

**IN THE DISTRICT COURT
AT TAUMARUNUI**

**I TE KŌTI-Ā-ROHE
KI TAUMARUNUI**

**CIV-2018-063-000396
[2018] NZDC 25805**

BETWEEN JOHN FRANCIS WAIRAMA SMYTHE
Appellant
AND HELENA BEATRIX GRAAF
Respondent

Hearing: 12 December 2018
(Heard at Hamilton)
Appearances: Appellant appears in Person
Respondent appears in Person
Judgment: 13 December 2018 at 10.00 am

**RESERVED JUDGMENT OF JUDGE R L B SPEAR
[Appeal against Order of Tenancy Tribunal]**

[1] This long running dispute between the parties has reached this Court by way of an appeal by Mr Smythe against an order of the Tenancy Tribunal dated 14 August 2018 to refuse his second application for a rehearing of the initial tenancy claim brought by Ms Graaf.

[2] A brief chronology of the steps taken in this proceeding is as follows:

- (a) **19 July 2016** – Ms Graaf applies to the Tenancy Tribunal as landlord seeking from Mr Smythe rent arrears and compensation for cleaning and rubbish removal, missing items and various other claims. This relates to Ms Graaf’s property at [address deleted] in the Taumarunui District;

- (b) **26 October 2016** – Hearing of the Tenancy Tribunal at Taumarunui;
- (c) **31 October 2016** – Decision of the Tenancy Tribunal ordering that Mr Smythe pay Ms Graaf \$1208.09, made up as follows:

Rent arrears to 17 June 2016	600.00
Costs to be paid to landlord, cleaning and rubbish removal	350.00
Missing items (first aid kit, garden stakes, black paint stain)	237.65
Filing fee reimbursement	20.44

Total	\$1208.09
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All other claims of landlord dismissed.

- (d) **18 July 2017** – Mr Smythe applies for rehearing (out of time);
- (e) **8 September 2017** – Application for rehearing dismissed;
- (f) **24 July 2018** – Second application for rehearing (again out of time) and for stay of proceedings;
- (g) **14 August 2018** – Second application for rehearing/stay dismissed;
- (h) **24 August 2018** – Appeal filed.

[3] An appeal against a decision of the Tenancy Tribunal is required to be filed within ten working days of the date of the decision¹. There is no jurisdiction to extend the time for appealing. Accordingly, the only order able to be appealed is the order of the Tenancy Tribunal of 14 August 2018 dismissing Mr Smythe’s second application for a rehearing.

[4] I bring to the registrar’s attention two related sets of proceedings currently filed in the District Court at Taumarunui:

¹ s. 117(6) Residential Tenancies Act 1986

- (a) CIV-2017-068-40 an application by each of Mr Smythe and Ms Graaf against each other seeking restraining orders. Those applications are for hearing on 21 March 2019 at 2.00 pm;
- (b) CIV-2018-068-24 a claim by each of Mr Smythe and Ms Graaf against each other in the Disputes Tribunal at Taumarunui.

[5] Both Mr Smythe and Ms Graaf confirmed to me today that they wish to abandon both those claims to the Disputes Tribunal. The registrar may now enter a withdrawal of each of the claims in that proceeding.

[6] Returning to the appeal, it is necessary to have some regard to the substantive issue in dispute in relation to the initial application to the Tenancy Tribunal by Ms Graaf against Mr Smythe.

[7] Ms Graaf claimed that Mr Smythe occupied her property for a time as her tenant. Mr Smythe disputes that to be so. Essentially, Mr Smythe's response is that he was at the time a good friend of Ms Graaf's and agreed to look after her property as he had the use of adjacent land for his business. However, he asserts that he was never more than the "guardian" of the property and on the basis that he would stay at the house as often as possible with the ability to use the property incidental to his horse trekking business. Mr Smythe contends that he was at all material times renting a property in Owhango.

