IN THE DISTRICT COURT
AT ROTORUA

I TE KŌTI-Ā-ROHE
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE

CIV-2019-063-000220
[2019] NZDC 15072

IN THE MATTER	Of an appeal against a decision of the Tenancy Tribunal at Rotorua
BETWEEN	OLIVE WHAKATIHI Appellant
AND	RENT ASSURED NZ LIMITED Respondent

Hearing: 26 July 2019

Appearances: Appellant in person
D Van Den Broek and T Williams for the Respondent

Judgment: 6 August 2019

RESERVED JUDGMENT OF JUDGE P G MABEY QC

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[1] The Appellant Olive Whakatihi (Olive) is the tenant of 5A Spinel Place, Pukehangi, Rotorua (the property). The tenancy is managed by Rent Assured NZ Limited the respondent.

[2] Rent Assured NZ Limited gave concurrent 90 day notices to Olive and also to the tenant of her neighbouring property 5B Spinel Place.

[3] Olive challenged the issue of the 90 day notice in the Tenancy Tribunal. She alleged the notice was retaliatory and invalid. The Tribunal disagrees.

[4] Olive now appeals the Tribunal's decision to this Court and execution of the 90 day notice has been stayed pending the outcome of the appeal.

[5] Olive took up a periodic tenancy of the property on 26 January 2018. She lives there with her children and dog.

[6] The Tribunal had evidence of ongoing conflict between Olive and her neighbours at number 5B Spinel Place. There are cross allegations between them.

[7] Olive maintains the neighbours are difficult, subject her and her children to racist abuse, aggravate her dog, obstruct her access to her property, make noise and have parties and make false complaints about her to the police.

[8] The neighbours deny all of this saying that Olive is aggressive, irrational and makes untrue allegations against them.

[9] The Tribunal had evidence of correspondence between both tenants and the respondent company where complaints were made and which show that Ms Van Den Broek and Ms Williams have responded in an attempt to resolve the numerous conflicts.

[10] I have seen the documents that were available to the Tribunal at the hearing when both parties were represented as they are before me, Olive in person and Ms Van Den Broek and Ms Williams for the company. The documents disclose a clear conflict between the tenants of both properties.

[11] It is evident that Ms Van Den Broek and Ms Williams became exasperated in their attempts to smooth matters out to the point that they felt the only way to resolve the unseemly and ongoing conflict was to give both tenants a 90 day notice.

[12] The tenant of number 5B Spinel Place has left and a new tenancy has been entered into by replacement tenants.

[13] Olive refuses to move maintaining that the notice she was given is in retaliation for her complaints about her neighbours.

[14] The relevant provisions of The Residential Tenancies Act 1986 are:

> **51 Termination by notice**
>
> (1) Subject to sections 52, [53, 53A, 59, and 59A], the minimum period of notice required to be given by a landlord to terminate a tenancy shall be as follows:
>
> [(a) where the owner of the premises requires the premises as the principal place of residence for the owner or any member of that owner's family, 42 days:]
>
> (b) Where the landlord customarily uses the premises, or has acquired the premises, for occupation by employees of the landlord, that fact being clearly stated in the tenancy agreement, and the premises are required for occupation by such an employee, 42 days:
>
> [(c) where the owner is required, under an unconditional agreement for the sale of the premises, to give the purchaser vacant possession, 42 days:]
>
> (d) In any other case, 90 days.
>
> (2) Subject to sections 52 [to 53A, 59, and 59A], the minimum period of notice required to be given by a tenant to terminate a tenancy shall be 21 days, in any case.
>
> (3) Every notice to terminate a tenancy shall—
>
> (a) Be in writing; and
>
> (b) Identify the premises to which it relates; and
>
> (c) Specify the date by which the tenant is to vacate the premises; and
>
> [(ca) in any case where the tenant is given less than 90 days' notice, set out the reasons for the termination; and]

(d) Be signed by the party giving the notice, or by that party's agent.

(4) In a notice to terminate a tenancy, no special form of words shall be required; and no such notice shall be held invalid for any failure to comply strictly with the requirements of subsection (3) of this section so long as the notice is in writing, the intention to terminate the tenancy on a particular date or on the expiry of a particular period is stated clearly in the notice, and that any non-compliance is not such as to mislead or affect unjustly the interests of the recipient.

(5) A notice to terminate a tenancy may be given on any day, and the period of notice may be expressed to expire on any day, regardless of the date on which the tenancy commenced or of any date on which any rent is to be paid.

