing bach in rural Southland. But I consider he did his best and was not assisted by the somewhat more precious approach taken by the respondents.

The Law

[31] Any appeal from the Tribunal to the District Court is a hearing de novo, but of course I am able to rely on the evidence which was given before the Tribunal to make my own assessment of information held having regard to the relevant law.

[32] The central issue in this matter is the application of s 66 of the Act which governs the reduction or termination of a fixed term tenancy. That section reads:

> **66 Reduction or termination of fixed term rent tenancy**
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> (1) On application by a party to a fixed term tenancy, the Tribunal may make an order reducing the term of the tenancy by a period stated in the order, and make such variations in the terms of the tenancy as are necessary because of the reduction of the term, where it is satisfied that because of an unforeseen change in the applicant's circumstances, the severe hardship which the applicant would suffer if the term of the tenancy was not reduced would be greater than the hardship which the other party of the tenancy would suffer if the term was reduced.

[33] This is the essential issue and the one primarily confronting the Tribunal, who had to examine whether there were, in this case, *"unforeseen circumstances"* and then look at a comparison of the hardships suffered by the parties in the event of termination or otherwise.

[34] I do not overlook s 85 of the Residential Tenancy Act, which is the obligation on the Tribunal to exercise its jurisdiction in a manner that is likely to ensure the fair

and expeditious resolution of disputes, and the further obligation to determine each dispute according to general principles of the law and the substantial merits and justice of the case, without being bound to give effect to strict legal rights or obligations.

[35] But that general injunction has to find its expression within the statutory framework. It cannot be thought to be unnecessarily technical to have regard to the obligations under s 66 and the requirement to assess the comparative hardships involved.

[36] I do not doubt that the matters of complaint about the premises raised by the respondents were irritating and were compounded by the deteriorating relationship which the Tribunal mentioned. I particularly do not doubt that this was the case, given the considerable rental involved and the expectation that a property in this area, drawing that amount of rental, would be well maintained and in good condition.

[37] However, in essence the matters complained about were relatively minor. Each is capable of amelioration or mitigation and it could not, by any manner of means be considered a severe hardship to the respondents to continue the tenancy where that was the case.

[38] Indeed at one stage there was an offer by the respondents to continue the tenancy with a reduction in the rental to account for the condition of the spa pool as a means of settling the dispute. The only implication from that must be that had the offer been accepted, the ……were prepared to continue the tenancy until expiry.

[39] A cat urine smell if it existed is, of course, more pernicious, but can be mitigated and masked in very well understood ways. Neither cumulatively, nor in isolation, were the complaints sufficient to amount to severe hardship; and even taking into account the by then toxic relationship between the appellant and the respondents, and the respondent's allegations of harassment, this situation overall, I am satisfied, was not one where severe hardship could be found.

[40] Nor could the circumstances come within the statutory definition of *"unforeseen change"*, although the Tribunal appears to have thought that the mere

circumstances of a dispute over maintenance items might be sufficient. After commenting that more care should have been taken at the outset to ensure the property was in order, the Tribunal said, *"that it was not, was an unforeseen circumstance as far as the tenants were concerned"*.

[41] However, the decided cases all show that to come within the definition there must be something which was well outside contemplation by the parties at the time the tenancy agreement was entered into; matters of more minor maintenance could never fall within that definition.

[42] Indeed the Tribunal seems to me to recognise that since at one stage it said very clearly, that this *"was not an emergency situation, it was not a circumstance that would justify early termination"*.

[43] The respondents' decision to move out of the premises was obviously a determined one regardless of the notice. The letter which the appellants received from the lawyer for the respondents required the defects to be remedied by 14 August. A letter from the lawyer dated 7 August informed the appellants that respondents were moving out on the 19th. All outstanding maintenance issues were in fact remedied by the 14th August, with the exception of the cat urine smell matter which I have already mentioned. In a very real sense the letter requiring remedy was irrelevant to the intentions of the respondents at that time.

[44] I have come to the clear view, that in the circumstances there were no grounds to reduce the term of this tenancy within the applicable law; and that the respondents were wrong to vacate the premises after giving reasonably short notice of their intention to do so.

[45] But that is not the end of the matter.

[46] Having received that notice, there was still an obligation on the appellants to mitigate any losses by taking sensible, prudent and immediate steps to find another tenant and to cover the potential period of loss. It was said to me from the bar that given a reasonably short period (something just over three months), it could not be

expected that would be an attractive to an incoming tenant. It was urged on me the return of the property to Ray White Real Estate to see whether another tenant might be forthcoming (which produced no such tenant), was all that was reasonably required of a landlord in those circumstances.

[47] I do not agree.

[48] Given what I understood from the bar to be the parlous shortage of rental properties at the time, there were clearly opportunities for a further short term lease which should have been explored with greater energy and enthusiasm. Trade Me and other options were suggested as a possibility; the possibility of other responsible tenants seeking a very short term lease, even a reduced rental, whilst waiting between house purchases, or the many other circumstances which can occur in a large commercial city, should have been more thoroughly explored.

[49] Something over three months of the tenancy was left to expire. Rent to the end of the term as a total figure came to $17,400. Because I think that the efforts to mitigate were so casual and in the interests of determining this matter on, what I regard as its substantial merits and the *"justice of the case"*, I propose to consider that one-half of this period ought to have been able to be covered by alternative arrangements.

[50] That being the case and for the reasons given, I now order that the decision of the Tribunal be set aside; that the respondents be ordered to pay loss of rent to the appellants amounting to $8,700, less the sum of $3,600 already paid – a balance of $5,100. All other claims are dismissed for reasons already given.

[51] I have considered the question of costs.

[52] There have been no winners in this dispute. My view is that costs should be left to lie where they fall.

[53] There will be no order for costs.

[54] Orders accordingly.

D J Carruthers
District Court Judge