[8] Mr Smythe did not appear at the initial hearing before the Tenancy Tribunal on 26 October 2016. The application by Ms Graaf was accordingly determined in Mr Smythe's absence. The reason for his absence was the subject of the first application for a rehearing.

[9] In a detailed decision given on 31 October 2016, the Tenancy Adjudicator determined that there was a tenancy between Ms Graaf and Mr Smythe arising from an oral agreement between the parties that allowed Mr Smythe to reside at the premises without paying rent in exchange for carrying out certain work on the farm. Furthermore, that in May 2014 the parties were held to have altered their original

agreement that required Mr Smythe to pay rent at \$200 per month from 5 June 2014. Furthermore, that the rental was increased by agreement to \$400 per month from 5 June 2015. The last payment was made on 5 May 2015 which covered the rent up to the end of April 2015. This identified the claimed rental deficiency of \$600.

[10] The Adjudicator also accepted the evidence from Ms Graaf that the premises were not left by Mr Smythe at the end of the tenancy in a reasonable, clean and tidy condition and that rubbish was not removed. Furthermore, a first aid kit and garden stakes were missing from the tenancy at the conclusion of it. Also, Mr Smythe was held to have used a tin of black stain owned by Ms Graaf to paint Mr Smythe's horse truck.

[11] Of some significance, however, is that the Adjudicator did not accept a number of aspects of Ms Graaf's claim relating to the alleged loss of a torch, a hairdryer, a duvet and a battery that Ms Graaf asserted must have been removed by Mr Smythe.

[12] The Adjudicator also refused a claim insofar as compensatory damages for phone calls and (as described) "living costs" as well as further claim for exemplary damages for:

- (a) Careless shearing causing damage;
- (b) Threatening behaviour by the tenant;
- (c) Verbal abuse and intimidation;
- (d) Assault;
- (e) Possession of a firearm;
- (f) Drug possession.

[13] On my consideration of the material that was before the Tenancy Tribunal Adjudicator at that hearing, I am in no doubt that the Adjudicator dealt with the claims in the absence of Mr Smythe in a careful and considered manner, with full reasons

being given. It is clear that the Adjudicator did not consider Ms Graaf's claim uncritically given the Adjudicator's refusal of a significant portion of the claim.

[14] On 18 July 2017, some eight months later, Mr Smythe applied for a rehearing stating that he had been unable to attend the hearing on 25 October 2016 "due to (his) work commitments". This application was heard on 8 September 2017 by the same Adjudicator. Both parties attended that hearing by telephone. The Adjudicator correctly identified that the Tenancy Tribunal's power to order a rehearing² arose when it was established by the applicant that "*a substantial wrong or miscarriage of justice has or may have occurred or is likely to occur*". Ms Graaf presented significant written material to the Adjudicator in advance of this first application for a rehearing as against a brief letter from Mr Smythe.

[15] The Adjudicator noted that the application for rehearing was out of time and that accordingly it was incumbent on Mr Smythe to persuade the Tribunal that an extension of time for bringing the application for rehearing should be granted to avoid a "serious risk of injustice".³ The Adjudicator noted that Mr Smythe had confirmed that he had received notification by post and by text messages as to the date of the initial hearing but states that he was unable to attend the hearing due to work commitments in the South Island. He was at that time on tour for "Kiwi Experience". Mr Smythe indicated further that he had difficulty finding any contact details to notify the Tribunal prior to the hearing "despite making countless telephone calls and going 'online'". Perhaps it is timely to note here that the Registrar of the District Court at Taumarunui is the defendant's sister and so his application that he was unable to find any contact details for the Tenancy Tribunal has to be seen with that background. In any event, the Adjudicator found that Mr Smythe had failed to establish the grounds for a rehearing:

I find that Mr Smythe was properly served and fairly informed of the nature of the claim against him. I do not accept that Mr Smythe was unable to contact Tenancy Services or the District Court at Taumarunui prior to the hearing or at any time prior to the late filing of rehearing application. The notice of hearing clearly states, "**for more information visit www.tenancy.govt.nz or contact 0800 836 262**".

