EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT TAURANGA

CIV-2018-070-000017
[2018] NZDC 704

BETWEEN	ESMERALDA MONICA SMITH Appellant
AND	ACCESSIBLE PROPERTIES NEW ZEALAND LIMITED Respondent

Hearing:	16 January 2018
Appearances:	M Sharp for the Appellant O Grant for the Respondent
Judgment:	18 January 2018

RESERVED JUDGMENT OF JUDGE P G MABEY QC

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[1] The appellant is a former tenant of Housing New Zealand. She occupied a residential property at [address deleted], Tauranga pursuant to a tenancy agreement entered into with Housing New Zealand.

[2] Clause 42 of that agreement provides that the landlord can terminate the tenancy by giving 90 days notice to vacate. No reasons need be given.

[3] In late 2016 Housing New Zealand sold the [address deleted] property, together with other properties, to a limited partnership known as AP Properties Tauranga LP. In turn the limited partnership leased the properties, including [address deleted], to the respondent, Accessible Properties New Zealand Limited.

[4] On 11 July 2017 the respondent served the appellant with a 90 day notice terminating the tenancy and requiring her to vacate. The notice purported to be pursuant to clause 42 of the tenancy agreement and consistent with that no reasons were given.

[5] The appellant challenged the termination before the Tenancy Tribunal. The Tribunal heard the matter on 29 November 2017 and upheld the termination.

[6] Prior to the Tribunal hearing Mr Sharp sought an adjournment on the basis that the appellant was at that time a prisoner and could not be present at the hearing. Mr Sharp also said that he was having difficulty obtaining instructions. The adjournment was refused on the basis that there was sufficient material before the Tribunal for the hearing to be conducted fairly and expeditiously.

[7] On refusal of the adjournment Mr Sharp withdrew as counsel for the appellant leaving her unrepresented.

[8] Subsequent to the Tribunal's ruling the appellant, with Mr Sharp returning as counsel, applied for a rehearing under s 105(1) of the Residential Tenancies Act 1986. Mr Sharp asserted a substantial wrong or miscarriage of justice had, or would, occur and that there was new evidence that was not reasonably available at the first hearing.

The application for rehearing was refused but the effect of the original ruling was stayed to enable an appeal to be brought to this Court.

[9] A notice of appeal was filed on 3 January 2018 asserting:

(a) The application for adjournment should have been granted.

The Tribunal was wrong in law in ruling that it could not make orders pursuant to s 78(1)(g) (*now accepted by the parties as s 78(1)(f)*) of the Residential Tenancies Act 1986 that it would be harsh or unconscionable for the respondent to terminate the tenancy on notice. The assertion being that the real reason for giving notice was the positive results of an illegally conducted test for the presence of methamphetamine within the property.

(b) The Tribunal erred in law in refusing the application for rehearing.

[10] The appeal sought orders that:

(a) The respondent's termination of the tenancy is harsh or unconscionable conduct under s 78(1)(f); or

(b) Alternatively, that there be a rehearing before the Tribunal.

[11] This matter came before me on 16 January 2018. Mr Sharp appeared and sought an adjournment of the hearing of the appeal on the basis that:

(a) He now had instructions that the appellant would be released from prison in February and wished to be present at the hearing of the appeal and present evidence.

(b) There would be an application under the District Court Rules for further evidence to be called on the appeal.

(c) It was intended that the appellant apply for legal aid to conduct the appeal.

(d) Should an adjournment be granted the stay of the original Tribunal decision be extended pending the hearing of the appeal and that orthodox case management orders be made to progress matters towards a substantive hearing.

[12] I indicated that I was in a position to deal with the substantive appeal and that the only basis for an adjournment would be if any intended fresh evidence was arguably admissible.

[13] The assessment of the admissibility of the intended fresh evidence would require an assessment of its relevance, cogency and whether it was reasonably available at the original hearing. In regard to the latter point Mr Sharp says that it was not reasonably available because his client was in prison and thus was unable to be present to present to give evidence.

[14] That may well be a valid point but the real issue is whether the intended fresh evidence is relevant. If not, there can be no basis to admit it and I made clear to the parties that if I reached that conclusion I was in a position to deal with the substantive appeal and would do so. The appeal would be granted or dismissed on the merits and on the basis of the information available on the Court file. That information included a complete record of the Tribunal hearing.

