IN THE DISTRICT COURT
AT KAITAIA

I TE KŌTI-Ā-ROHE
KI KAITAIA

CIV-2018-029-000156
[2019] NZDC 3813

BETWEEN	GRAEME GERAGHTY LEONIE JONES Appellants
AND	URUPANI RAUI Respondent

Hearing: 28 February 2019

Appearances: Appellants appear in Person
Respondent appears in Person

Judgment: 5 March 2019

DECISION OF JUDGE K B de RIDDER

Background

[1] On 24 July 2018 the Tenancy Tribunal ordered the appellants to pay the respondent the sum of $6,432.48.

[2] On 24 October 2018 the Tribunal dismissed the appellants application for a rehearing of the case.

[3] The appellants now appeal against the refusal of the Tribunal to grant a rehearing.

[4] Ms Raui entered into a tenancy agreement with Ms Jones and Mr Geraghty with the tenancy commencing on 27 July 2017. The house was a three-bedroom house, but there was also a semi-detached flat on the property occupied by a Mr Allen.

[5] When the tenancy began there was a single power meter for the property recording power used at both the house and the semi-detached flat. Ms Raui paid the power bills. She became concerned at the cost of the monthly power bills and raised this issue with Ms Jones but did not receive any satisfaction.

[6] Ms Raui was given a 90-day notice to vacate the premises on 7 June 2018. She then applied to the Tribunal for reimbursement of the power accounts and for an order that the 90-day notice to terminate her tenancy was a retaliatory notice and therefore of no effect. The Tribunal ruled that the termination notice was not retaliatory.

[7] The Tribunal determined that as there was no means of measuring Ms Raui's power use for the house she occupied then, pursuant to s 39(3) of the Residential Tenancies Act she could not be liable and therefore was entitled to reimbursement by the landlord. Ms Jones and Mr Geraghty were dissatisfied with that and applied for a rehearing. That application was dismissed on the grounds that the threshold test required by s 105 of the Act that there had been a substantial wrong or miscarriage of justice was not made out.

Grounds of appeal

[8] The notice of appeal asserts that the adjudicator conducted the hearing in an unfair manner as he indicated at the hearing that he had not read the correspondence the applicants had filed in support of their application for a rehearing, that their statements had been ignored, and that they had received legal advice that the Tribunal had incorrectly interpreted s 39(3) of the Act in its decision of 24 July 2018.

[9] In support of the appeal the appellants filed further written submissions dated 23 February 2019 together with supporting documentation.

[10] Both parties appeared at the hearing of this appeal and made brief oral submissions which, in essence, simply repeated the material already before the Court.

Approach on appeal

[11] It is now well established that the appeal proceeds by way of rehearing[1] that is this Court is to take into account the evidence before the Tribunal and may consider any new evidence before reaching its own determination on the matter, which in this case, is whether or not a rehearing of the original application should be ordered.

[12] In his written submissions of 10 October 2018 in support of the application for rehearing Mr Geraghty focused on what he says was the power sharing arrangements between Ms Raui and Mr Allen in relation to lawnmowing whereby Mr Allen mowed the lawns as his contribution for the power usage of his semi-detached flat, asserts that the weekly rental figure was reduced to take into account Mr Allen's use of power in his flat, and that Mr Raui used the dwelling as a four bedroom home to accommodate up to 11 people living in it which meant she was paying substantially below a fair market rent.

[13] In his written submission Mr Geraghty stated:

> I do not accept the order as fair and reasonable to pay Urupaui Raui $6,432.48 for her power consumption during her tenancy.

[14] In its decision of 25 October 2018 dismissing the application for a rehearing the Tribunal acknowledged that Mr Geraghty considered the outcome to be unfair.[2]

[15] In the written submissions dated 23 February 2019 the appellants traverse much of the issues that were considered by the Tribunal in the original hearing, but it is also clear that the appellants seek also to appeal the original decision of the Tribunal ordering them to pay the sum in question. This appeal is confined strictly to the decision of the Tribunal not to grant a rehearing.

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[1] *Wellington City Council v McMillan* [2003] DCR 50 and *Housing New Zealand Corporation v Salt* [2008] DCR 697

[2] At paragraph [13].

Discussion

[16] Before a rehearing can be ordered it must be established that a substantial wrong or miscarriage of justice has or may have occurred in the original hearing. The application for a rehearing was dealt with by the Adjudicator having regard to that statutory requirement.

[17] In the case of *Wellington City Council v McMillan* the District Court commented as follows[3]:

> ….an application for rehearing can only succeed if the applicant shows that a substantial wrong or miscarriage of justice has or may have occurred or is likely to have occurred. These are strong words which set a high standard. They most obviously apply, as the adjudicator pointed out, to cases of procedural error, e.g. a hearing which takes place in the absence of a party who has not been given notice of it; the improper admission or rejection of evidence; misconduct by the adjudicator or by one of the parties or a witness. The words may also encompass the discovery of new and important evidence not previously available.