[(6) A party who has given an effective notice to terminate a tenancy—

(a) may, at any time before the expiry of the period of notice, revoke the notice with the consent of the other party; but

(b) may give a further notice to terminate the tenancy only if the prior notice is revoked.**]**

(7) Where a party has given a notice to terminate the tenancy and subsequently realises that, because of—

(a) Some error in the way in which the period of the notice or the date of the expiry of that period is expressed in the notice; or

(b) Some delay in serving the notice,—

the period of notice given is less than the minimum prescribed by subsection (1) or (as the case may require) subsection (2) of this section, that party may, with the agreement of the other party or (failing such agreement) with the consent of the Tribunal, give to the other party a further notice varying the first notice so as to bring the period of notice given up to or above that minimum so required.

(8) Every notice given under subsection (7) of this section shall comply with the requirements of subsection (3) of this section.

(9) The Tribunal shall not give its consent under subsection (7) of this section unless it is satisfied—

(a) That the error in the notice or the delay in serving the notice was inadvertent; and

(b) That the party who gave the notice has sought to correct the matter as soon as practicable after realising that the period of notice given is inadequate; and

(c) That it would not be unfair to the other party to allow the original notice to be varied in the manner proposed.

54 Tribunal may declare retaliatory notice of no effect

(1) Within [28] working days after receipt of a notice terminating the tenancy, being a notice that complies with the requirements of section 51 [(or, in the case of a boarding house tenancy, section 66U)], the tenant may apply to the Tribunal for an order declaring that the notice is of no effect on the ground that, in giving the notice, the landlord was motivated wholly or partly by the exercise or proposed exercise by the tenant of any right, power, authority, or remedy conferred on the tenant by the tenancy agreement or by this or any other Act or any complaint by the tenant against the landlord relating to the tenancy.

(2) If, on any such application, the Tribunal is satisfied that the landlord was so motivated in giving the notice, it shall declare the notice to be of no effect unless the Tribunal is satisfied that the purported exercise by the tenant of any such right, power, authority, or remedy, or the making by the tenant of any such complaint, was or would be vexatious or frivolous to such an extent that the landlord was justified in giving the notice.

[(3) The giving of a notice terminating a tenancy is an unlawful act if the notice is declared under subsection (2) to be of no effect.

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.

118 Powers of District Court Judge on appeal

(1) On the hearing of an appeal under section 117 of this Act, a District Court Judge may—

(a) Quash the order of the Tribunal and order a rehearing of the claim by the Tribunal on such terms as the Judge thinks fit; or

(b) Quash the order, and substitute for it any other order or orders that the Tribunal could have made in respect of the original proceedings; or

(c) Dismiss the appeal.

(2) In ordering a rehearing under subsection (1)(a) of this section, the District Court Judge may give to the Tribunal such directions as the Judge thinks fit as to the conduct of the rehearing.

(3) The procedure at an appeal under this section shall be such as the Judge may determine.

[15] Section 51 has been complied with. A periodic tenancy can be terminated on a 90 day notice.

[16] The Tribunal's powers under s 54 to declare a termination notice to be of no effect requires proof on the balance of probabilities that:

> *The giving of the notice [in this case by the landlord's agent and property manager] was motivated wholly or partly by the proposed exercise of a tenant of any right … conferred by the tenancy agreement ….*

[17] Olive's tenancy agreement, and the general law, entitled her to peaceful occupation of the property. She says that her tenancy has been terminated because the giving of the notice was motivated wholly or partly by her insistence upon her right of quiet enjoyment. She says because she complained about her neighbours interfering with that right the landlord has responded by terminating the tenancy.

[18] She says that the landlord, in the form of the respondent company, simply wants to remove her notwithstanding that she is otherwise a good tenant. She says because she complains she must go and there is no other reason.

[19] There is understandably little case law interpreting s 54. The plain and ordinary meaning of the words in that section speak for themselves.

[20] If a landlord is motivated to terminate a tenancy by reason of a tenant asserting a right that not need to be the landlord's sole motivation. There may be other reasons but there needs to be at least in part a motive which responds to the tenthat the landlord's right to terminate the tenacy under s 51 was lawfully excercisedant asserting a right.

[21] The Collins dictionary definition of motive is:

> *The reason, whether conscious or unconscious, for a certain course of action.*

[22] *Motivate* and *motivated* have corresponding meanings.