[15] Both counsel filed submissions and spoke to them. Each addressed not only the issues surrounding the intended fresh evidence but also the merits of the matters raised on appeal.

[16] It became clear during submissions that an examination of the issues relating to the admissibility of fresh evidence would resolve the appeal.

[17] Mr Sharp did question whether an appeal to the District Court from a ruling of the Tenancy Tribunal was *de novo* or by way of a rehearing. If de novo, there is no

real restriction on the introduction of fresh evidence. If by way of rehearing the tests for admission of fresh evidence must be satisfied.

[18] I resolved that preliminary point on the basis that I consider the appeal is clearly by way of rehearing as is made clear under r 18.19 of the District Court Rules 2014.

[19] Counsel's opposing positions on the appeal can be stated simply.

[20] The appellant says that as the tenancy agreement makes no provision for the conduct of forensic tests for methamphetamine such tests can only be carried out with her consent. She says she did not consent and therefore the testing was conducted illegally and the results of the tests have been obtained illegally.

[21] The appellant then says that the only reason she was given notice terminating her tenancy was because methamphetamine was found. As the testing was conducted illegally it would therefore be harsh and unconscionable for the tenancy to be terminated.

[22] There is no evidence that the respondent was motivated to terminate the tenancy because of the test results but Mr Sharp says that is an obvious and available inference. In any event says Mr Sharp if the Court is not prepared to draw that inference the hearing of the appeal should be adjourned to enable him to:

(a) Call his client to give evidence she did not consent to the testing; and

(b) Subpoena personnel from the respondent to confirm on oath the termination notice was given because of the test result.

[23] Mr Sharp says that any person subpoenaed from the staff of the respondent would reasonably be expected to tell the truth on oath and that he anticipates that the evidence will confirm his client's contention that the tenancy was terminated because of the illegally obtained forensic test results.

[24] Ms Grant makes the submission that the appellant misses the point. She says the termination notice was a straight forward application of the respondent's rights under clause 42 of the tenancy agreement which entitles the respondent to terminate the tenancy on a 90 day notice without cause.

[25] She says that there is no dispute that the notice was valid and properly served and says that is the end of it. Issues as to the validity or otherwise of the forensic testing are entirely irrelevant.

[26] Ms Grant says that in any event there is no established connection between the test results and the termination notice and even if there was the bare fact of the matter is that the tenancy agreement provides for termination and there is no possible basis to assert under s 78(1)(f) that the termination was harsh and unconscionable.

[27] On that basis Ms Grant says that there can be no prospect of fresh evidence called on the appeal because the intended evidence is irrelevant, it has no cogent effect and whether it was reasonably available or not before the Tribunal does not change that.

[28] Ms Grant says that the Tribunal's refusal of the adjournment was in the circumstances justified as was the refusal of a rehearing. Her submission is that the appeal can be dismissed on the basis that there is no error in the way the Tribunal has conducted itself in any respect.

[29] Mr Sharp accepted that were it not for issues raised concerning the validity of the methamphetamine testing there would be no available ground of appeal. He puts his money entirely upon the proposition that the testing was illegal, the notice was given as a result of the testing and in those circumstances to allow the landlord to terminate would be to condone harsh or unconscionable conduct.

[30] He acknowledged that if issues relating to the validity of the testing are irrelevant the matters raised on appeal fall away.

[31] I am of the very clear view that the appeal must be dismissed. The tenancy was terminated pursuant to a provision in the tenancy agreement. The respondent was exercising a contractual right which is consistent with its statutory rights to terminate. An appropriate notice was given. No reasons were required and the tenancy was validly terminated.

[32] The various rulings of the Tribunal were not only appropriate but were entirely justified.

[33] Even if evidence was called on appeal concerning the methamphetamine testing and even if I accepted the testing was conducted without the consent of the appellant that would have no impact at all on my consideration of the appeal. The end result would still be that the respondent has validly exercised a contractual right to terminate and the Tribunal's ruling upholding the termination is unassailable on appeal to this Court.

[34] The appeal is dismissed and the Tribunal's ruling is upheld.

[35] Two remaining matters need to be addressed. When the appeal was heard I extended the stay until Friday, 19 January 2018. I confirm the stay ends on that day and is not extended.

[36] Secondly, Ms Grant sought leave to address issues of cost.

[37] If the respondent wishes to pursue costs both counsel can file appropriate memoranda.

P G Mabey QC
District Court Judge