

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

**IN THE DISTRICT COURT  
AT TAURANGA**

**I TE KŌTI-Ā-ROHE  
KI TAURANGA MOANA**

**CIV-2018-070-000991  
[2019] NZDC 1060**

BETWEEN

CHARLES TE TOKOTU SERGEANT  
Appellant/Cross-Respondent

AND

ADRIENNE MAREE NIGRO and  
MICHAEL JOHN TAPSELL  
Respondents/Cross-Appellants

Hearing: 15 January 2019

Appearances: G Denize Counsel for the Appellant/Cross-Respondent  
M Ward-Johnson as Counsel for Respondents/Cross-Appellants

Judgment: 24 January 2019

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**RESERVED JUDGMENT OF JUDGE P G MABEY QC**

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[1] By order of the Tenancy Tribunal in Tauranga, dated 29 August 2018, the respondents, as trustees of the Tapsell Family Trust (the Trust) were granted possession of the residential premises at [address deleted] (the property).

[2] The property was at that time, and still is, occupied by the appellant. He appeals the Tenancy Tribunal decision.

[3] The trustees cross-appeal the decision to the extent that the Tribunal required 42 days' notice for the appellant to vacate, they say that should be reduced to immediate possession or no more than five days' notice.

[4] The appellant, Mr Sergeant had been in a long term de facto relationship with Maureen Tapsell. They lived in the property throughout that relationship. Maureen owned the property.

[5] In 2001 the appellant and Maureen signed an agreement pursuant to the Property (Relationships) Act 1976 designating the property as Maureen's separate property.

[6] In 2003 the trust was created with Maureen as the settlor. In 2005 the property was transferred to the trust. The trustees at that time were Maureen and the respondents. Maureen died later in 2016 and the appellant has continued to reside in the property. He has not paid rent and the trustees have continued to meet ongoing obligations and outgoings relating to it.

[7] The property is subject to a mortgage to the Heartland Bank securing a debt in the form of a reverse annuity mortgage. The debt is due for repayment six months after the death of the nominated resident of that property.

[8] Maureen was the nominated resident. The debt is due. The Heartland Bank has issued a Property Law Act notice demanding repayment. There is a threat of a mortgagee sale.

[9] The appellant challenges the Tenancy Tribunal decision saying that the adjudicator was wrong to grant possession to the trustees in the face of knowledge that there are proceedings before the High Court which are yet to be resolved.

[10] At the time of the hearing in the Tenancy Tribunal the appellant had extant High Court proceedings challenging the validity of the relationship property agreement signed in 2001, pleading that if the agreement is invalid then the transfer of the property to the trust is equally invalid and the trustees thus have no right to demand possession of the property.

[11] As a further cause of action the appellant claims an interest under a constructive trust whereby he has an interest in the property.

[12] Since the Tribunal's decision the claim in the High Court has been amended to include additional assertions that the trustees have acted improperly in failing to notify the mortgagee that the appellant was in residence and thus should have been included in the list of nominated tenants. That the trustees are acting in conflict of interest, they being beneficiaries of Maureen's estate, and that the trustees are in breach of trust and their fiduciary duty to the appellant, claiming (inter alia) that they are attempting to defeat a previously given life occupational interest.

[13] Determination of the appeal requires consideration of the Tenancy Tribunal's jurisdiction and the extent to which extant proceedings in other Courts can influence the exercise of that jurisdiction.

## **The law**

[14] Appeals from the Tenancy Tribunal are to this Court. Section 117 of the Residential Tenancies Act 1986 provides:

### **117 Appeal to District Court**

- (1) Subject to subsection (2) of this section, any party to any proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in the proceedings may appeal to [the 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.]
- (2) No appeal shall lie—
- (a) against an interim order made under section 79 of this Act; or
  - [(b) against an order, or the failure to make an order, for the payment of money where the amount that would be in dispute on appeal is less than \$1,000; or]
  - [(c) against a work order, or the failure to make a work order, where the value of the work that would be in dispute on appeal is less than \$1,000.]
- (3) [The District Court has] jurisdiction to hear and determine an appeal under this section notwithstanding any limits imposed on such courts in their ordinary civil jurisdiction by [sections 74 to 79 of the District Court Act 2016].
- (4) The provisions of section 85 of this Act, with any necessary modifications, shall apply in respect of the hearing and determination by [the District Court] of an appeal brought under this section.
- (5) An appeal under this section shall be brought by the filing of a notice of appeal ... in the District Court nearest to the place at which the Tribunal sat in the proceedings to which the appeal relates.
- (6) Every such notice of appeal shall be filed within 10 working days after the date of the decision to which the appeal relates.
- (7) As soon as practicable after a notice of appeal has been filed under this section, the Registrar of the Court shall cause a copy of the notice to be lodged with the Tribunal's records relating to the proceedings to which the appeal relates, and, on receipt of that copy, the Registrar of the Tribunal shall send the Tribunal's file on the matter to the Court.
- (8) The Registrar of the Court shall fix the time and place for the hearing of the appeal and shall notify the appellant.
- (9) A copy of every notice of appeal together with a notice of the time and place for hearing the appeal shall be served by the Registrar on the other party to the proceedings before the Tribunal, and that party may appear and be heard.
- (10) The filing of a notice of appeal under this section shall not operate as a stay of proceedings, unless the Tribunal or a District Court Judge, on application, so determines.
- (11) Where the appeal relates to an order terminating the tenancy made on the ground of non-payment of rent, a stay of proceedings shall not be granted unless the application for stay is supported by a receipt or other written evidence tending to show that the rent was not in fact in arrear at the date of the hearing before the Tribunal.

[15] Although not expressed in the section this Court has proceeded in the past by dealing with appeals from the Tenancy Tribunal as appeals by way of rehearing.

[16] The appeal is heard on the record from the Tenancy Tribunal but there is a discretion to receive further evidence. The Court may also take account of developments post the tribunal hearing and there is, of course, the natural appellate caution against differing from factual findings unless the finding was not available on the evidence or plainly wrong.

[17] At the heart of the Tenancy Tribunal decision in this case is s 65 of the Act which provides:

**65 Eviction of squatters**

- (1) Where, on the application of any person entitled to possession of any residential premises, the Tribunal is satisfied that any other person is in possession of the premises as a squatter or trespasser, or otherwise than pursuant to any right of occupation granted to that person by any person having lawful authority to grant that right to that other person, the Tribunal shall make a possession order granting possession of the premises to the applicant.
- (2) Nothing in subsection (1) of this section shall limit or affect the provisions of the [Trespass Act 1980](#), or any other remedy that may be available to the person lawfully entitled to possession of the premises.
- (3) To avoid doubt, the Tribunal has jurisdiction under this section even though the premises are not subject to a tenancy agreement.]

[18] In its decision the Tribunal also refers to s 85 which states:

**85 Manner in which jurisdiction is to be exercised**

- (1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises to which this Act applies.
- (2) The Tribunal shall determine each dispute according to the general principles of the law relating to the matter and the substantial merits and justice of the case, but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities.

[19] As I refer to below s 85 has no application in this case. The Tenancy Tribunal's jurisdiction depends solely upon s 65.

[20] Although, before the Tribunal, the trustees did not maintain that the appellant was a trespasser or squatter, that is exactly what he was.

[21] The appellant is not a tenant as defined in s 2 of the Act. The trustees are not landlords and the appellant has no right of occupation. He is a squatter.

[22] Section 85 has no application. Section 85(1) makes express reference to resolution of disputes "*between landlords and tenants of residential premises*".

[23] Section 85(2) says that the Tenancy Tribunal shall determine "*each dispute,*" a reference to the landlord and tenant disputes referred to in s 85(1).

[24] Section 85 is thus limited to disputes between landlords and tenants. It has no application to s 65.

[25] It is clear from the wording of s 65 that the exercise of the jurisdiction under that section does not involve a discretion. Upon satisfaction of the primary jurisdictional requirements it is mandatory that the Tenancy Tribunal make a possession order.

[26] The s 65 jurisdictional thresholds to be satisfied on the balance of probabilities are:

- (a) The premises the subject of the application are residential premises.
- (b) The applicant for possession is entitled to possession of those premises.
- (c) Another person or persons are in possession as squatters, trespassers or otherwise than pursuant to any right of occupation granted by a person having lawful authority to do so.