[23] Thus for the Tribunal to rule that the 90 day notice given to Olive was invalid it must be established on balance that, at least in part, the reason for the notice was Olive asserting her right to quiet enjoyment of the property.

[24] In its written decision dated 22 May 2019 the Tribunal noted the evidence given by Olive at the hearing and summarised her complaints against the neighbours. The Tribunal recorded that Olive's evidence was that the landlord, in the form of the property manager, failed to do anything in response to her valid complaints against the neighbours.

[25] The landlord represented at the hearing by Ms Van Den Broek and Ms Williams said that both neighbours had been complaining against each other and that they were faced with a "he said," she said" scenario that was incapable of peaceful resolution.

[26] Ms Van Den Broek and Ms Williams said that contrary to what Olive says they had been at pains to attempt to resolve the conflict by speaking with both parties and had consistently responded to all complaints.

[27] They were able to produce evidence from tradesman who had attended Olive's address at 5A Spinel Place to carry routine work but had been abused without reason and had left.

[28] The Tribunal heard an audio recording of a verbal exchange between Olive and the residents of 5B Spinel Place where allegations were made by Olive alleging threats to herself and her children, racial abuse and "rarking up" her dog. It is clear from the transcript that Olive was angry and expressed her views to the neighbours using multiple expletives.

[29] Having heard both parties and having reviewed all of the documents available the Tribunal found that the landlord had taken reasonable steps to try and resolve the issue between both neighbours. The Tribunal also said that in pursuing those attempts it was reasonable for the landlord to request from both tenants' evidence which supported their "he said she said" allegations. Olive was unable to provide any evidence in the form of photographs, videos or audio recordings whereas the tenant of 5B Spinel Place did. The landlord was also able to rely upon the independent evidence of the tradesman who were faced with what they say was Olive's abuse and unreasonable attitude.

[30] The Tribunal found that contrary to Olive's allegation of retaliation the landlord adopted a last resort action to the ongoing conflict between both tenants to end each tenancy and that was a fair, sensible and reasonable resolution to the conflict.

[31] For that reason Olive's claim of retaliation was rejected and the notice was upheld.

[32] Although not expressly stated in s 117 of the Act, appeals to this Court from the Tenancy Tribunal are by way of rehearing on the Tribunal's record.

[33] In *Housing New Zealand Corporation v Salt* this Court said: [1]

> *There is something akin to a presumption that the decision appealed from is correct and it is also customary for this Court to exercise restraint in interfering with discretionary decisions. This Court will only differ from the factual findings of the Tenancy Tribunal if:*
>
> *(a) The conclusion reached was not open on the evidence, that is, where there is no evidence to support it; or*
>
> *(b) The Tribunal was plainly wrong in the conclusion it reached.*

[34] I address matters in that light.

[35] I have considered all of the information available to the Tribunal. At the appeal hearing I heard directly from the parties that appeared before the Tribunal and have had the benefit of their oral submissions together with written submissions filed by Olive.

[36] On all the information available to me I am more than satisfied that the Tribunal was correct in its ruling. There is not a hint of retaliation in the actions of the landlord and Olive has not persuaded me that the 90 day notice given to her was motivated wholly or in part by retaliation for her insistence upon her right to quiet enjoyment.

[37] Undoubtedly she has that right. Undoubtedly she is entitled to insist upon it. However I am quite satisfied that the landlord, in the form of Ms Van Den Broek and Ms Williams, went to considerable lengths to quell the dispute between the

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[1] *Housing New Zealand Corporation v Salt* [2008] DCR 697.

neighbours, acted in response to Olive's complaint and those of the neighbours and as a last resort gave notice to both tenants.

[38] The independent evidence of the tradesman who were subject to Olive's calumny was persuasive before the Tribunal and is persuasive before me.

[39] For whatever reason Olive was unable to get on with the occupants of 5B Spinel Place. I do not know if her allegations against them are true or false. I do not know if the tenants at 5B Spinel Place have made false allegations against Olive. What I do know is that the landlord was placed in an impossible position after considerable efforts to deal with the problem and exercised a legal right under s 51 of the Act to terminate the tenancy. That right was lawfully exercised and there is no basis at all for Olive's claim that the notice was retaliatory.

[40] For that reason Olive's appeal is dismissed, the interim order staying the notice is revoked with the consequence that Olive must now vacate in accordance with that notice.

P G Mabey QC
District Court Judge