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

IN THE DISTRICT COURT
AT PORIRUA

CIV-2017-091-000370
[2018] NZDC 4131

BETWEEN	HEREMIA AND ROSANNE TUIVAITI Appellants
AND	SYD AND LIO HUNT Respondents

Hearing: 1 March 2018

Appearances: W Bevan for Appellants
C O'Connor for Respondents

Judgment: 14 March 2018

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] This is an appeal by the Tuivaitis against a decision of the Tenancy Tribunal dated 16 June 2017. Earlier judicial rulings have clarified that the appeal is limited to Order 3 of the decision.

[2] That order related to one aspect of the Tuivaitis' cross-application (No 4079243) pursuant to which the Tuivaitis had sought a credit for a portion of the $800 per week *"occupation payments"* which they made during their occupation of the property at [address deleted], Paraparaumu. The amount of the credit claimed was the difference between the market rental during the tenancy and the $800 weekly payment. The Tribunal declined to allow a credit.

The Tenancy Agreement

[3] The issue arises because of ambiguity in the written agreement between the parties relating to the occupation of the property at [address deleted]. That agreement

was negotiated directly between the parties and drafted by the Hunts, who are presumably not legally qualified.

[4] The agreement is intituled *"Property Management Agreement"* although the Adjudicator determined that it created a residential tenancy in terms of the Residential Tenancies Act (the Act). That finding is not challenged on appeal. To maintain consistency with the Tribunal's decision, I will refer to the agreement as *"the PMA"*.

[5] The PMA refers to the parties as Property Owners and Property Managers rather than Landlords and Tenants. At the end of it there is a summary, which throws light on how the Hunts viewed their relationship with the Tuivaitis in respect of the property. It also assists in ascertaining the intentions of the parties in respect of the crucial issue. It is helpful to set it out in full:

> **Summary**
>
> * This agreement has been written with the intention that both parties respect each others parameters.
>
> * The Property Owner does not wish to sell the property but circumstances have dictated the consideration of reasonable sale and rental options.
>
> * The Property Owner does not see the Occupiers as Tenants; this is disrespectful to the personal relationship that we share culturally and socially.
>
> * The Property Owner has been transparent in discussions with the Property Managers who will now be responsible for the care of a treasured property.
>
> * In saying this, we the Property Owners strongly want to recognize the contributions of the Property Managers as not "Rent", more that these are recognized as a contribution towards a reduction or discount off the Sale & Purchase if and when the property is relisted.
>
> * If at the end of this relationship a sale and purchase cannot be agreed to, then the Property owner WILL reimburse an amount back to the Property Managers a percentage of their total contribution.

[6] Consistently with that approach, the PMA provides for a *"Weekly occupation rate of $800 (inclusive of Rates)"*. The duration of the right of occupancy given to the

Tuivaitis under the PMA is not easy to deduce, but nothing turns on that. They remained in occupation until the date of the Tribunal's hearing.

[7] The Tuivaitis were given a right to purchase the property in the PMA. This right is set out in the section of the PMA intituled *"Property Managers rights to purchase the said property"*. The nine paragraphs which make up this section are not well drafted, but it is possible to draw from them some conclusions about the broad intentions of the parties which are relevant to the determination of the issue in this case.

[8] First, it was clearly intended that the Tuivaitis would have a right, but not an obligation to purchase the property – in other words an option to purchase it. That option was never exercised.

[9] Secondly, if they did exercise their option to purchase, the price which they would have to pay would be reduced by virtue of their payment of the $800 *"occupation rate"*. A formula was set out for calculating the amount of the deduction. This formula is not clearly expressed and would have been difficult to calculate if the option had been exercised. But what is clear is that the price was to be substantially reduced from what it would otherwise have been because the Tuivaitis had been paying the occupancy rate of $800 per week during their occupation of the property; the longer the period of occupancy prior to purchase, the greater the deduction, the amount being in the order of $10,000 for each year.

[10] There was also a section intituled *"Improvements and Construction"*. This allowed the Tuivaitis to make renovations and improvements to the property during their occupation with the prior consent of the Hunts. There was provision in paragraph 6 of the section for the Tuivaitis to receive financial recompense from the Hunts for any such improvements made by them. The paragraph reads:

> 6. The Property owner acknowledges and recognize improvements made by the property managers through fair and reasonable understandings of length of occupancy. i.e. The Property Owner will value the investment applied for construction and apply that formula to the length of occupancy e.g. if the Property Manager invests $6,000.00 on home improvements then this will equate to $6000 divide by $800 weekly rate = 7.5 weeks. The occupancy

term will be extended by 7.5 weeks. (Option for the Property Manager to take up)

The Factual Background

[11] The circumstances which led to the making of the PMA have been helpfully set out in the Tribunal's decision in paragraphs 8 and 9 which are set out below:

> 8. Before the tenancy began, the Tuivaitis had been living with their large family in a 7 bedroom property in Whitby. They were unable to continue their tenancy. The Hunts were wanting to sell [address deleted], Paraparaumu. The Tuivaitis were keen to buy the property. And so the Hunts prepared the PMA, based on the parties' intention that there would be a sale and purchase. The Tuivaitis were called 'Property Managers' (not tenants) and the Hunts were 'Property Owners'.
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> 9. The $800.00 per week was based on the amount of the mortgage payment that the Hunts were paying to the bank. Mr Hunt had temporarily lost the ability to provide income from work and so payment of the mortgage amount was needed if the Tuivaitis were to be given the opportunity to buy the property. If the Tuivaitis couldn't afford to pay $800.00 per week the property would have to be sold. The Tuivaitis accepted paying $800.00 per week.

The Tribunal's Decision

[12] The Adjudicator defined the dispute between the parties as relating to the meaning of *"contribution"* in the PMA. The Tuivaitis believed that there was an amount due to them from the $800 weekly rate whether or not they purchased. The Hunts considered that *"contribution"* related to the Tuivaitis' making of additions or improvements to the property which would be recognised whether or not they purchased it.

[13] The Adjudicator considered that the PMA was ambiguous as to the meaning of *"contribution"*, therefore it was necessary to decide what a reasonable person would understand it to mean.

[14] After citing dictionary definitions of *"contribution"* as a gift or donation or payment to a common fund, the Adjudicator considered whether the $800 occupancy rate could be described as such. He considered that an *"occupancy rate"* has the same meaning as rent, both terms being used to describe the charge made to occupy

premises, a fee for possession of the premises. Having equated the *"occupancy rate"* to rent, the Adjudicator pointed out that rent is not a gift or donation or contribution to a common fund.

[15] The Adjudicator also pointed out that the PMA linked the amount of the occupancy rate to the amount of the mortgage payments that the Hunts had to make. He also commented that the $800 was not divided into separate amounts for occupation and for contribution. In summary the Adjudicator considered that the weekly payments should not be considered as a contribution from the Tuivaitis in terms of the PMA.

[16] He then went on to consider what then was meant by *"contribution"* in the PMA. He drew attention to the section of the PMA headed *"Improvements and Construction"* relating to renovations and improvements made to the property by the Tuivaitis and reached the conclusion that the *"contribution"* to be recognised in the event the Tuivaitis did not purchase the property, was intended to relate to the value of any such improvements that they had made. He considered the subsequent conduct of the parties was consistent with that interpretation. He also considered that the general background to the PMA and other provisions of it were inconsistent with the Tuivaitis' interpretation.

The Parties' Submissions

[17] Both parties filed written submissions including supplementary submissions. Both couched their arguments in terms of conventional concepts of the law of contract: estoppel, the plain and ordinary words of the agreement, the general principles applicable to contractual interpretation, the contra proferentum rule.

[18] While I am grateful to counsel for their submissions, it is unnecessary to recount them here because they are well-established and not in dispute. It is a question of applying them to the PMA and the issue in dispute here.

Discussion

[19] The manner in which this Court should determine the dispute is set out in s 85(2) of the Act[1]:

> The (Court) 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.

[20] The general principles of law applicable to this dispute are those relating to contractual interpretation. Those principles were expounded in the judgments in the Supreme Court in *Vector Gas Limited v Bay of Plenty Energy Limited*[2]. A succinct exposition is contained in the judgment of Tipping J[3]:

> The ultimate objective in a contract interpretation dispute is to establish the meaning the parties intended their words to bear. … The language used by the parties, appropriately interpreted, is the only source of their intended meaning. As a matter of policy, our law has always required interpretation issues to be addressed on an objective basis. The necessary inquiry therefore concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean. The court embodies that person. To be properly informed the court must be aware of the commercial or other context in which the contract was made and of all the facts and circumstances known to and likely to be operating on the parties' minds. …

[21] Applying those principles to the PMA, I reach the conclusion that the parties did intend that, if their occupation of the property ended without them purchasing it, the Tuivaitis would receive recompense for their payment of an *"occupancy rate"* which exceeded the market rental of the property. I am drawn to that conclusion by the plain wording of the last bullet point in the Summary, particularly when viewed in the context of the PMA as a whole.

[22] First, I consider that the word *"contribution"* as used in the last bullet point of the Summary is intended to apply to the $800 weekly payment. The word is used in only two other provisions of the PMA: first, in paragraph 7 of the section of the PMA

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1 Which is applicable to this Court on appeal pursuant to s 117(4)
2 [2010] NZSC 5; [2010] 2 NZLR 444
3 At para [19]

relating to the Tuivaitis' right to purchase; secondly, in the penultimate bullet point of the Summary[4]. The former provision states:

> 7. The Property Owner also retains the right not to accept any offer for the sale of the property but will ensure to recognise the value of the Property Manager's contribution in the equation of the Sale and Purchase.