[27] I find, as did the Tribunal, that:

- (a) The property falls squarely within the definition of “residential premises” contained within s 2 of the Act.
- (b) The appellant has no right of occupation granted to him by any person having such authority and is therefore a squatter.
- (c) The trustees are the legal owners of the property and are entitled to be in possession of it.

[28] The appellant argues that he does have a lawful right to occupation and says that on the basis of his claim yet to be heard in the High Court the relationship property agreement is invalid, the transfer to the trustees is thus invalid and in any event he was given a lifetime right to occupy by the deceased, with the concurrence of the trustees. He says he has changed his position accordingly and the trustees cannot now defeat his occupation by insisting on strict legal rights arising from their ownership of the property.

[29] Those arguments can only be assessed in terms of an analysis of the primary jurisdictional hurdles set out above. An as yet unresolved argument based on the High Court claim can only have an impact in the Tenancy Tribunal if it prevents the Tenancy Tribunal from being satisfied as to one or more of the above jurisdictional requirements.

[30] Does an argument based on as yet unheard claims in the High Court prevent the Tenancy Tribunal being satisfied that the appellant is not a squatter or trespasser but is in possession pursuant to a lawful right granted by someone in a position to do so? Does it prevent the Tenancy Tribunal being satisfied that the trustees are entitled to possession?

[31] I do not think so.

[32] The adjudicator said he is not in a position to evaluate the claims before the High Court although he did go on to do so. I consider he was wrong in that regard.

[33] Evidence was presented to the Tribunal in support of the matters pleaded in the High Court in an attempt to establish the appellant's right to occupy. However no effective assessment of that evidence or the strength of the claim it is intended to support can properly or usefully be conducted within Tenancy Tribunal parameters. How could it be?

[34] The fact that a mortgagee sale is likely was also raised before the Tenancy Tribunal but again in my view that was not a relevant consideration to the exercise of the s 65 jurisdiction.

[35] An impending mortgagee sale may be relevant on an application for stay of the Tenancy Tribunal's decision but that is another matter.

[36] Mr Ward-Johnson acknowledges that the Tenancy Tribunal is not the place to resolve the appellant's claims but says that in any event, at their highest, they are no more than monetary claims. He says on any analysis of the appellant's pleadings at best all he can hope to receive is a monetary award.

[37] In that regard, I note that Judge Andrew in the High Court granted an application to remove a caveat and notice of claim under the relationship property legislation lodged by the appellant. The judge concluded that at best the appellant had a monetary claim and removed the caveat and notice on the basis that 50% of the proceeds of sale of the property be held in trust pending the outcome of the substantive High Court proceedings.

[38] In my view the Tenancy Tribunal decision must stand. However I am obliged to observe that the Tenancy Tribunal's reference to, and parent application of, s 85 was inappropriate as was the analysis of the claim in the High Court. What was required was a direct application of s 65 and a focused analysis on whether the elements under that section were satisfied.

[39] The consequence of the Tenancy Tribunal order will mean that the appellant must vacate and lose his home of many years but that is a result of the direct application of s 65.



[40] I do note however that the appellant has other remedies. If in fact all he has is a monetary claim and if, on his arguments in the High Court, 50% of the net proceeds of sale may be insufficient to meet his claim an application can be made to hold more than 50% of the proceeds of sale in trust.

[41] If the claim in the High Court may arguably result in a right to possession and/or a propriety interest in the property then that can be a matter for the High Court to determine at an interlocutory stage. If there is such an arguable case and if the balance of convenience dictates no doubt an interim injunction against sale by the trustees could be obtained. The High Court would not be in a position to injunct the mortgagee to prevent a mortgagee sale but that matter would be relevant to weighing the balance of convenience.

### **Decision**

[42] For the reasons above the Tenancy Tribunal's decision is upheld with the result that the trustees are entitled to possession.

[43] The trustees cross-appeal is granted. The appellant must vacate the property within 10 days of this order.

[44] Costs are awarded to the trustee respondents on the appellant's appeal on a 2B basis. No costs are awarded on the cross-appeal.

[45] I invite cost memoranda from counsel.

P G Mabey QC  
District Court Judge