[18] In the transcript of the hearing of the application for a rehearing on 25 October 2018 the Adjudicator made the following observations at page 9:

> Two questions to be determined, and neither of them required me to decide what would be a fair outcome. That's not my job. It is not me to impose my subjective ideas about what's fair and what is reasonable. My job is to apply the Residential Tenancies Act to the claims that are put before the Tribunal…The section on outgoings says that if there is a type of outgoing that is incurred whether or not the property is occupied, like rates and insurance and those sorts of things, the landlord has to pay those. If it's a consumption-based outgoing, if it's something that only gets sort of used if there is someone living there, the tenant pays for it. But, the tenant pays for that actual consumption, okay? So, none of that wording requires me to ask what would be fair here? What do I think would be reasonable and appropriate? I just apply the law, and the law gives me the answer. Now, sometimes there's interpretation involved in the law. Was the landlord motivated? Well, you know, that can be a difficult question to answer sometimes, but that's the question to answer.
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> So, I just want to make it clear that there was nothing in my decision then or in my decision today that will say, "This is what I think is a good, fair, reasonable, appropriate and suitable answer." That's not my job.

[3] Paragraph [18]

[19] The application for the rehearing and the submissions made by the appellants in support of the application make it clear that they considered the result of the original decision to be unfair and unreasonable. Although not articulated as such by the applicants for the rehearing that assertion raises the issue of whether or not s 85 of the Act has been taken into consideration in the original decision, and again in the decision refusing the application for rehearing. Section 85 provides as follows:

> (1) Subject to the provisions of this Act and of any regulations made under this Act, the Tribunal shall exercise its jurisdiction in the 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.
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> (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.

[20] The High Court commented on this provision in the case of *Welsh v Housing New Zealand Limited* High Court Wellington AP35/2000 6 March 2001 at paragraph 30 as follows:

> If a remedy is justified by the principles of law applicable to the matter, the Tenancy Tribunal will have to consider the merits and justice of the case and whether the strict application of the law gives rise to a fair result, but, if there is no remedy provided for by the law it is not open to the Tenancy Tribunal to invent one.

[21] In this case there was no reference by the adjudicator to the provisions of s 85 in the reasons given for refusing a rehearing. No doubt this was because that provision was not referred to the Adjudicator. The order in question was for the payment of a very significant sum of money by the landlord on the basis that it was not possible to exclusively attribute the tenant's power use to her based on a strict application of s 39(3). However, it is clear that the applicant for the rehearing considered this to be an unfair and unreasonable result which, in my view, triggered a consideration of whether or not a rehearing should be granted in order to consider the possible application of s 85.

[22] The net effect of the original order is that the tenant Ms Raui had the benefit of a tenancy for over a year at what appears to be a market rental at least, or, in the view of the appellants, perhaps less than market rental, but has also received free

power for that period when a significant number of people were occupying the house. It could be argued that although power could not be exclusively attributable to Ms Raui on the basis of a meter reading, clearly power was being used in her household by a significant number of people as opposed to the power being used by Mr Allen living alone in the flat. On that basis at least 50% of the power bills paid by Ms Raui must have been for power use in her household, and in that sense, that can be said to be exclusively attributable to her. Such an approach it appears to have been at least contemplated in the decision of *Green v McGregor*.[4]

[23] It is clear from the comments of the Adjudicator recorded at [18] above that the adjudicator took a strict legal approach and applied a strict application of the words "exclusively attributable" used in s 39(3) of the Act. There is an argument that whilst the strict legal application of s 39(3) means that Ms Raui does not have to pay for any of her power use, an application of the principle of determining the matter according to the substantial merits and justice of the case, and considering whether that, "… strict application of the law gives rise to a fair result…,"[5] might arguably lead to a result where Ms Raui should be paying something for her power and not, effectively, receiving it for free. Also by requiring the landlord to pay for the power clearly used by Ms Raui, the benefit of rental income from the property to the landlord is significantly reduced by the amount of the order.

[24] In all the circumstances, where there is an argument that s 85 might apply to produce a different result and that provision has not been considered, then that could be said to amount to a procedural error which in turn has possibly resulted in a substantial wrong or miscarriage of justice.

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[4] *Green v McGregor* [2015] NZTT Waitakere 1292 at [14].
[5] *Welsh v Housing New Zealand Limited* High Court Wellington AP35/2000 6 March 2001

[25] For those reasons I would allow the appeal, and grant the appellants a rehearing of the original claim so that the application or otherwise of s 85 can be considered. That is not to say that a different result will necessarily occur as a result of the rehearing. That will be a matter entirely for the Tribunal. But in a rehearing of the matter the appellants are entitled to have the possible application of s 85 considered.

K B de Ridder
District Court Judge