[23] It is clear that the contribution referred to in that paragraph is that which the Tuivaitis were making by paying the occupancy rate. That is because the earlier paragraphs of the relevant section made provision for the calculation of a credit in favour of the Tuivaitis against the price at which they could purchase the house. It was specifically stated that this credit was to account for the occupancy payments made. It was calculated as a proportion of the amount of the occupancy rate paid annually.

[24] In light of that, the *"contributions"* referred to in the penultimate bullet point of the Summary can only be sensibly read as a reference back to the section relating to the right to purchase the property. It is logical to read the reference to the Tuivaitis' contribution in the next and final bullet point as referring to the same contribution, that is, by way of payment of the occupancy rate.

[25] That interpretation also gives commercial sense to the PMA. If the Hunts intended (as they plainly did) to give the Tuivaitis a reduction in the purchase price calculated as a percentage of the occupancy rate in the event they purchased the property, it is logical that they should account to them for a similar sum in the event that their occupancy ended without such a purchase.

[26] It also makes commercial sense in that the evidence established that $800 per week was well over the market rental, which was fixed by the Adjudicator at $695 per week at the end of the occupancy period. That that was understood by the parties is evidenced by the fact that the PMA clearly provided for an effective refund of part of it in the event of a purchase. It is also obvious from the fact that the evidence showed that figure was fixed, not by reference to the rental market, but simply because that was the amount of the Hunts' mortgage payments (and could be increased if

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[4] See paragraph [5] supra

thesyincreased). Obviously, the amount of a houseowners' mortgage payments is not a measure of the property's market rental. It is illogical and against the spirit of the PMA, expressed in the Summary, that the Tuivaitis should receive recompense for the amount by which the occupancy rate they paid exceeded the market rental in the event they purchased the property, but not if they did not.

[27] It is obvious from the above that I do not agree with the Adjudicator that the occupancy rate was simply the equivalent of rent, even putting aside the language the parties used for cultural reasons. It obviously included an amount for the right to occupy the property, but was not fixed by that measure and was clearly understood by the parties to exceed a fair charge for that right alone. Thus, it was to be partially refunded when the occupancy relationship ended, however it ended.

[28] It also follows that I do not agree with the Adjudicator that the *"contribution"* referred to in the final bullet point of the Summary was intended to refer to physical improvements or renovations made to the property by the Tuivaitis. There are a number of reasons for that. First, I consider that the *"contribution"* referred to was intended to mean the occupancy rate for the reasons already given so could not apply to physical improvements to the property. Secondly, the word *"contribution"* is not used at all in the separate section of the PMA relating to that issue. Thirdly, that section itself provides reimbursement to the Tuivaitis for improvements, not in money terms but in terms of occupation without charge for an appropriate period.

[29] Finally, while the general principles of contractual interpretation have led me to the conclusion I have reached, I consider that it also accords with the substantial merits and justice of the case. The Tuivaitis should pay only the market rental for their occupation because occupation was all they received. By the same token, there is no injustice to the Hunts in receiving no more than a fair market rental.

[30] I do not agree with the Adjudicator's view that the Tuivaitis' actions in continuing to pay the $800 per week occupancy rate when they could have walked away at any time in the three years after they became unable to purchase, showed they thought that that sum was a not unreasonable rental. That assumes that when they

were making the payments they were aware that no part of them would be refunded. Their claim to the Tribunal belies that assumption.

[31] Nor do I agree with the assumption made by the Adjudicator that the Tuivaitis were willing to take the risk of paying the mortgage amount for the opportunity to house a very large family and to purchase the property. That overlooks the very clear provision for a substantial proportion of the occupancy rate to be credited against the purchase price in the event of a purchase. That shows the Tuivaitis were not prepared to pay the $800 per week rent merely for occupation and the option to purchase the property.

Result

[32] The appeal is allowed. Order 3 made by the Tribunal is quashed. This is a case where it is unnecessary to order a rehearing in the Tribunal because there is sufficient information available for this Court to make the necessary order.

[33] What is required, is to fix the amount of the credit. The only information on which to do so is the Tribunal's finding that at the date of its hearing, the market rental was $695 per week. It is likely that the market rental for earlier periods of the occupancy was less, but there is no evidence about that. Furthermore, the PMA did not provide that that was to be the measure of the percentage of the Tuivaitis' contribution which was to be reimbursed. No formula was stipulated. It would have been a matter for negotiation in the first instance. In all the circumstances, I consider a fair recompense is not less than the difference at the end of the relevant period, that is, $105 per week.

[34] I make an order that the Hunts credit the Tuivaitis with a sum calculated at $105 per week from 10 February 2014 to 5 June 2017 against the sum which the Tribunal ordered them to pay. If this creates a balance in the Tuivaitis' favour, it is to be paid to them immediately.

[35] The parties have leave to file memoranda regarding costs within 14 days if they cannot agree on them.

C N Tuohy
District Court Judge