² Section 105(1) Residential Tenancies Act 1986.

³ *Campbell v Pickles* [1982] 1 NZLR 477.

In addition, the backing sheet attached to the original Order clearly sets out contact details with the Tenancy Tribunal, Ministry of Business, Innovation and Employment (MBIE) and the Bond Centre. Being unhappy or dissatisfied with the decision of the Tribunal is not a ground for rehearing (*Hobsonville Realty Ltd v Amosa*, DC Waitakere, CIV-2008-090-002567, 9 February 2009). I am not persuaded there has been a substantial wrong or that a miscarriage of justice has occurred.⁴

[16] The Adjudicator was not prepared to accept the application for hearing out of time given that nearly nine months had passed for Mr Smythe to consider the orders made against him and take action well beforehand. The Adjudicator did not consider that a serious risk of injustice had been made out.

[17] Mr Smythe then applied a second time on 24 July 2018 for a rehearing primarily on the basis that there was new evidence available that confirmed that he was never a tenant of Ms Graaf. The application was accompanied by documentation that to a large extent has been replicated by material that Mr Smythe has placed before me for the purposes of this appeal.

[18] The Adjudicator dismissed the second application for a rehearing in a detailed decision given on 14 August 2018. That application was of course also out of time as was the first application for a rehearing and subject to the same consideration accordingly as set out as for the first application; namely, that a rehearing should be allowed if it was necessary to avoid a “serious risk of injustice”.

[19] While Mr Smythe presented material to the Adjudicator and again placed that before me contending that this was “new evidence” and that it established that he was never a tenant at any time of Ms Graaf’s property, the real difficulty he faces in that respect is that this is not “new evidence” but evidence that was available to be presented to the Tenancy Tribunal at the hearing of Ms Graaf’s claim on 26 October 2016. While Mr Smythe may well have had work commitments in the South Island, and there is no dispute about this, the proper course for him to have followed would be to have sought an adjournment of the hearing of Ms Graaf’s claim before the Tenancy Tribunal so that he could attend and present such material as was available to him at that time. Notwithstanding that he was properly served and notified of the

⁴ *Graaf v Smythe* Tenancy Tribunal 4036985 Taumarunui, 8 September 2017 at para 10.

hearing date, he chose not to attend or to seek an adjournment of the hearing. That was clearly a conscious decision made by him to prefer his work commitments to addressing Ms Graaf's application for monetary compensation.

[20] There is a need for any court or tribunal proceeding to be progressed in accordance with the appropriate rules relating to that court or tribunal to ensure that the proceeding is brought to a conclusion for the benefit of all concerned. There is a clear need for finality to be achieved in any dispute which is one of the reasons why there is a limited ability to rehear a claim, whether it be before the Tenancy Tribunal, the District Court or the High Court. This is one of the fundamental principles upon which the system of justice depends.

[21] The Adjudicator carefully considered the second application for a rehearing, the Adjudicator approached it having regard to the correct legal principles and then dismissed it as being unsubstantiated and inappropriate. I entirely agree with the Adjudicator in the approach she has taken in this respect.

[22] Before I conclude this judgment, I need to say something about the way in which the parties have conducted themselves in respect of this proceeding and generally in respect of matters that remain alive between them. Some of the material provided to me indicates that Ms Graaf has made serious allegations of misconduct on the part of Mr Smythe, which has clearly aggravated Mr Smythe and it has served to ensure that this dispute between them continues to rage. Mr Smythe contends that the allegations made against him of serious criminal conduct are unfounded and untrue and that he has accordingly been defamed by Ms Graaf that has been to his detriment within the small community in which they both reside. I am not impressed with Ms Graaf's attempt to turn a claim for tenancy related loss into a substantive attack on Mr Smythe's character. The allegations that she has made had no place in her claim for the tenancy related loss and it has simply stoked the fire in respect of the on-going issues between them.

[23] The appeal is dismissed.